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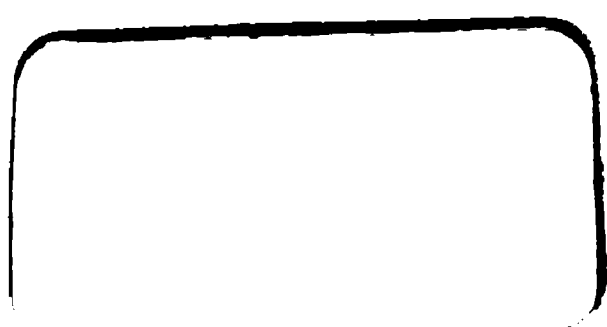
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A  
GENERAL ABRIDGMENT  
OF  
**Law and Equity,**

ALPHABETICALLY DIGESTED UNDER  
PROPER TITLES;

WITH NOTES AND REFERENCES  
TO THE WHOLE.

---

BY CHARLES VINER, Esq.  
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY  
OF OXFORD.

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*FAVENTE DEO.*

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## Game.

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1. *BR* 13 R. 2. cap 13. None unqualified shall keep dogs for sport, or use nets, &c. who have not 40s. per ann. or destroy gentlemen's game on pain of a years imprisonment.

2. 11 H. 7. cap. 17. None may take pheasants, or partridges with nets in another's freehold on pain of 10 l.

3. 19 H. 7 cap. 11. Inflicts a penalty of 10 l. for every stalking of game.

4. 14 & 15 H. 8. cap. 10. None to kill hares in the snow, on pain of 6s. 8d.

5. 25 H. 8. cap. 11. §. 2. Inflicts a penalty of one year's imprisonment and to forfeit 4d. for every wild-fowl taken with nets, or other engines, within the times limited by statute.

6. 23 Eliz. 10. §. 2. Penalty of 20s. for destroying every pheasant, and 10s. for every partridge in the night.

In an indictment on this statute for taking partridges, it was laid to be cum retiis; but held per tot. curiam to be ill, for that there are no such words as cum retiis. Pasch. 17 J. 1. 3 Buls. 178. the King v. Rivett.

§. 3. The forfeiture for destroying of pheasants and partridges shall be recovered in any court of record, and divided betwixt the lord of the liberty or manor where the offence is committed, and the prosecutor; but in case the lord shall dispence with the offender, the poor of the parish are to have his moiety, to be recovered by any of the church wardens.

§. 4. None to hawk or hunt in standing corn or lying in the swarth on pain of 40s.

§. 6. Saving for tramellers, if they let the game go.

7. 1 Jac. 1. cap. 27. §. 2. None to kill or destroy the game or any pidgeon on pain of 20s. or three months imprisonment.

§. 3. Any person not having 10 l. per ann. or 200 l. in goods, keeping dogs or nets to forfeit 40s. or be imprisoned for 3 months unless the son and heir apparent of an esquire, or of higher degree.

§. 4. Forfeitures for buying to sell again, or selling deer 40s. hare 10s. pheasant 20s. or partridge 10s.

§. 5. *None shall by any former law suffer punishment for the same offences for which he shall be punished by this law.*

*Two justices of peace may hear and determine these offences.*

8. 7 Jac. 1. cap. 11. §. 2. *Any person hawking or hunting pheasant or partridge between the 1st of July, and the last of August to forfeit 40s. and 20s. more for every bird taken.*

*Qualification by 1 Jac. 1. repealed.*

§. 7. *Every lord of a manor, and every freeholder having 40l. per ann. or 400l. in goods, may take pheasants and partridges in their own lordships and freeholds between Michaelmas and Christmas.*

[ 2 ] §. 8. *Inferior persons killing pheasants or partridges to be committed for 3 months, or pay 20s. for every bird taken.*

§. 9. *Constable to search for dogs and nets by the justices warrant.*

Trespass for breaking and entering his house, and taking away a gun; the defendant justified by virtue of the statute 22 & 23 Car. 2. cap. 25. §. 2. *Impowers lords of manors or other royalties to make game-keepers to take away guns, dogs and nets.*

25. for preserving the game, setting forth, that the lords of manors, and other royalties, may depute game-keepers, who, by virtue of such deputation, may seize guns, &c. and by warrant from a justice of peace, may search the houses, &c. of suspected persons, &c. and seize them for the use of the lord of the manor, &c. and so brings his case within the statute, and justifies the seizing the gun, &c. it was held that there was no occasion of setting forth all this matter; because the defendant acted under a warrant from a justice of peace, and in such case he might have pleaded the general issue; but if he had acted as a game-keeper only, and without such warrant, then he must have pleaded specially. Nels. Abr. 1073. justification (C) pl. 17. cites. 2 Lutw. 1502. Bowkley v. Williams. — \* In the report nothing appears of the opinion of the court and the words are only (it seems) which is the opinion of the reporter. 2 Lutw. 1506. — † This is mentioned only as a quære of the reporter.

The defendant in his justification set forth, that J. W. was seized in fee of the hundred of B. and had a court leet there, and that he had a warrant of a justice of peace, to search, &c. the reporter makes a quære, if a hundred with a court leet is within the words (manors, or other royalties) for if not then (as it seems) it ought to have been alleged that the house of the plaintiff was within the manor of the lord who deputed the game-keeper to seize the gun, because the gun was seized to his use; and that if it was within the same, or any other manor of the said lord, it was to no purpose to mention the hundred and court leet. 1506. in S. C.

Game-keeper takes away a gun, he ought to have had a warrant from a justice of the peace, and an authority from the lord of the manor is not sufficient. Cumb. 183. Trin. 3 W. & M. B. R. Carpenter v. Adams.

§. 3. *Game-keepers may search the houses of suspected persons by a justice's warrant.*

§. 9. *Gives appeal to the quarter sessions.*

10. 4 & 5 W. & M. cap. 23. §. 3. *Impowers constable to search the house of a peacher. And if game be found there, he shall forfeit a sum not exceeding 20s. for every hare, &c.*

§. 4. *Indemnifies game-keeper resisting offender in the night.*

It is enacted by the 3 & 4 W. & M. 10. against deer-stealers, that no certiorari shall be allowed to remove any proceedings on that act, unless the party convicted becomes bound with good sureties in 50l. to pay full costs and damages, within one month after the conviction shall be confirmed, or a procedendo granted. 2 Hawk. Pl. C. cap. 27. s. 60. and ibid. s. 61. The serjeant says, that the like in effect is enacted by 4 & 5 W. & M. 23. and 5 Anne, sess. 2. cap. 14. in relation to convictions on those acts of offences concerning the game.

§. 7. *No certiorari to be allowed without a bond of 50l. for payment of costs.*

In trespass against an inferior tradesman, for entering his close and trampling his grass; *ad hoc & ibidem in clausis prædictis venatus fuit & alia enormia, &c. contra pacem, &c. and contra formam statuti, &c.* After a general verdict

§. 10. *Inferior tradesmen committing trespasses in following the game to pay full costs.*

tradesman, for entering his close and trampling his grass; *ad hoc & ibidem in clausis prædictis venatus fuit & alia enormia, &c. contra pacem, &c. and contra formam statuti, &c.* After a general verdict

verdict for the plaintiff, it was moved in arrest of judgment, that part of the action was for a trespass at common law, and part upon the statute, and that contra formam statuti goes to the whole; and took notice of the act of 13 R. 2. cap. 13. and that of 22 & 23 Car. 2. 25. and that it was enacted the same year that if the jury finds damages under 40s. in actions of trespass, the plaintiff should recover no more costs, and if more are awarded, the judgment shall be void, that the statute of 4 & 5 W & M. enacted that all and every law and statute now in force, for the better preservation of the game, should be duly put in execution, and that after comes a clause, that inferior tradesmen, &c. presuming to hunt, &c. shall be subject to the penalties by this act, and may be sued for trespass in coming on any man's land, and if found guilty the plaintiff, shall not only recover his damages thereby sustained, but his full costs of suit, &c. and insisted that this was a repeal of the 22 & 23 Car. 2. which gives no more costs than damages. As to the matter of costs it was said, that this was an independent clause, and the plaintiff should have declared that defendant hunted being an inferior tradesman, which had been sufficient to intitle him to costs upon a general law; and the best way had been to omit contra formam statuti. But this being moved in Hillary term, the court was of opinion, that where a statute makes an offence, the conclusion must be contra formam statuti; but this was an offence before that act, which only repeals that clause of 22 & 23 Car. 2. and therefore the declaration, though it concludes contra formam statuti, is well enough; and the plaintiff had judgment nisi causa. 5 Mod. 307. Mich. 8 W. 3. B. R. Bennet v. Talbot. Salk. 212. S. C. and the court held, that contra formam statuti, should be applied only to the later part, which was really against the statute, and that since the hunting and breaking could not be separated, the plaintiff should have his costs, according to the new statute, and judgment for the plaintiff. Hill. 8 W. 3. B. R. Carth. 384. Trin. 8 W. 3. B. R. S. C. S. P. Carth. 424. Mich. 9 W. 3. Shadow v. Painter. And another exception, because it is not laid, that the defendant hunted and killed game, but only that he hunted generally. Sed non allocatur. Ibid.

S. 11. No heath or fern, &c. to be cut or burnt, from the 2d of [ 3 ] February to Midsummer.

11. 5 Ann. cap. 14. s. 2. Higler or victualler, having any game in their keeping to forfeit 5l. for every hare, &c. and the lord of the manor where, &c. or justice of peace may take it from him.

No certiorari allowed till 50l. security given to pay costs.

S. 3. An offender against the game acts, discovering a carrier, or victualler offending, shall be discharged of the pains, &c.

S. 4. Unqualified person keeping or using dog or net, to forfeit 5l. The offence for which

the statute gives the forfeiture, is the keeping of dogs and nets, but not the killing hares, &c. and if a man not qualified goes a hunting and kills never so many hares upon the same day, he forfeits but one 5l. For it is but one offence; but if he hunts several days and kills, it should be laid, that he, such a day, kept dogs and killed, &c. and then again such a day, and so by laying it severally, the offence is severed and he shall forfeit 5l. for each offence; per Cur. 10 Mod. 27. in case of the Queen v. Matthews.

This was a conviction upon the 4 & 5 of Anne for the preservation of game; exception was taken that the charge setting forth that the defendant M. not being a person so and so qualified, and enumerating distinctly the several qualifications in the act of Car. 2. for the preservation of the game omitted a new qualification allowed by this act, viz. that he was not a person qualified by a lord or lady of a manor to kill game for their use; per cur. had it been laid generally thus, that he not being a person qualified according to the law it had been enough; but the qualifications being distinctly and severally mentioned, omission of one fatal. 10 Mod. 26, 27. Trin. 10 Anne. B. R. Queen v. Matthews.

Whether keeping a gun barely without using, or intention laid, is within this act it seems not. Trin. 11 & 12 Geo. 2. King v. Gardiner.

Action of debt qui tam, &c. was brought by a common informer on the statute 5 Anne 14. for 15l. wherein the plaintiff declared on two several counts, one for 10l. for killing two partridges, the other for 5l. for keeping an engine to destroy the game not being qualified, virtute statutorum hujus regni; upon nihil debet pleaded, the plaintiff had a verdict for 5l. only, and it was now moved that he might enter the verdict on either of the counts; because the defendant intended to move in arrest of judgment, for though he might not be qualified by the statutes of this land to keep a gun, yet if he is otherwise qualified by law, he is not subject to this penalty. Now he may be qualified by law as being a huntsman to a nobleman, who, in coming up to the parliament may kill a deer in any of the king's forests, and this he may do by the forest law which is part of the law of this realm; and for this reason the plaintiff was ordered to enter his judgment. 8 Mod. 238. Shipton v. Hopton. This action is given by the stat. 8 Geo. 19. by which it is enacted, that where an offence shall be committed against any law for preserving the game, and the offender liable to pay a pecuniary penalty upon a conviction before a justice, any person may sue for it by action of debt. 3 Mod. 238. Pasch. 10 Geo. 1725. S. C.

*A justice of peace, or lord of a manor may take game from unqualified persons, and seize dogs and nets.*

*Game-keepers selling game, to be committed 3 months.*

Per 3 Just.  
confession  
of the

*The conviction shall be made within 3 months after the offence, upon the oath of one credible witness.*

offence is sufficient conviction, though the statute directs it to be upon oath, and so if it had been made any where else, and not to the justice of peace if such confession had been proved the justice of peace might have convicted the offender. But Eyre J. contra, because by 22 Car. 2. *he that keeps a grey-hound* is punishable, and the conviction is to be by oath, or confession of the party, which statute is confirmed by this of 5 Annæ, so that these statutes shall stand both together, and the statute 5 Annæ having directed the conviction to be upon oath, whereas the other is by confession or oath, it seems intended by this last act, that the manner of conviction by confession should still be on the statute of 22 Car. 2. For by the 5 Annæ the conviction is to be on oath; for if a man might be convicted on this last act on his own confession, there had been no occasion of confirming the statute of 22 Car. 2. 8 Mod. 64. Hill. 8 Geo. the King v. Gage.

12. 9 Ann. cap. 25. §. 1. *But one game-keeper shall be for one manor, and he to be registered by the clerk of the peace, and he and every other person unqualified, who shall sell any game to forfeit 5l.*

S. 2. *Unqualified person having game in his possession, shall be deemed an exposing to sale, and shall forfeit accordingly.*

S. 3. *Any person whatever killing game in the night, to incur the like.*

13. 3 Geo. 1. cap. 11. §. 1. *Lords to appoint game-keepers qualified or their own servants, or those whom they immediately employ to kill game only for their use.*

*And if any other under colour of deputation, shall kill game or keep guns, dogs, or nets, they shall forfeit as other offenders.*

14. 8 Geo. 1. cap. 19. §. 1. *Persons may sue at law for penalties incurred by the game acts.*

15. 9 Geo. 1. cap. 4. *The penalty of any officer or soldier killing game.*

[ 4 ]

16. 9 Geo. 1. cap. 22. §. 1. *Stealing, killing, wounding, or hunting game in disguise, made felony in what cases.*

17. *Goods distrained on a conviction of keeping dogs, nets, and ferrets to catch conies, by a person not qualified, were replevied; the court would not set aside the replevin, but made a rule to shew cause why an attachment should not go against him that granted it. 8 Mod. 208. Mich. 10 Geo. 1724. the King v. the Town Clerk of Guildford.*

18. 7 Geo. 2. cap. 2. §. 37. *Soldiers how restrained from taking, or destroying game.*

## (B) Prosecution, when, and how, and by whom tried.

1. 23 Eliz. 10. §. 5. *Justices of assize, and justices of peace in their sessions and stewards of leets, &c. have power to hear and determine offences relating to the destroying partridges and pheasants, and*

and one justice of peace may examine such offender, and bind him over with good sureties, to answer it at the next general sessions, if the offence be not before determined at the assizes, or in a leet.

2. 7 Jac. 1. 11. Destroyers of the game shall be prosecuted within 6 months after the offence committed.

3. In some place a man may stand in one county and shoot into 2 or 3 so that it must be where the offence was committed, and that is where the party stood when he shot, not where the object was which he shot at. Mich. 3 W & M. Show 339. King v. Alsop.

## Gaming.

### (A) Restrained by Common Law or Statutes.

1. 33 H.8. **N**O person of what degree or condition soever, shall by himself, factor, deputy, servant, or other person, for his or their gain, lucre, or living, keep, hold, exercise or maintain any common house, alley, or place of bowling, coytting, coylsh, cayles, half bowl, tennis, dicing table, or carding, or any other manner of game prohibited by any statute heretofore made, or any unlawful new game, now invented or made, or any other new unlawful game, hereafter to be invented, found, had, or made, on pain of 40s. a day, for every day he keeps or suffers any such game to be played.

§. 12. And every person resorting to such houses, and there playing, to forfeit for every offence 6s. 8d.

§. 14. A justice of peace may enter such houses, and commit the offenders, until they find sureties not to offend again.

§. 15. Justices, &c. neglecting to search suspected houses to forfeit 40s. a month.

§. 16. And no artificer or handicraftman, husbandman, apprentice, labourer, servant at husbandry, journeyman, or servant of artificer, mariner, fisherman, waterman, or serving man, shall play at tables, tennis, dice, cards, bowls, clash, quoiting, logating, or any other unlawful games out of Christmas, on pain of 20s. for every offence, and in Christmas, to play in their masters houses, or presence, and no person shall at any time play at bowls, in any open place, out of his garden or orchard, on pain of 6s. 8d. for every offence. And all justices, mayors, sheriffs, and head officers, are authorised to commit every offender, without bail or mainprize, until they be bound in such sums as the said justices, &c. shall think fit, not to use such unlawful games.

[ 5 ]

§. 17. All former statutes against unlawful games are hereby repealed.

§. 18. And where any such forfeitures shall be found within any franchise or leet, the lord shall have one moiety thereof, and the other shall go to the prosecutor; and where it shall be found out of the franchise or leet, the forfeitures shall be divided between the king and the prosecutor: and this act shall be proclaimed once a quarter in every market town, by the respective mayors, sheriffs, or other head officers, and at every assises and sessions.

§. 22. Provided that it shall be lawful for any master to licence his servant to play at cards, dice, or tables, with their said master or any other gentleman repairing to him openly in his house or presence.

§. 23. Persons having 100l. per ann. may license their servants to play in their own houses or yards.

2. 2 & 3 P. & M. cap. 9. Every licence, placard, or grant made for keeping of any bowling allies, dicing houses, or other unlawful games, shall be void.

3. 16 & 17 Car. 2. cap. 7. s. 2. They that by fraud or ill practice in playing at cards, dice, tables, tennis, bowles, kittles, shovel-board, or in cock-fightings, horse-races, dog-matches, or foot-races, or other pastime or games, or by bearing a part in the stakes, wager, or adventures, or by betting on the sides of such as play, act, ride, &c. and acquire to themselves, or others, money or things of value, shall ipso facto forfeit the treble value, one half to the king, the other to the loser prosecuting within 6 kalender months, and in default of such prosecution, that moiety to them that will sue within a year after the 6 months expired.

S. 3. If any person play at the said games, or other pastimes (other than for ready money) or bet on other men's sides and shall lose any sum of money or other things exceeding 100l. at one time of meeting, they shall not be compelled to make good the same; but such contracts, and all securities for the same shall be void. The person winning the same shall forfeit the treble value of such money, or other things won above 100l. one half to the king, the other to the prosecutor suing within a year.

A ring of 20l. value was lost at play, and paid, and there was lost also at the same time 100l. upon credit and a

bond given for the 100l. Windham and Morton J. held that this was within the statute. But Keeling and Twisden e contra; and afterwards Windham being dead, it was adjudged by Keeling and Twisden, that the bond was good, Morton contradicente. Sid. 394. Hill. 10 & 11 Car. 2. B. R. Danvers v. Thistlethwaite.

4. Winner shall not recover for money won at play against an acceptor; but an indorsee of a bill shall. 1 Salk. 344. Mich. 8 W. 3. Hufley v. Jacob. Carth. 356. S. C. 5 Mod. 175. S. C.

5. 9 Ann. cap. 14. s. 1. Lands incumbered for money won at play, shall pass to the heir of him in reversion, and all conveyances, or other securities, where the whole or any part of the consideration is for money won at play or lent or advanced at such time shall be void.

In debt on bond defendant pleaded 'twas for money won at

play, plaintiff replied 'twas not for money won at play; it is not good, but he must add, nor any part thereof and therefore judgment was for the defendant. 8 Mod. 57. Mich. 8 Geo. 1722. Coleburn v. Stockdale.

S. 2. Any person losing 10l. at one time may recover it again of the winner by action of debt. And in default thereof a stranger may recover it with treble value.

S. 3. Obliges



S. 3. Obliges offenders to answer upon oath to bill preferred against them for discovery.

S. 5. Persons cheating at play, or winning above 10*l.* and being convicted thereof on an information or indictment to forfeit 5 times the value of their winnings to the informer, and suffer corporal punishment as for perjury.

But where an indictment was found by the grand-jury, and

it was quashed for insufficiency, an information was afterwards denied; for another bill might be found. 8 Mod. 187. Mich. 10 Geo. 1714. Anon.

S. 6. Two justices may commit common gamesters till they find security for their good behaviour.

[ 6 ]

S. 8. And any person challenging another for money won at play, to forfeit his personal estate, and suffer two years imprisonment.

S. 9. Saving for persons playing in the royal palaces.

6. 5 Geo. 24. No gamester to have benefit of the acts of bankruptcy.

7. 12 Geo. 2. Prohibits lotteries and games of the ace of hearts, pharoah, basset, and hazard.

Every adventurer in any of the said games, lottery, or lotteries, sale or sales, or who shall play, set at, stake, or punt at either of the said games, and be thereof convicted as aforesaid shall forfeit 50*l.*

Such sales shall be void, and the houses, lands, &c. so set up and exposed to sale shall be forfeited to any person who shall sue for the same.

Persons agrieved may appeal to the next quarter sessions, &c.

No conviction or judgment upon this act, shall be set aside for want of form.

No certiorari, or other process, shall issue to remove the record of any such conviction from the quarter session, into the courts of Westminster, but upon 100*l.* security.

Offenders not having sufficient goods and chattles whereon to levy the penalties inflicted by this act, or who shall not immediately pay, or give security for the same, shall be committed to goal for 6 months.

Justice of peace neglecting, &c. shall forfeit 10*l.* one moiety thereof to the person who shall sue for it, and the other moiety to the poor.

This or any former act, not to hinder any games within his majesty's royal palace. Nor shall affect any estate, &c. in manors, lands, &c. legally allotted, or held by any allotment by lots.

Every action upon this act to be commenced within 3 months after the fact committed.

Defendant may plead the general issue, &c.

8. 13 Geo. 2. Enacts that, the game of passage, and every other game invented, or to be invented with one or more die or dice, or any other instrument, engine, or devise, in nature of dice (backgammon and other games now played with the backgammon tables excepted) shall be within the intent of the act of 12 Geo. 2. against gaming.

## (B) What Gaming is within the several Statutes.

1 Salk. 344.  
it was not  
on the  
chance but  
on the right  
of the play.

1. **W**AGER concerning the right manner of playing is not within the statute, because it was a mere collateral matter, which happened on a mere chance, and the event of it did not depend on the success of the game, and the act expressly prohibits wagers on the parts or hands of the players, and had they intended other wagers, it is probable that mention would have been made of them. Lutw. 487. Mich. 5 W. & M. Pope v. St. Leger.

5 Mod. 175.  
S. C.

2. If A. wins 100l. of B. and A. being indebted to C. 100l. appoints B. to give bond for the 100l. to C. this is a good bond; for C. is an innocent person, and if A. be bound with B. it will be the same thing, per Holt Ch. J. who says, 'tis the only case he knows where it shall not be void, and which he says has been adjudged both on the statute of gaming and usury, and that if A. loses 100l. to C. and A. and B. become bound to C. for the money, the bond is void as to both. 1 Salk. 344. Mich. 8 W. 3. Husley v. Jacob.

See 12  
Mod. 258.  
in case of  
Walker v.  
Walker.—  
S. P. per  
Keeling Ch.  
J. Sid. 395.  
but Twissden c contra.— \* Lev. 244. Trin. 20 Car. 2. B. R.

3. At play H. may lose 100l. to A. and 100l. to B. because 'tis a several contract, secus if it were a joint contract. It was held in the case of \*DANVERS. v THISTLEWORTH that if H. loses 2000l. in ready money and after lose 100l. on note more, the note is good, but all beyond it is void, per Holt. Ch. J. 1 Salk. 345. Mich. 12 W. 3. in an anon. case.

[ 7 ]  
Per Holt.  
Ch. J. 12  
Mod. 540.  
\* Per Pem-  
berton Ch.

4. Losing \* more than 100l. to several persons at one sitting is not within the statute, unless they go shares fraudulently and join in the stakes; for then as to the chance of the game they are as one person. 1 Salk. 345. Mich. 13 W. 3. B. R. Dickson v. Pawlet.

J. losing above 100 l. on tick at one sitting though to several persons, is void by the statute, secus if at several times. 2 Show. 185. Noel v. Reynolds.

If one lose upwards of 100l. to two at one sitting both the sums would be void. But if one lose 99l. to A. and then on purpose to avoid it loses 20l. to B. there A. may specially set out the fraud, and so avoid it, per Cur. 12. Mod. 258. Mich. 10 W. 3. 1698. Walker v. Walker.

12 Mod.  
540. per  
Holt. Ch.  
J. Trin. 13  
W. 3. S. P.  
Anon.

5. If 40l. be fairly won and 66 l. with false dice, this will not avoid the 40l. debt, unless he was party to the fraud. 1 Salk. 345. per Holt Ch. J. in case of Dickson v. Pawlet.

## (C) Actions and Pleadings.

1. **I**N debt. A. won 80l. at one meeting, of B. and for which B. gave security, and then they appointed another meeting, and A. won 70l. more of B. The question was, whether this was within



within the statute. The court was divided, which the plaintiff perceiving, discontinued his action, but the better opinion was, that it was not within the statute, though if it had been *pleaded, that the several meetings were purposely appointed to elude the statute*, it might be otherwise. 2 Mod. 54. Hill. 27 Car. 2. C. B. Hill v. Pleasant.

2. *A. wins 100l. of B. at play, and A. owing C. 100l. brings C. to B. who owned the debt, and B. gave C. a bond for the 100l. C. not being privy to the matter, accepted the bond, and afterwards put it in suit. The obligor pleaded the statute, but the plaintiff disclosing the whole matter, the court were of opinion upon demurrer, that it was not a case within the statute; and gave judgment for the plaintiff.* 2 Mod. 279. Mich. 29 Car. 2. C. B. Anon.

3. In debt upon articles for 100l. won at a horse race defendant pleaded the *covenants*, by which it was farther agreed, that the plaintiff at the request of the defendant, *would run his horse again, at another day and place for 200l. more*, and then pleads the statute; the plaintiff replied, that the defendant did not make such request. But upon demurrer, the defendant had judgment. For though the statute allows the losing of 100l. yet in this case the 100l. was not lost [before] a security given to run for more. And though there was but 100l. actually lost, yet the *contract being [originally] made for more*, it was void for the whole ab initio, and can't be made good by the subsequent event. 2 Lev. 94. Mich. 25 Car. 2. B. R. Edgebury v. Rosendale.

Vent. 253. S. C. by name of Hedgeborough v. Rosenden. — Where the contract is intire, though the wagers are distin<sup>d</sup>, yet no part of the money is recoverable. 3

Salk. 175. cites Rostington's case. — The case of Edgebury v. Rosendale, cited 5 Mod. 352. in the case of Stanhope v. Smith, is stated to have been upon articles of agreement, concerning a horse match, wherein the defendant agreed to *run four heats, at several days for 40l. each heat*, and this was held by my Lord Hale, to be *but one agreement, though to be run at several times*, and the defendant in that case had judgment.

4. *Indebitatus aff.* lies not for \* money at play, but there ought to be a *special declaration*; it was said by two of the judges, that peradventure, by special pleading, a good *replication* may be made. Lutw. 180. Whitgrave v. Chancy.

S. P. because it wanted consideration; it being but

*excusatory*. per Holt Ch. J. 5 Mod. 14. in case of Walker v Walker. — 1 Salk. 23. Hard's case. — S. P. 6 Mod. 129. Pasch. 3 Annæ. B. R. SMITH v. AIERY, notwithstanding the said case of Eccleston v. Lewin. — For per Holt Ch. J. There is no way in the world to recover money won at play, but by special assumpsit. And the action should be brought upon the agreement of the parties. 'Tis true, when two agree to play for so much money, that is an actual promise; but if either win there is no debt arises; for *nothing but a meritorious valuable consideration can raise a debt*, ibid. 129. — 12 Mod. 81. S. P. But for money *staked on a wager*, it lies; for being in a third person's hands, the winning the wager determines the property. — \* 2 Show. 82. contra. . . . v. Sterne. — 3 Lev. 118. contra. Eggleton v. Lewin. — 2 Vent. 157. contra. Sherborn v. Colhatch. — A general *indebitatus* will not lie on a *wager, or money won at play*; but it must be laid by way of mutual promises specially, and so a judgment was reversed. But the chief reason was, because the court would not countenance gaming, by giving so easy a remedy; and though the precedent of EGGLETON v. LEWIN was shewn, in which judgment was affirmed in Cam. Scacc. yet it would not prevail. Carth. 338. Jackson v. Colegrave. — An *express promise* will support an action. Per Parker Ch. J. 10 Mod. 312. Pasch. 1 Geo. B. R.

+ [ 8 ]

5. In an action upon a note for money won at play, defendant pleaded the statute, and set forth, that *at one sitting he lost 35l. to the plaintiff, and 40l. more to W.* But upon demurrer, judgment was

was given for the plaintiff; for the statute intends a remedy, where more than 100*l.* is lost to one person, and at one sitting; but if it be lost to several, it is not within the act. 5 Mod. 351. Trin. 8 W. 3. B. R. Stanhope v. Smith.

This second losing, being done on purpose to avoid the first debt

of the 95*l.* B. may set out the fraud specially and so avoid it. 12 Mod. 258. in case of Walker v. Walker.—But Trin. 18 Car. 2. B. R. where A. had lost to B. at one sort of game 90*l.* and to C. at another sort of game 30*l.* and to D. at another sort of game 60*l.* and in an action of debt on bond brought [for one of the sums,] defendant pleaded the statute, and that he lost the several sums, as above, at the same time it was demurred to, because it did not appear, that the several winners were parties together, or in trust for one another, and that the statute only voids debts won, where they are parties or trusted for each other, and not to different gamesters. But it was adjudged for the defendant, the statute being to be extended against play. 3 Keb. 671. Hudson v. Malin.

6. *As if A. loses 95*l.* to B. and B. refusing to play any longer with him, A. loses 10*l.* to C. at the same sitting, yet this shall not defeat B. of the money which he lawfully won.* 5 Mod. 352. in case of Stanhope v. Smith.

### (D) Cases in Equity.

S. P. Toth. 81. cites 44 Eliz. Hubbard v. Ld. Compton.

1. *A Bill was exhibited to be relieved against a bond made for money won at dice, the defendant would have been dismissed, but ordered to answer it.* Toth. 81. cites 22 May, 38 Eliz. Cromer v. Champney.

2. *A perpetual injunction was granted to an action at law for 40*l.* unduely won at dice.* 10 Car. 1. fo. 609. Chan. R. 88. Blackwell v. Redman.

3. *The bill being to discover what money the defendant won at dice, or play, of the plaintiff, demurrer over-ruled, and an injunction to stay suit upon a bond entered into for [the] money.* Toth. 84. cites 11 Car. Sucklyn v. Morley.

4. *A bill to be relieved upon articles of agreement, but (because the bargain was at dice) would not decree it.* Toth. 86. cites Mich. 14 Car. Delabarr v. Cox.

2 Vern. 70. S. C. Trin. 1688. Defendant finding the court strongly against him compounded with the plaintiff.

5. *A. won a great sum of money of B. which A. carried away with him, and won besides, another great sum, which B. re-took by force from A.—A. brought action at law, for taking from him forcibly this bag of guineas.—B. exhibited his bill, and Ld. Chan. granted injunction, 'till the hearing cause.* Mich. 1687. Vern. 489. Firebrace v. Bret.

6. *In an action brought on an exorbitant wager, in B. R. in Ld. Ch. J. Hale's time, his lordship declared he would give the defendant leave to imparle from time to time, cited per Ld. Jefferies.* Trin. 1688. 2 Vern. 70. as the case of Sir Cecil Bishop v. Sir John Staples.

7. *One apprentice wins 50*l.* at cards of another apprentice, and gets a bond for the money, but decreed to be delivered up.* Trin. 1693. 2 Vern. 291. Woodroffe v. Farnham.

(A) *Caol.*

## (A) Gaol.

1. 14 Eliz. *cap. 5. s. 37.* **D**irects how prisoners in common gaols are to be relieved by rates made at the quarter sessions.

2. It is incident to a court to have a gaol, as a court of py-powders to a fair, and a gaol is not in a place certain, but goes with the person of the gaoler. Cro. E. 168. Smith v. Hellier.

3. 3. Jac. 1. s. 10. Directs, how charges, in sending offenders to gaol shall be defrayed.

4. Every county has two sorts of gaols, viz. one for debtors, which the sheriff may appoint in any house where he will; and the other gaol, for breakers of the peace, and matters of the crown, which is the county gaol. Lat. 16. Anon.

5. The owners of the gatehouse prison have no charter to sue a commission of gaol delivery, and it is hard to maintain a right to a gaol, without such a liberty, and there is an act of parliament, that all felons should be committed to the county gaol, and the meaning of it is, if there be not a franchise and power to sue for gaol delivery, and such suit must be made in Chancery, per Holt. Fart. 31. Trin. 1 Annæ. B. R. Anon.

## (B) Belong to whom.

1. 14. E. 3. **G**AOLS which were wont to be in the sheriff's custody, shall be again rejoined to their bailiwicks, and they shall put in such keepers for whom they will answer. Stat. 1. cap. 10.

This statute is confirmed by Stat. 19

H. 7. cap. 10. Hawk.

Pl. C. 117. cap. 16. s.

6.—Upon this statute,

it was resolved that

grants of

custodies of

gaols, then lately made

by K. H. 8. or after

granted to diverse per-

sons, were utterly void, and that inasmuch as the custody of them, belonged to the office of

sheriff who being immediate officer to the king's courts, shall answer for escapes, and shall be

subject to amerciaments, if he has not the body in court upon process to him directed, &c. it is

reason that he put in such keepers of the said gaols, for whom he will answer, according to the

purview of the said act, which it would be unreasonable for him to do, if another should have the

ward, and custody of the gaol. 4 Rep. 34. cited by the reporter as adjudged by the two chief

justices

2. 13 R. 2. cap. 15. The King's castles and gaols, which were wont to be joined to the bodies of the counties, and are now severed, shall be rejoined to the same.

3. 19. H. 7. cap. 10. The sheriff of every county shall have the keeping of the common gaol there, except such as are held by inheritance or succession. And all letters patents of the keeping of gaols for life or years, are annulled and void; howbeit neither the King's Bench nor Marshalsea shall be in the custody of any sheriff; and the patents of Edward Courtney, E. of Devonshire, and John Morgan, for keeping of prisons are excepted.

sons, were utterly void, and that inasmuch as the custody of them, belonged to the office of sheriff who being immediate officer to the king's courts, shall answer for escapes, and shall be subject to amerciaments, if he has not the body in court upon process to him directed, &c. it is reason that he put in such keepers of the said gaols, for whom he will answer, according to the purview of the said act, which it would be unreasonable for him to do, if another should have the ward, and custody of the gaol. 4 Rep. 34. cited by the reporter as adjudged by the two chief

justices, and all the justices of England. Mich. 39 & 40 Eliz. the case of Gaols.—S. C. cited by Raymond J. who said, that so the gaols of liberties are incident to the lord of the liberty Raym: 423.

The assises had usually been kept in York castle, and Q. Eliz. granted the custody of all persons taken within the county of York, and to be in prison, and kept in prison, in the castle of York by the patentee, to whom the said castle was then granted, and upon diverse prisoners being taken by the sheriff, it was demanded of the Master of the Rolls, the Ch. J. of B. R. and the Chief Baron, whether the patentee should have the custody of them or not; and they held that the patentee (keeper of the castle) had nothing to do with them, but that the sheriff ought to have the custody of all persons taken by him, by virtue of any commandment or writ, issuing out of any court of record for debt, outlawry, or other cause whatsoever; because it is his office to apprehend such persons, and to keep them at his peril; for he is the immediate officer to the court out of which the commandment issues, and chargeable to the party, if the prisoner is set at large. And it being further demanded of them, whether if the common gaol of the county had been in part of the castle, time out of mind, &c. the keeper or patentee of the castle, might bar the sheriff of having the place accustomed for the common gaol, and custody of the prisoners. As to this, they thought it was convenient to have it allowed to the sheriffs, and that by the law it ought to be so observed; and upon comparing the statutes of 14 E. 3. cap. 16. and 19. H. 7. cap. 10. they held as above. 1 And. 345, 346. pl. 320. The sheriff of York's case.

Serjeant Hawkins says, it seems, that since the statute of 14 E. 3. cap. 10. the grant of the King to private persons to have the custody of prisoners committed by justices of peace is void. 2 Hawk. Pl. C. 118. cap. 16. s. 7.—None can claim a prison as a franchise, unless he have also a gaol delivery of felony; and therefore, where the Dean and Chapter of Westminster have no such gaol delivery, they ought to send a calendar of their prisoners to Newgate, and return habeas corpus's to B. R. with a claim of their franchise. per Holt. Ch. J. 1. Salk. 343. Trin. 1 Anne B. R. The QUEEN v. TAYLOR.—7 Mod. 31. Anon. but seems to be S. C. and says, that it is hard to maintain a right to a gaol, without such a liberty.

\*[ 10 ]

4. 11 & 12 W. 3. cap. 19. s. 3. *All murderers and felons shall be imprisoned in the common gaol, and the sheriff shall have the keeping of the said gaol.*

S. 4. *Saving the right of all persons having any common gaol by inheritance for life or years.*

S. 7. *Where any county gaol of England or Wales is situate on lands belonging to the crown, such lands shall not be aliened from the crown, but be for the publick service of the county.*

S. 9. *This act to continue ten years, and to the end of next sessions of parliament.*

Made perpetual by 6 Geo. 1. cap. 19.

### (C) Repaired, at whose Expence.

1. 11 & 12 W. 3. *Impowers justices to alter and enlarge the county gaols, and raise money and defray the charges.*

S. 2. *The money to be levied by distress, if refused.*

*And the said justices are authorised to constitute a receiver or receivers of the money so assessed, taking a security for their being accountable: and if the said receivers, constables, &c. shall, by the space of four days, refuse to account, the said justices may commit them till they do account; and the receipt of the receiver shall be a sufficient discharge to the constable, &c. as the receipt of the justices shall be to the receiver. And the justices are impowered to contract with any person for building and repairing the gaol.*

S. 5. *Provided that this act shall not charge any inhabitant of a liberty, city, or town corporate, which have common gaols for felons, and commissioners of assise, or gaol delivery, for trial of felons, with an assessment for the county gaol.*

S. 8. *Provided*

S. 8. *Provided no collector shall enter into the house of a peer or peers to distrain for the duties aforesaid.*

S. 9. *This act to continue ten years, and to the end of the next sessions of parliament.*

## (D) To what Places Offenders are to be committed, and where kept.

1. 5. H. 4. cap. 10. **NONE** to be imprisoned by justices of peace but in the common gaol.

2. 11 & 12 W. 3. cap. 19. s. 3. *All murderers and felons shall be imprisoned in the said common gaol, and the sheriff shall have the keeping of the said gaol.*

## Gaoler.

[ 11 ]

### (A) Who.

1. **THE** course of all corporations is, that the mayor, who is the judge, is the gaoler also; so the sheriffs of London have a court in the Guild-hall, and are officers and gaolers to it. Cro. E. 168. Hill. 23 Eliz. B. R. Smith v. Helliar.

### (B) His Power and Duty.

1. 4 Ed. 3. 10. **GAOLERS** shall receive felons without taking any thing.

2. Gaoler cannot detain prisoner for his diet, and so is 8 E. 4. but for his fees he may. But in action of debt upon contract for his diet, he shall not wage his law, because it is a work of charity. Roll. R. 338. Atkinson v. Hobbs.

Gaoler is in a manner compellable to find victuals for his prisoners, and

therefore the prisoner shall not wage his law in such case. 9 Rep. 87. in Pinchon's case. Pl. C. 68. a. Holt Ch. J. said, that the gaoler is not bound to find his prisoner with meat and drink, and denied 9 Rep. 88. Pinchon's case, and he cited Pl. C. 68. a. See 12 Mod. 683. And he said, that while the prisoner is in his charge, the gaoler cannot take any security for his victuals from the prisoner himself; for that a bond from him in that case would be, ipso facto, void, and therefore since he is disabled to take other security from him than only a promise, it were hard to allow the prisoner to clear himself by his oath; and that it is for the prisoner's benefit not to be put upon it, for the gaoler must make out his charge, and not put the prisoner to his oath. Ibid.

3. Prisoner

3. Prisoner was delivered per Cur. without paying for his diet, because his imprisonment was not lawful. Roll. R. 339. Oliver's case.

4. A gaoler, who had felons in his custody, finding that the felons were breaking off their fetters, went to them with a hatchet; and they assaulted, and beat him; the gaoler killed two of them with the hatchet. Resolved by all the council that it was well done. Jenk. 23. pl. 42.

5. Twisden J. cited my Lord Hob. that a gaoler could not take a bond of his prisoner for a just debt; but Hale said, that seems hard, because he takes it in another capacity; but he cannot take a bond for his fees; because it would give him opportunity to extort. Vent. 237. Mosedell v. Middleton. Obiter.

6. 2 Geo. 2. 22. §. 3. 'Gaolers must permit prisoners to send for victuals from what place they please, and to have such bedding, &c. as they shall think fit.

§. 4. None but lawful fees to be taken of prisoners till further settlement.

Tables to be made of the fees, and of gifts for prisoners, and to be hung up in every gaol.

§. 5. Courts at Westminster, every Mich. term, shall enquire after the fees and orders, and at assises shall give such inquisition in charge to the grand jury.

§. 6. Judges may hear petitions in a summary way.

## [ 12 ] (C) Punishable for Escapes of Felons, &c.

The reason is, because in the first case he has his remedy over, but not in the last case. Cro. E. 815. in case of Southcot v. Bennet.——Cites 33 H. 6. 1.

1. If rebels break a gaol, so that the prisoners escape, the gaoler is liable; but it is otherwise of enemies. Vent 239. in the case of Morfe v. Slue.

2. If a person, convicted of a misdemeanor, escapes and is retaken before the gaoler is indicted for it, he shall not be troubled for the escape. 12 Mod. 227. The King v. Fell.

3. Gaoler *de facto* is punishable for suffering an escape. 2 Hawk. Pl. C. cap. 19. s. 23.

4. If a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he be discharged paying his fees; so that till they be paid, the first imprisonment continued lawful as before; for as much as he is detained not as a criminal, but only as a debtor; yet, if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also till he pay his fees, and he escape after such time is elapsed without paying them, perhaps such escape may be criminal; for that it was part of the punishment that the imprisonment be continued till the fees be paid; but it seems, that this is to be intended, where the fees are due to others, as well as



to the gaoler; for otherwise the gaoler will be only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only in the non payment of a debt in his power to release.  
2 Hawk. Pl. C. 129. S. 4.

## (C. 2.) Punishable for \* other Offences than Escapes.

\* See 12 Rep. 127. of dures by Gaoler.

1. 1 Ed. 3. St. 1. c. 7. **DIRECT** how gaolers, using dures to compel prisoners to appeal, shall be punished.  
14 Ed. 3. St. 1. c. 10.

2. Gaoler for life commits a forfeiture, he in reversion shall have the naming another in his room. 2 Lev. 71. the King v. Lady Broughton.

3. 3 Geo. 1. 15. s. 10. Directs how gaolers shall be punished for buying, selling, or farming their offices.

4. Gaolers are not only punishable by attachment, as all other officers are by the courts to which they more immediately belong, for any gross misbehaviour in their offices, or contempts of the rules of such courts, but they are also punishable by any other courts for disobeying writs of habeas corpus awarded by such courts, and not bringing up the prisoner, at the day prefixed by such writs.  
2 Hawk. Pl. C. 151. S. 31.

5. 2 Geo. 2. cap. 22. s. 16. Inflicts a penalty of 50l. on gaoler for not permitting prisoners to send for victuals from what place they please, or to have such bedding, &c. as they think fit.

## (D) \* Allowances.

\* See Fees, (B) pl. 1.

1. **WHERE** a gaoler brings a prisoner into B. R. by reason of a writ of error, or to reverse outlawry, he shall have for his labour by discretion of the court, which is out of the case of the statute. Br. Fees, pl. 6. cites 21 H. 7. 16.

2. And if a sheriff takes of the prisoner his cloaths, or money out of his purse, in spite of his teeth, it is out of the case of the statute, because trespass lies. Br. Fees, pl. 6. cites 21 H. 7. 16.

3. On a hab. corp. the gaoler is bound to bring the body, though he has not his charges tendered him; but he may move the court, and they will rule that he shall have his charges first. 2 Show. 172. Mich. 33 Car. 2. B. R. the King v. Greenway.

A gaoler at his own charge brought up a prisoner upon a

*habeas corpus*, and the prisoner refusing in court to repay the gaoler, he was remanded by rule of court. Cumb. 36. Mich. 2 Jac. 2. B. R. anon.——Gaoler may detain a prisoner after a *hab. corp.* directed to him for his fees, but not for chamber rent, &c. Cumb. 109. Pasch. 1 W. & M. B. R. the Warden of the Fleet's case.——The plaintiff caused the defendant to be brought up by *habeas corpus* from Stafford, and now the gaoler moved to be allowed his charges for bringing him up; but the court said he should have agreed with the plaintiff before he brought him. Holt bid him to take his action against the plaintiff for his charges. Cumb. 229. Mich. 5 W. & M. B. R. Grammar v. Thompson.

4. 8 and

4. 8 and 9 W. 3. cap. 26. s. 14. No prisoner shall be compellable to pay rent for any chamber in any prison, for any longer time than he shall be in possession thereof, nor to pay above 2s. 6d. a week for such chamber, and the marshal, warden or other keeper demanding or taking more shall forfeit 20l.

### (E) Securities taken by him. What may be.

1. 8 and 9 W. 3. 26. s. 5. This act shall not extend to make void such securities as prisoner shall give for their lodging, within the rules of the said prisons, so that such security be not taken for the enlargement of a prisoner out of or beyond the rules.

### (F) Pleadings.

1. **I**N debt against a gaoler, he shall not shew how he was gaoler; for it lies against a gaoler in possession there. Br. Count, pl. 82. cites 11 H. 4. 72.

\* So it is in Cay's Abr. but in Win-gate's Abr. and Kebles stat. at large it is 26.

2. 8 and 9 W. 3. cap. \* 27. s. 6. Enacts that no retaking on fresh pursuit shall be given in evidence on the trial of an issue in any action of escape against the marshal or warden, or any other keeper of any other prison, unless the same be specially pleaded; nor shall any special plea be received, unless oath be made in writing by the marshal, &c. and filed, that the prisoner did, without his consent, privity or knowledge, make such escape; and if such affidavit shall appear to be false, and the marshal, &c. be convicted thereof, such marshal, &c. shall forfeit 500l.

S. 17. Any person, sued for putting in execution any power given by this act, may plead the general issue; and if the plaintiffs be non-suit, &c. such defendant shall have double costs.

## Gavelkind.

### (A) Antiquity thereof, and of what regard in Law.

1. **L**AND in gavelkind is held in socage, and not in chivalry, and this land is partible between the males, and not the land which is held in chivalry, &c. Br. Customs, pl. 57. cites 9 H. 3. and Fitzh. Prescription, 63.

2. The



2. The *custom of devising* is a meer collateral custom, and no part of the custom of gavelkind; per three justices, but Windham J. contra. Lev. 79, 80. Mich. 14 Car. 2. B. R. Wiseman v. Cotton.

3. All the lands in England before the conquest, and for some time after (contrary to Coke's opinion) were generally gavelkind; but soon after the conquest, for the better strength and support of the crown, knight service tenure was introduced, and the course of descent altered; per Holt Ch. J. 6 Mod. 120. in case of Clement v. Scudamore.—cites Lamb. Sax. Law. 167. Seld. Eadmer.

Wms's Rep.  
64. Hill.  
1703. B. R.  
S. C. and P.  
—Fig. of  
Recov. 4.—  
And my Ld.  
Hale is of  
opinion,  
that till

King John's time the hereditary succession to the eldest son, was not settled. But this must be understood of *socage land*; for from the conqueror's time, the feudal tenures of knight's service were introduced, and there the eldest son inherited; and this held till the statute de donis, when the lords and great men being fond of perpetuating their names, and handing down their estates to their families, by that statute, created these estates tail. Fig. of Recov. 4. 5.

4. The law takes notice of borough-english and gavelkind customs. 6 Mod. 121. in case of Clement v. Scudamore.

## (B) Descent. How.

1. **R**ENT or common out of land in gavelkind, burgh-english, or the like, which has continued from ancient time, shall be of the nature of the land, as feme to be endowed of the moiety, &c. Contra of rent newly granted. Br. Customs, pl. 58. cites 4 E. 3. 32.

S. P. Br.  
Customs,  
pl. 65. cites  
14 H. 8. 7.

2. In gavelkind, burgh-english or the like, a man may have *formedon for the youngest of the land tailed*; for though the tail be by statute, yet this shall not change the nature of the land; but it shall go to all the sons in the one case, and to the youngest in the other case. Br. Customs, pl. 62. cites 11 E. 3. and Fitzh. Formedon, 30. and Fitzh. Garanty 94.

S. C. cited  
Dav. 31. in  
the case of  
Tanistry.—  
and cites 32  
E. 3. Fitzh.  
Age, 81. and  
2 Eliz. 176.  
b.

3. *Quod ei deforceat* was brought by two men as heirs in tail in gavelkind, and awarded good. And so note, that notwithstanding the tail be by statute, yet the inheritance of the land shall go to all the sons according to the custom of the land. Br. Taile & Dones, &c. pl. 8. cites 46 E. 3. 21. and Fitzh. Formedon 30. 11 E. 3.

4. Where there is lord mesne and tenant in gavelkind, the rent and services of the mesne shall not be intended of the nature of the land, if it be not specially shewn; quod nota. M. 3 E. 3. as it was said there. Br. Customs, pl. 24. cites 21 H. 6. 19, 11.

Br. Rents,  
pl. 6. cites  
21 H. 6. 11.

5. At the common law, if a man had made a lease for years of two acres of land, the one in borough-english, and the other in gavelkind, rendering rent, and he had issue two sons, and died; in this case the rent should be apportioned; because the rent descended to them by course of law. Arg. D. 4. b. 5. pl. 5. Mich. 25 H. 8. Anon.

S. C. cited  
Div. 31. in  
the case of  
Tanistry —  
But if I give  
land in gavelkind

6. If I give land in gavelkind or borough-english to J. S. for life, remainder to the right heirs of W. R. the true heirs shall take it. For this is out of the case of custom, and so must run to the heir at common law. Hob. 31. cites 37 and 38 H. 8. Br. Descents, 59. & Done 42.

J. S. and the heirs male of his body, and he has issue four sons; all the sons shall inherit. 1 Rep. 102. b. 103. a. cites this diversity taken by Ld. Brook. Br. Done, pl. 42. 37 H. 8. between a claim by descent and by purchase.

7. If A. be seised of lands in *soke fee, and gavelkind*, and grants a *rent-charge* out of them to B. in fee, and B. dies, having issue three sons, the eldest son shall have all the rent. Adjudged. Noy. 15. Randall v. Roberts.

[ 15 ]  
2 Lev. 87. S.  
C. by name  
of Randall  
v. Writtle  
S. P. cited  
by Twiss.

8. A *rent charge* was granted out of gavelkind lands to A. and his heirs; and it was held by Hale, Rainsford, and Wild, that the rent ought to descend to all the brothers, according to the descent of the land; because the rent is part of the profits of the land, and issues out of it; and they gave judgment accordingly. Mich. 25 Car. 2. B. R. Mod. 96. Randall v. Jenkins.

den, to have been adjudged. Mod. 112. pl. 7. Anon. — Br. Rents. pl. 137. cites 22 Aff. 78. acc. S. P. Jenk. 193. pl. 100. and 205. pl. 32. cites 26 H. 8. 3.

9. In case of gavelkind, if a man has three sons, and purchases land in gavelkind, and the youngest son dies in the life of the father, and leaves issue a daughter, there is no doubt but the daughter shall inherit; per Holt, Ch. J. in delivering the opinion of the court. 6 Mod. 121. Hill. 2 Annæ, B. R. in case of Clement v. Scudamore.

10. But if the purchase had been to himself and the heirs male of his body, the daughter had been excluded per formam doni; but the custom making it descendible to the heir male, makes room for his representative. Per Holt, Ch. J. 6 Mod. 121. Hill. 2 Annæ, B. R. in case of Clement v. Scudamore.

11. A will was made of gavelkind lands by a grandfather in favour of his eldest grandson, the fathers of each being dead (they being by several venters) but upon proof that the testator afterwards cancelled his will, the grandson by the second venter recovered a moiety. 8 Mod. 208. Mich. 10 Geo. 1724. Turner v. Turner.

### (C) Disposed of, How; And who shall take by the Limitation.

Br. Customs, pl.  
71. cites  
S. C. —

\* Orig.  
(Sans.) —

† Orig.

• lease) but

1. **T**HE custom of gavelkind is, that an infant at 15 years of age may make feoffment; but he cannot declare his will\* upon it, that his feoffees shall make such estate, &c. and therefore subpœna does not lie thereof; per Cur. for a custom shall be taken strictly; and per Jenney, J. lease and release is not warranted by this custom; and per Dygar, the use of land upon feoffment of trust

† trust of burgh-english shall go to the youngest son, and the same in the last  
in gavelkind. Br. Customs, pl. 50. cites 21 E. 4. 24. edition, and  
year book it is (trust.) — An infant of 15 years old, seised of lands in gavelkind in Kent  
by descent, may sell his said land, and make feoffment of it to the vendee. Nota, that Hale, serjeant  
said, that this was the custom there, Bendl. 33. pl. 52. Hill. 2 E. 6. Anon. — But to make  
feoffment, without a sale of it, is not good by the said custom. Ibid. — Nor can such infant make  
feoffment of any such land, of which he has a reversion only depending on an estate for life. Ibid. —  
Nor of lands purchased by himself within age there. Ibid.

2. Where a man seised of land in gavelkind makes feoffment to  
the use of himself and his feme in tail, the remainder to his right  
heirs, this remainder shall go as the custom of the land is; by  
the best opinion of the court. Br. Customs, pl. 1. cites 26  
H. 8. 4.

3. So of rent granted out of such land, by the best opinion of the  
court; but Shelly contra for the prescription of gavelkind; and that  
the land in gavelkind, and all land in nature of gavelkind is held  
in socage, and is partable between males, &c. and therefore the  
prescription shall not go to the rent; contra by two other justices.  
Ibid.

4. And it was held there, that if a man gives land of gavelkind in  
tail, to hold of him in chivalry, yet it shall be departible. Ibid.

5. A. seised of gavelkind in fee, devised it to A. and M. his wife,  
for term of their lives, the remainder proximo hæredi masculo de  
corporibus suis legitime procreato in perpetuum. They have issue  
three sons, and \* die. This point was argued two several terms by  
several, but no judgment or opinion. See D. 133. b. pl. 5.  
Mich. 3 & 4 P. & M.  
whole; but no such judgment is there, nor did the court give any opinion. But this seems taken  
from Hughes's Abr. tit. Gavelkind, pl. 7.

Nels. Abr.  
894. pl. 3  
cites it as  
adjudged,  
that the  
eldest son  
should not  
have the  
\* [16]

6. It was found by a jury of the county of Kent, that gavelkind  
lands were not devisable by custom; and in all the cases produced  
of devises of such lands on which verdicts had been found for such  
devisees, it appeared that such devisors made feoffments to the use of  
their wills, though the wills took no notice of the feoffment; and  
though the court shewed their dislike of the verdict, by reason of  
several authorities cited, yet the jury, after consideration thereof,  
affirmed their verdict. Pasch. 1659. B. R. 2 Sid. 153 to 155.  
Brown v. Brokes.

Cro. C. 561,  
562. contra  
LAUNDE v.  
BROOKS.  
See (E)  
Wileman v.  
Cotton.

## (C. 2) Forfeitures of Gavelkind in General.

1. **T**HE custom of gavelkind is, that if the father be attainted  
and hanged, yet the son shall inherit; contra elsewhere if he  
be not put to execution; and in this case the feme shall have dower;  
contra if he abjures, or be outlawed of felony, and is not put to  
execution; for custom is taken strictly. Br. Customs, pl. 54. cites  
22 E. 3. and Fitzh. Prescription, 40.

C 2

(D) Dower,

(D) Dower, and Tenancy by the Curtesy of Gavelkind. How. And how forfeited.

1. 17 E. **T**HE king shall have all the goods of felons and fugitives, and the year, day, and wast of their lands, and then the land shall be delivered to the lord of the fee, who may also, (if he please) compound with the king for the year, day, and wast.

Here certain lands in Kent, called gavelkind, are excepted; where the father may go to the bow, and yet the son to the plough; and in gavelkind, all the heirs male shall divide the inheritance, and so shall the female; but women shall not make partition with men. Also a woman shall be endowed of the moiety, and if she commit fornication in her widowhood, or marry, she shall lose her dower.

Mo. 160.

pl. 408. Cro.

E. 121. S.

C.—Goldsb.

108. pl. 13.

S. C.—Sav.

91. pl. 168. seems to be S. C.—Cro. E. 825. S. P. Davis v. Selby.

Co. Litt.

55. b. S. P.

—S. P. 3

Rep. 38.

per Cur. obiter, in Ratcliffe's case.

2. Dower of gavelkind land is of a moiety, and must be so demanded, and not otherwise. And it is *quandiu non maritata remanserit*. Le. 62. pl. 83. 133. pl. 182. Hill. 30 Eliz. C. B. Hunt v. Gilborn.

3. Of land in gavelkind, the son cannot endow his wife *ex assensu patris*, because there is a possibility of his not continuing heir. 6 Rep. 22. a. Arg. in Amb. Gorge's case.

4. If one takes a wife that is seised of gavelkind lands, and she dies without issue by her husband, her husband shall be tenant by the curtesy of half of the lands, so long as he shall live unmarried; but if he marry again, he shall forfeit his estate in the land. M. 22 Car. B. R. This is by the custom of Kent; but by the same custom, if he had issue by his wife, then he shall be tenant by the curtesy of all the lands his wife was seised of; and although he do marry again, he shall not forfeit his estate. Mich. 22 Car. Quære whether in the former case he shall forfeit his tenancy by the curtesy, if he do live incontinently, as the wife shall her dower by a like custom? L. P. R. 627.

[ 17 ]

(E) Alteration of the Custom; In what Cases; And How.

• Dal. 23.

pl. 1. 4. & 5.

Ph. & M.

S. P. Anon.

and the

same if it

came to be

held in capite

1. **T**HE custom of gavelkind goes with the land, and is by reason of the land; for though lands in Kent were held in socage in gavelkind at the beginning, and now much of it is held in chivalry, yet the custom of it remains as before; per Mountague Ch. J. Dal. 12, in pl. 21. Pasch. 7 E. 6. Anon.

Ibid.

2. 31 H.

2. 31 H. 8. 3. *The manor &c. of Thomas Lord Cromwell, and others within the county of Kent, being gavelkind land, shall hereafter descend as lands at the common law.* My Lord Coke says, that by this statute, a great part of Kent is made descendible to the eldest son, according to the course of the common law, for that by the means of that custom, divers ancient and great families, after a few descents, came to very little or nothing. Co. Lit. 140. b. — The statutes for disgavelling, do not destroy the privileges of the tenure, as the power of devising, but only the manner of the descent, which was the only thing looked upon as a grievance, and petitioned against. Sid. 135. &c. Wiseman v. Cotton. — And per Wyndham J. if the parliament had intended to take away all gavelkind customs, they would have mentioned more than only the partibleness; and Twisden J. accorded, and he denied the opinion of Lambert, that if the K. purchase gavelkind, that it shall go to all his sons, for Lambert had it out of Plowden 247. a. from Southcote's opinion; and he from 35 H. 6. 28. 2. And Mallet and Forster of the same opinion, and judgment acc. Raym. 76. S. C. — For else, instead of a benefit which the acts intended them, the owners would be greatly prejudiced by the loss of their former privileges, as in case of forfeiture for felony, &c. Hard. 325. Pasch. 15 Car. 2. B. R. Cotton v. Wiseman.

3. If land in gavelkind descend to the K. and his brother, they shall each of them take a moiety. Pl. C. 247. per Brown J. Trin. 4 Eliz. in case of Willion v. Barkley. See the notes on pl. 2.

4. But if the King has two sons, and dies, the moiety of the King shall not descend to his two sons, but the eldest alone shall have it by prerogative; for the quality of the person there alters the descent; but not the estate; for the estate is as it was before, be it fee simple, or fee tail; so that the estate shall be in the King, as in another. Per Brown J. Pl. C. 247. in case of Willion v. Barkley.

5. A difference is taken, where custom runs with the seignior, and where with the tenancy; for where custom runs with the tenancy, it shall not be destroyed by conveyance according to the course of the common law, Dav. 36. b. Hill. 5 Jac. B. R. in the case of Tanistry. Gavelkind, and such customs, which fix the order and descent of inheritance, can be altered no otherwise than by parliament. Jenk. 220. pl. 708

6. As if fine be levied of land in gavelkind; for though it be made a quære in Dyer 72. b. whether the course of inheritance be altered and made descendible to the heir at common law, yet it was agreed by the justices here, that the custom was not altered. Dav. 36. b. case of Tanistry. — And cites 2 Eliz. \* D. 179. b. that it was so held of lands in borough-english. \* D. 179. b. pl. 45. Anon.

## (F) Declaration and Pleadings. In what Cases it [ 18 ] must be pleaded; And How.

1. **I**N error it was agreed, that release of the ancestor in gavelkind is a bar to all the co-heirs, but the warranty is no bar but to the eldest, who is heir at common law. Br. Barre. pl. 62. cites 21 E. 3. 21.

2. In assise, title was made, in as much as all the lands were departible by custom; the tenant said, that this land is not departible; for the tertendants had only one son time out of mind; &

non allocatur; for if the rest of the vill be departible, this shall be departible likewise, and shall be of the same nature; and where it is confessed that vill or manor has such a custom, it is *no plea*, that such land there has not the custom, *without special matter shewn*; for custom shall be general; quod nota. Br. Customs, pl. 66. cites 23 Aff. 12.

3. Where there is *lord, mesne, and tenant*, and the land is held in gavelkind, yet the *rent and services of the mesne may be held at common law, unless it be specially shewn*, that the rent is of the nature of the land. Br. Aide, pl. 80. cites M. 30 E. 3.

Br. Prescrip-  
tion. pl. 53.  
cites S.C.

4. *One house in B. cannot be gavelkind and departible, where the rest of the vill is otherwise*; per Caund. to which Finch. and Thorpe agreed; by which Belk. said, that this part of the vill was of the fee of H. C. and in ancient time was a vill merchant, which time out of mind has been devisable, &c. but per Thorp, this is not of record; and the justices were in opinion to have given judgment against the plaintiff; by which he was nonsuited; quod nota. And per Caund. all the ancient boroughs of England appear in the Exchequer of Record. Br. Customs, pl. 37. cites 40 Aff. 27.

5. Of land tailed in gavelkind and burgh-english, the writ shall be general, and the *count shall express the custom*. Br. Tail & Dones, pl. 8. cites 46 E. 3. 21. and Fitzh. Formedon, 30. 11 E. 3.

6. In *dower de medietate*, the *custom shall be declared in the count*; So in action for burgh-english or gavelkind, &c. and this at common law; but *contra in their customary courts in the country*; for there it is their common law known; contra in the courts of common law of the realm. Br. Customs, pl. 69, cites 2 E. 4. 19. & M. 5 E. 4. 8.

Br. Count.  
pl. 65. cites  
S.C.

7. Where action is brought by *co-heirs* in gavelkind or burgh-english, they ought to *shew the custom, and prescribe in it*; so of a *feme who demands dower of the moiety*; for it is as a law, and varies from other customs. Br. Custom, pl. 44. cites 5 E. 4. 8. per tot. Cur.

It was  
agreed by  
all, that if  
lands are  
alleged to  
be in the  
county of  
Kent, it  
shall be pre-  
sumed to  
be gavelkind,  
unless the  
contrary  
be proved.  
But as for

8. The Court, of themselves, will not take cognizance that lands in Kent are gavelkind, unless something be alleged, or *found of record* to prove it; and so is Litt. S. 265. and the Lord Coke, in his comment upon it, that the *declaration shall mention the land to be of the custom of gavelkind*; but he says that he *shall not prescribe in it*, and that so it is of borough-english; and those two vary in this point from other customs; for when they are generally alleged, the law will take cognizance of them, but where it is *not alleged at all*, as in the principal case it is not it shall *not be intended to be gavelkind*. Lutw. 754. 755. Hill. 35 & 36 Car. 2. Humfry v. Bathurst.

the † *special customs incident to gavelkind, they must be shewn*; as that baron shall be tenant by the curtesy, without issue, and that feme shall be endowed of a moiety. 2 Sid. 153. Pasch. 1659. B. R. Brown v. Brokes. — \* Sid. 138. Pasch. 15 Car. 2. Wiseman v. Cotton. — 1 Mod. 98. Arg. — Wms's Rep. 475. Arg. — † Cro. C. 561, 562. S. P. Mich. 15 Car. B. R. Launder v. Brokes & al. — So of the custom of devising. per 3 J. Lev. 79, 80. Mich. 13 Car. 2. B. R. Wiseman v. Cotton.



## Gift.

### (A) What shall be said a Gift.

1. **A** Gift is at the will of the donor, and therefore cannot be prescribed for. See Prescription (K) pl. 2.

2. If a man puts a robe, or other garment on his servant to use, this is a gift in law. Br. Done, &c. pl. 9. cites 11 H. 4. 31.

Br. Trespass. pl. 93. S. C.

3. If an adulterer cloaths the woman, the baron may take his wife and the apparel, and justify both. Br. Done, pl. 9. cites 11 H. 4. 31.

Br. Trespass. pl. 93. cites S. C.

4. A. borrowed 100 l. of B. and at the day brought it in a bag, and cast it on the table before B. and B. said to A. being his nephew, *I will not have it, take it you, and carry it home again with you.* Per Cur' this is a good gift by parol, being cast upon the table; for then it was in the possession of B. and A. might well wage his law. But it had been otherwise, if A. had only offered it to B. for then it was a chose en action only, and could not be given without a writing. Noy. 67. Flower's case.

5. A gift of any thing without a consideration is good; but it is revocable before the delivery to the donee of the thing given. *Donatio perficitur possessione accipientis.* Jenk. 109. pl. 9.

6. If I have a horse in London, and I, being at a great distance from London, give my horse to J. S. he may have trespass without other possession. 1649. Coram Thorp. Clayt. 135. in case of Wilby v. Bower.—cites F. N. B. 140. Perk. 30. 21 E. 4. 25. 21 H. 7. 39. 21 H. 6. 43.

By the civil law, a gift of goods is not good without delivery.

Yet it is otherwise in our law. Per Coke Ch. J. Roll. R. 61, 62. Mich. 12 Jac. B. R. in case of Wrotes v. Clifton.

7. A. made a present of a jewel to a lady whom he courted, but the marriage not taking effect, he brought an action of detinue against her, and she taking it to be a gift, offered to wage her law, but the court was of opinion that the property was not changed by this gift, being to a specifical intent, and therefore would not admit her to do it; cited per the Ch. J. 2 Mod. 141. Mich. 28 Car. 2. C. B. in case of Beaumont v. ———

S. P. 18 & 19 Eliz. Cary's Rep. 77. Young v. Burrell.

8. If the King, being apprised of the value, lets a thing for years, &c. worth 500 l. per ann. reserving only 5 l. per ann. this is not a letting to farm, but a gift. Skin. 151. in the Exchequer. Arg. Mich. 35 Car. 2. B. R.

## Glebe.

### (A) Glebe in general. And in what Cases it shall pay Tithes.

1. **G L E B E** is a portion of land, meadow or pasture, belonging to, or parcel of the parsonage or vicarage, over and above the tithes. Godolph. Rep. 409.

[ 20 ] 2. *Lease of a rectory* excepting the glebe is a void *exception*; for no rectory may be without glebe.—But he may except parcel of the glebe.—So of a manor excepting the demesnes. Mich. 19 Jac. 1. per Hobert. Winch. 23. Mabies case.

3. If a parson hath land sowed with corn, and *grants the land*, the *corn shall pass* inclusive. 2 Buis. 184. in case of Moyle v. Ewer.

4. So if the parson grants the *rectory*, *reserving the land*, he shall pay tithes to his grantee. 2 Buis. 184. in case of Moyle v. Ewer.

5. If the endowment of the *vicarage* has special words, that the vicar shall have *minutas decimas* of the glebe, he shall have it. Note, it ought to be ancient glebe at the time of the endowment. Mo. 910. Trin. 38 Eliz. Blinco's case.

6. As long as the *vicar occupies* the glebe land in his own hands, he shall pay no tithes. *But if he demises it* to another, the lessee shall pay tithes *to the parson that is impropriate*. Brownl. 69. Harris v. Cotton.

Cro. E. 161. PERKINS v. RIND. 7. *Lessee* of the glebe shall *pay tithes* to the parson, if it be at a very low rent, otherwise, if at a rack-rent; sed quære of the diversity. Noy 35. Perkins v. Wilde.

though the rent was expressed to be \* *for all exactions, and demands*.—11 Rep. 13. b. in case of Priddle v. Napper.—Lessee of glebe shall pay tythe. Fin. Law. 8vo. 88.—Great tythes to the parson and small tythes to the vicar. Mo. 900. Blinco's case.—\* Le 300. Stile v. Miller.

\* D. 43. a. b. pl. 21. says, that the justices and serjeants were in several opinions whether he should or not, and it is left a quære. 8. If the *parson of a church not impropriate leases* his glebe, the \* *lessee shall pay tithes*. But otherwise it is, if it had been an *impropriate church*, because of the statute of 32 H. 8. of dissolutions. Noy 132. cites it as the case of Brewer v. Vesey. cites D. 43. a.

### (B) Power



(B) Power of the Parson in, or as to the Glebe.

1. 28 H. 8. cap. 11. f. 6. **I**NCUMBENT may devise corn sown by him, and growing on his glebe. Godolph. 518.—Watf. Comp. Inc. 8vo. cap. 40.

2. A prohibition was granted to stay waft, on a suggestion, that the parson *plowed up* the ancient glebe-land. Cumb. 59. Trin. 3 Jac. 2. B. R. Anon.

3. And agreement was about glebe-lands *inclosed*, and the parson, &c. to have an *equal quantity, and as good in another place*.—The agreement was decreed. 5 Car. 1. Chan. Rep. 41. Morgan v. Clark.

4. Parson *exchanges* his glebe-land and dies; the *successor enters* into the exchanged land, and takes the profits; yet the successor is bound for his time; & adjournatur. It is clear the exchange should not have been good, if it had been made *after 13 Eliz.* But the exchange in this case was before. Noy. 5. Turther's case.

5. Prohibition was moved for to a parson for digging new *coal mines* in his glebe, and also for felling *trees*; for it is waft and prohibitable by the statute de non prosternd' arbores, &c. the court held, it lay not for the mines; for then no mines in glebe could ever be opened. Lev. 107. Trin. 15 Car. 2. B. R. E. of Rutland's case.

(C) Entry on it, at what Time.

[ 21 ]

1. 28 H. 8. cap. 11. **E**VERY successor, on a month's warning, after induction, may have the mansion house, and the glebe belonging thereto, not sown at the time of the predecessor's death.

2. He that is instituted may enter into the glebe-land before induction, and has right to have it against any stranger. per Coke Ch. J. Roll. R. 192. See Present. ment (O. c) pl. 1. contra.

—Before induction there is no possession or freehold in him, of glebe or house, or tithes. Finl Law, 8vo. 89. Pl. C. 528.

■ See Forgery (A)  
pl. 24, 25.

## (A) \* Goldsmiths Notes.

1. 6 *Annæ*, cap. 22. s. 9. 7 *Annæ*, cap. 7. s. 61. and 3 *Geo.* 1. cap. 8. s. 44. Enacts that, during the continuance of the bank, no body politick, erected or to be erected, (other than the said bank) nor any other persons united or to be united in partnership, exceeding the number of six persons, shall, in England, borrow any sums of money on their bills or notes, payable at demand, or in less than six months from the borrowing thereof.

2. A note of one goldsmith was taken in by another goldsmith, who gave his note for the same sum, and sent his dunner many times for the money, but at length the goldsmith failed. The second goldsmith was decreed to pay the money, though his note given by him was for so much received on account, and that he had entered in the margin of the other note, whom he had received it of, and so Lord Keeper affirmed a former decree made at the Rolls. Mich. 1710. Abr. Equ. Cases. 375, 376. *Trowell v. Sir Step. Evans*.

3. A goldsmith's note was given in part of payment on a Saturday, and not offered till the Monday following to the drawer, when the cashier of the drawer cancelled the note, but not having money to pay it, gave a new note of the same date with the former. This is no new credit given to the drawer, but that the indorser is still liable. 9 Mod. 60. Mich. 10 G. 1. in Canc. *Mead v. Caswell*.

## Good Behaviour.

### (A) What it is.

1. **A** Binding to the good behaviour is not by way of punishment, but it is to shew, that when one has broke the good behaviour, he is not to be trusted. per Holt Ch. J. Trin. 1 *Annæ*, B. R. Farr. 29. in case of the Queen v. Rogers.

(B) In

(B) In what Cases, and of what Persons, and by whom.

1. **I**N *appeal of maihem*, the court took surety of peace of the one part and of the other, of their discretion by four mainpernors, 'till the stroke of the plaintiff was healed, each in 40*l.* to the King. Br. Peace, pl. 21. cites 21 Aff. 27.

2. Pledges were found by the defendant *in bill of trespass in C. B.* for his good behaviour, and keeping the peace, and that he should do nothing to the plaintiff in private, nor in publick by himself, nor by others. Br. Pledges, pl. 17. cites 30 Aff. 14. Br. Surety. pl. 11 cites S. C.

3. 34 Ed. 3. 1. *Impowers justices of peace to chastise rioters, barretors, and other offenders, and also to imprison and punish them according to law, and by discretion and good advisement; also to bind people of evil fame to the good behaviour, and to hear and determine felonies, and trespasses done in the same county according to law.* This statute being penned in such general words seems in a great measure to

have left it to the \*discretion of justices of peace, to determine what persons are fit to be bound to their good behaviour, and consequently seems to empower them, not only to bind over those, who seem to be notoriously troublesome, and likely to break the peace, as † *eves-droppers*, &c. but also those who are publickly scandalous or contemnors of justice, &c. as *baunters of bawdy houses*, or *keepers of lewd women* in their own houses, common *drunkards*, or those that *sleep in the day*, and go abroad in the night, or such as keep suspicious company, or such as are generally suspected as robbers, or such as speak contemptuous words of inferior magistrates, as justices of peace, mayors, &c. not being in the actual execution of their offices; or of inferior officers of justice, as constables, &c. being in the actual execution of their office; but it seems, that † *rusty, quarrelsome, or unmannerly words*, spoken by one private person to another, unless they directly tend to a breach of the peace, are not sufficient cause to bind a man to his good behaviour. 1 Hawk. Pl. C. Abr. 153. cap. 61. S. 2. The book at large, Sect. 2, 3, 4. cites as follows.—\* 4 Inst. 181. 2 H. 7. 2. b. 3. a. Lamb. 115, &c. Dalt. cap. 75. Cro. E. 78. Lev. 52, 53, 107. 11 Rep. 98. Roll. R. 224. Lat. 220. Cro. E. 689. Contra Palm. 130. Roll. R. 227, 8. 3. Buls. 139, 140.—† 2 Roll. R. 199, 227. Palm. 126. Dalt. 75. Roll. R. 150. 2 Vent. 22, 23, 24.—‡ Cro. C. 498, 9. Cro. E. 86. Mo. 249.

4. If a man is afraid of being beaten by *X. S.* he shall have surety of the peace; and contra if he is afraid of imprisonment; for he may have false imprisonment. Br. Peace, pl. 22. cites 17 E. 4. 4.

5. Note, that C. B. has no power of surety of peace, unless of surety to be before themselves; quod nota bene. Br. Peace, pl. 12. cites 2 H. 7. 1.

6. A. offers money to a woman with child to buy poison to kill the child. This is good cause to bind A. to his good behaviour. Trin. 28 Eliz. B. R. Cro. E. 49. in case of Sir Thomas Cockain and Ux. v. Witnam.

7. If one do affront any court of justice, this is a good cause to bind the party to his good behaviour. Pasch. 24 Car. B. R. for the affronting of justice is a publick misdemeanor, and not a private, although it be done but to the person of one man, as to the judge of a court, a justice of peace, &c. because such persons are publick ministers of justice, and act for the commonwealth. L. P. R. 649, 650. He who gives another the lie in Westminster hall, sitting the courts, shall be bound to his good behaviour.

Hawk. Pl. C. 58. cap. 21. f. 9. cites 1 Lev. 107. 1 Keb. 558.

8. A justice

8. A justice of peace cannot bind one to the good behaviour upon a *general information*, or commit him to prison for refusing to find sureties for his good behaviour upon such information. Sti. 16. Pasch. 25 Car. 1. Sir William Bronker's case.

9. Per Holt, Ch. J. by law *none can be compelled to find surety for his good behaviour, except it be by ancient custom within a leet, or for vagrancy or some certain offence*; and here one being committed thus; whereas A. has been convicted of a *misdemeanor*, and cannot find security for his good behaviour, therefore &c. and here could be no certiorari, there being no record of the conviction, the party being brought up upon habeas corpus, was discharged on motion. Per Cur. Trin. 12 W. 3. B. R. 12 Mod. 413. Anon.

[ 23 ]

10. If one *lives extravagant and high, who has no visible way of getting it*, it may be reasonable to enquire how he lives, and may be liable to find sureties of the good behaviour; but if a man lives *in a reasonable quiet manner*, it is hard to hold him to it. Per Holt, Ch. J. Mich. 13 W. 3. B. R. 12 Mod. 566. in Elizabeth Claxton's case.

11. *Lewd and disorderly persons* may be held to the good behaviour; per Holt, Ch. J. Mich. 13 W. 3. B. R. 12 Mod. 566. Eliz. Claxton's case.

12. If a *witness is insolent*, we may commit him for the immediate contempt, or bind him to his good behaviour, but we cannot indict him for it, and that is according to the common law of England; per Holt Ch. J. Trin. 1 Annæ, B. R. Farr. 29. in case of the Queen v. Rogers.

\*Hawk:  
Pl. C. cap.  
64. pl. 8.  
† Ibid. cap.  
73. pl. 9.  
‡ Ibid. cap.  
30. pl. 50.

13. Surety for the good behaviour may be required of *scandalous turbulent suspicious persons*, as of \* *forcible enterers*, or † *obscene writers*, or ‡ *recusants*, but not in respect of *bare words*, unless they tend to a breach of the peace, or scandal of the government. Hawk. Pl. C. cap. 61. See pl. 1, 2, 3, 4.

14. An *appeal by one disabled to be an approver*, was a good cause to bind to the good behaviour. 2 Hawk. Pl. C. cap. 15. pl. 43.

## (B. 2) In what Cases, for Words, &c. of Justices of Peace, &c.

1. A. was committed to Newgate by the mayor of London for *calling B. an alderman of London, fool and knave, upon the Royal Exchange, in the presence of divers*; upon a habeas corpus, it was certified, that the *custom of London* was, upon such a misdemeanor, to commit any citizen to prison, &c. but by assent of the whole court, he was discharged. And Walmsley J. said, that if justices of peace require sureties of the peace, not having good cause so to do, and the party refuses, and is committed to prison, false imprisonment lies. For the *statute* of 34 & 35 E. 3. which gave them

them that authority, is principally for vagrant persons, &c. and is not intended for every private abuse. And Anderson said, he could not see how the custom could be maintained; and that a man may be imprisoned for a contempt done in but not for one done out of court. Cro. E. 689. Trin. 41 Eliz. C. B. Dean's case.

2. One was indicted, for that he scandalous & contemptuous propalavit & publicavit verba sequentia, viz. that none of the justices of peace understand the statutes for the excise, unless Mr. A. B. and he understands but little of them; no, nor many parliament men do not understand them upon the reading of them. And it was moved to quash the indictment, for that a man could not be indicted for speaking such words; and of that opinion was the Court but they said he might be bound to his good behaviour. Pasch. 21 Car. 2. B. R. Vent. 16. the King v. Burford.

3. In an action on the case for maliciously prosecuting an indictment of perjury of which he was acquitted. Upon not guilty pleaded, it appeared on the evidence, that the defendant was a justice of peace, and procured some as witnesses to appear against the plaintiff, and his own name was indorsed on the indictment to give evidence. The Court agreed, this did not make him a prosecutor; for if a justice of peace knows any person that can give evidence against one indicted, he ought to cause him to do it. But it was proved on the defendant's side, that this indictment was drawn up by an order of the sessions. Keyling Ch. J. said, the plaintiff deserved to be bound to his good behaviour for bringing this action. Mich. 21 Car. 2. B. R. Vent. 47. Gurlington v. Pitfield.

(C) How.

[ 24 ]

1. **W**HERE one is arrested to the peace, the justice is not bound to demand surety, but the party ought to offer surety, otherwise the justice may award him to gaol. Br. Peace, pl. 7. cites 14 H. 7. 8.

2. Note where supplicavit of peace is directed to the justices of peace, the justice to whom the writ is first delivered, shall alone make precept to take the party to find surety, and it shall be returnable before him only, and he only shall take sureties, and shall make the return alone without the others. Br. Peace, pl. 9 cites 21 H. 7. 20. Per Fineux Ch. J.

But where justices of peace ex officio award a warrant of peace, and the party is arrested,

and it is at his election to appear before what justice he will; if the officer will not permit him to appear before such justice as he would, the party shall have false imprisonment against him; per Fineux. But Brook makes a quere thereof, if the officer cannot carry him before what justice of peace he will, and if the justice cannot award the precept or warrant returnable before himself only; and says, it seems that he may. Ibid.

3. The court was moved to grant the good-behaviour against the Lord Foliot, because he was indicted for a foul battery at the sessions in London, and the bill was found against him; but per Roll Ch. J. it cannot be granted on a motion, but you must prefer articles against him here on oath, and then you may move for it; and

He that doth, upon articles sworn in court, desire that the

party, and if there appears cause in the articles, it shall be granted. *Sti.*  
 against whom the 299. Mich. 1651. B. R. Davis v. Lord Foliot.  
 articles are sworn, may be bound thereupon to the good behaviour, must *express some special matter*  
 in those articles, for which he ought to be bound to the good behaviour; for if the articles be  
 only general, the good behaviour is not to be granted upon them. (Mich. 22 Car. B. R.) For a  
 general accusation is no accusation for the uncertainty of it, and the party cannot tell what answer  
 to make to such a general accusation. L. P. R. 650.—The articles *must be read in the presence of*  
 the other. Pasch. 5 Annæ, B. R. 6 Mod. 132. Dennis v. Dr. Lane.

4. 1000 l. bond may be required for keeping the peace, as the  
 case may stand, viz. if the party to be bound be a *dangerous person*;  
 per Roll. Ch. J. Pasch. 1652. B. R. Sti. 322. Anon.

5. The *return of the recognizance* ought to be *certified* by the  
 persons who took it, and if by any other, as the sheriff, &c. it is  
 not good. Trin. 21 Jac. 1. B. R. Cro. J. 669. Leonard Ford  
 v. the King.

6. By the course of the court, a person bound to keep the  
 peace, ought to *continue upon his recognizance for a year*; per Holt  
 Ch. J. 12 Mod. 251. Mich. 10 W. 3. B. R.

\* See Cer-  
 tiorari.

### (D) \* Discharged, or superseded.

A man who was arrested for the peace in C. B. was let to bail, and at the day came and cast *superfedeas of the chancery*, making mention that he had found surety in the chancery, and because he who is in bail is in prison by the law, and he who is prisoner in C. B. cannot find surety in the chancery, therefore the *superfedeas* was disallowed. Br. Peace, pl. 5. cites 22 H. 6. 59.

1. **I**N error, when the *peace* is granted in B. R. and after *superfedeas of the chancery* comes to them, ipso facto their power in bank is expired, and the party, against whom it was awarded, is discharged against them of the bank; per all the justices. Br. Peace, pl. 17. cites 21 E. 4. 40.

And if the party breaks the peace, and scire facias is awarded against him, there the party cannot release the peace. Ibid.

2. And when a man has found surety to keep the peace against J. S. and all the king's people, the party cannot release it after, because others have interest in it; but Brook says, it is used otherwise now. Ibid.

[ 25 ] 3. And if he pays the money, yet he shall be awarded to prison, till he finds surety again; for the first recognizance is now determined, and he appears to be a trespassor of the law; and if the *sureties die*, there, upon surmise of the king's attorney, the court shall award process, to compel the party to find new *sureties*; per all the justices, and by others e contra, for the executors are obliged. Ibid.

4. And by some, if a man finds surety of the peace, and no day is limited, there none can release it, but he is bound during his life, and therefore it is good to find surety till such a day. Ibid.

5. A new king cannot take the forfeiture of mainprise taken in the time of the king his predecessor. Tempore E. 3. tit. Re-attachment

attachment in Fitzh. 18. and such mainprise was anno 1 H. 7. 20. and the opinion of the Court was, that by the death of the king it is discharged, and that every surety of the peace, and mainpernor, for keeping of day in the time of another king are *discharged by the demise of the king in every court.* Quod fuit concessum of surety of peace, for it is *servare pacem nostram*, viz. of *that king*; and his peace is determined by his death. Br. Peace, pl. 15. cites 1 H. 7. 2. and 1 E. 5. 1. and Fitzh. Reatt. 18. accordingly.

6. Where, on reading affidavits, and examining the matter, it appeared to the court, that the binding to the good behaviour was *upon malice* and for vexation, B. R. discharged them. Hill. 1652. B. R. Sti. 364. Sir Thomas Revell's case.

7. Note, the king cannot *discharge a recognizance* taken for surety of the peace, but *after it is broken* he may. Hill. 1 & 2 W. & M. C. B. 2 Vent. 131. cites 11 H. 7. 12. and in Marg. 3 Inst. 238. Vaugh. 334.

8. A husband was bound to the peace for a year, upon articles exhibited against him by his wife, and on motion to discharge the recognizance, upon suggestion that the wife was *consenting*, it was denied per Holt, who said, how can we discharge it before the condition is performed? Pasch. 6 Annæ, B. R. 11 Mod. 109. the Queen against Lord George Howard.

9. It hath been \* holden, that a *certiorari to remove a recognizance* for the good behaviour, will supersede its obligation; but this would be highly inconvenient, and the contrary opinion seems to be supported with the better † authority. 2 Hawk. Pl. C. 294. cap. 27. §. 65. cites as follows; \* 2 R. a. 922 (F) pl. † 12. Dalt. cap. 75. — † Cro. Jac. 282.

† Yelv. 207. Trin. 9 Jac. B. R. Rolfe v. Pie. [† This should be pl. (2)]

## (E) Breach.

1. **I**F a man is bound to keep the peace, and *menaces J. N.* *being present*, it is a breach of the peace, *contra* by some, *if J. N. be absent* when the other menaces him. Br. Peace, pl. 16. cites 18 E. 4. 28.

2. If a man is bound to the peace, and *procures another to break the peace*, it is a forfeiture of his bond, as it was said in the time of H. 8. Br. Peace, pl. 20.

3. Being *arrested* on a suspicion of *felony*, though no felony was committed, yet if he *makes his escape*, which is a misbehaviour, it is a forfeiture of recognizance. Godb. 22. Pasch. 26 Eliz. C. B.

S. P. And though it was not alleged that a felony was com-

mitted. For per tot. Cur. if a subject be arrested by a lawful officer, it is not lawful for him to escape; but he ought to stand to the law, and to answer to what he is charged with. 2 Le. 86. pl. 199. Pasch. 26 Eliz. B. R. Crabdell's case.

4. To the breach of such bond, some act ought to be done, which imports intention to do violence to his body, as to say, *I will*

\* Cro. E. 86. King's case. —



Entry into  
land with  
force is.

Trin. 21

Jac. B. R.

Cro. J. 699.

the King

v. Ford.

*I will meet thee.* But 'tis not broke by \* *entry into a close*, otherwise of *taking things from his person, vi & armis.* Mich. 29 Eliz. B. R. Mo. 249. pl. 395.

5. *Battery* was after a conditional pardon; and the person was hanged. Pasch. 39 Eliz. See Mo. 466. Cole's case.

[ 26 ]

Cro. E. 86.

King's case.

—S. P.

Cro. J. 498.

the King v.

Heyward.

—

6. To be *drunk* is breach of good behaviour, but *cholerick words* being provoked by another is not, per Haughton J. and Chamberlaine J. accordingly. But per Mountague J. Words that are *actual and violent and not vocal* are a breach. Mich. 18 Jac. B. R. 2 Roll. R. 200 Stamper v. Hide.

Giving a man the lye in Westminster hall, or in any great concourse of people, is a breach; per Holt Ch. J. Farr. 29. in case of the Queen v. Rogers.

7. If one that is bound to the peace break his recognizance, he may be *indicted* upon it, for 'tis a new offence, per Roll Ch. J. Pasch. 1653. C. B. Sti. 369. Anon.

8. Such a recognizance shall not only be forfeited for such *actual* breaches of the peace, for which a recognizance for the peace may be forfeited; but also for some others, for which such a recognizance cannot be forfeited, as for *going armed with great numbers* to the terror of the people, or *speaking words tending to sedition*. And also for *all such actual misbehaviours*, which are *intended to be prevented* by such a recognizance, but not for barely giving *cause of suspicion*, of what perhaps may never actually happen. Hawk. Pl. C. cap. 62. pl. 6.

## (F) Pleading.

1. [ If a man be bound to the good behaviour with sureties, and for his appearance in B. R. at a day certain, and he *dies before the day*, and for non-appearance the recognizance be *estreated*, and process made against the sureties, the *sureties must shew by plea* all this matter before they can be discharged; and if the Attorney General will confess it, 'tis enough; otherwise, if he will take issue on the death, it must be tried. Pasch. 25 Eliz. B. R. Savil, 53. pl. 114. Half-hyde's case.

2. *Sci. fa.* on a recognizance for the good behaviour taken in the Crown Office. The breach assigned was, that he assaulted and beat such a one such a day, and says not *vi & armis*. And for this cause, after verdict, the exception was taken, and judgment stayed. Cro. J. 412. Mich. 14 Jac. B. R. The King v. Hutchins.

## (G) Proceedings.



## (G) Proceedings.

1. **I** F recognizance of peace be taken of justices of peace, it may be certified by certiorari, though the justice of peace does not bring it to the sessions, nor to the custos rotulorum, and if *supersedeas* be returned to the sessions, and no recognizance, then certiorari may be awarded to the same justice to certify the recognizance; but see the statute of 3 H. 7. cap. 3. that the justice forfeits 10 l. if he does not certify the recognizance at the next sessions. Br. Peace, pl. 11. cites 2 H. 7. 11.

2. 'Tis a common course in cases of persons bound to their good behaviour to *indict* them, which will be evidence in a *Sci. fa.* on the recognizance. Hill. 30 Eliz. B. R. Cro. E. 86. King's case.

3. *Capias* against A. to find sureties de se bene gerendo. Sheriff may break the house to arrest the party, as upon a cap. utlag. Trin. 42 Eliz. B. R. Mo. 606. pl. 837.

4. To have security of peace of one, you must make *affidavit of the cause* of fear, and exhibit it in articles, and then make affidavit that you demand this, not of any ill will or malice, but out of fear of some bodily hurt. Mich. 13 W. 3. B. R. 12 Mod. 565. Anon.

## (A) Grammar.

[ 27 ]

1. **T**H O' mala grammatica non vitiat instrumenta, yet in expositione instrumentorum mala grammatica, quoad fieri potest, vitanda est. Pasch. 3 Jac. C. B. 6 Rep. 38. b. Bellamy's case.—Als. Walker v. Bellamy.

## (A) \* Grand Serjeanty.

\* See Co.  
Litt. 105. b.  
80 108. a.—

Spelm. Gloss. Verbo Serjeantia.

1. **T**H E tenure of grand serjeanty was created by King Edward the 2d. Cro. Car. 484. Mich. 13 Car. Moulin v. Dalison.

## Grants.

### (A) By what Names the Grantors may grant. *Corporations.*

Cro. E. 167. S. C. —11 Rep. 20. A sci. fa. was abated for the like  
[ 1. ] If the *dean and chapter in Exeter*, being incorporate by the name aforesaid, lease land by the name of the dean and chapter of *Exeter*, yet it is a good lease; for this is no material variance. H. 32 Eliz. B. R. adjudged between Germin and Willis. ]

variance of (of for in.) Br. Corporation, pl. 33. cites 15 E. 14, 15. —Christ Church in Oxford was incorporated by the name of the *dean and chapter of the cathedral church of Christ of Oxford*, and made a lease by the name of the *dean and chapter of the cathedral church of Christ in the university of Oxford*; and it was adjudged good by all the judges of B. R. Because the substance of the corporation is inserted in the words of the lease. Mich. 36 and 37 Eliz. Mo. 361. Ld. North's case. —For (*Oxford*) and the (*university of Oxford*) are by intendment the same. Cro. E. 338. S. C. by the name of *Button v. Wightman*. —Poph. 56. S. C.

[ 2. If a *man* lease land for years by a *contrary name of baptism*, yet it shall be a good lease; for it is not grounded merely upon the indenture, but partly upon the demise. H. 32 El. B. R. ]

Le. 146. Hedd v. Chaloner. —Per  
[ 3. As if *Johan* lease land by name of *Jane* (admitting that they are several names) yet it is good lease, for the cause aforesaid. H. 37 El. B. R. adjudged between Hidd and Chaloner. ]

Wray, the names are both the same, and said, that so it had been adjudged upon conference with grammarians. Cro. E. 176. S. C.

A grant by an abbot or provost, by the name of abbot or provost without the name of baptism, is good. Bro. Grants, pl. 116. cites 12 H. 4. 5.  
4. Grant by an *abbot*, without other name, is good. Hob. 32. cites 10 H. 4. 5.

[ 28 ] 5. A grant of an annuity by an *abbot by the name of the foundation*, without his name of baptism, is good, if there be not any more abbots in England of the same name of foundation, so as the certainty may be known who is the grantor. Perk. 16. S. 36. cites 8 E. 4. 14.

So of a mayor and commonalty. Br. Corporations, pl. 31. cites 15 E. 4. 1.  
6. Where an *abbot and all their monks by proper names*, and not by names of their corporation, make a bond under the covent seal, it shall not bind the successor, because the covent is not named by the name of covent. Br. Corporation, pl. 31. cites 15 E. 4. 1.

If a college be incorporated by the name of *warden and fellows*, and not by any christian name, it is reasonable they should purchase and lease by such name without any  
7. If a *dean and chapter* make a lease in these words, *Sciatis nos decanum & capitulum, &c. demisisse, &c. without shewing the proper name of the dean*, the lease is void, per tot. Cur. Br. Corpor. pl. 59. and 73. cites 18 E. 4. 8.

not by any christian name, it is reasonable they should purchase and lease by such name without any

any christian name; per Anderson Ch. J. Le. 307. Carter v. Claypole.—If a prebendary makes a lease, and in the indenture it is said to be with the assent of R. the bishop and of the dean and chapter of the said church, without mentioning the name of the dean. Quere, whether this be a good confirmation of the lease. Dy. 106. pl. 21.

8. Grant by *the master & confratres sive socios de D.* and the name of the corporation is *master & confratres only*, is good, notwithstanding the surplusage; for it is the name and more, and the surplusage is void, per Choke justice; quod non negatur. Br. Corporations, pl. 62. cites 20 E. 4. 12.

9. Where a warden and chaplain, mayor and commonalty, dean and chapter, &c. are; the *warden, mayor nor dean alone cannot make a lease alone nor discontinuance*; for it shall be by the whole corporation, and by deed, otherwise it is void; for he cannot release nor make lease but with the rest, &c. Quod nota per tot. Cur. Br. Corporations, pl. 66. cites 21 E. 4. 76.

*Contra, of the possessions which they have severed from the rest of the corporation.* Br. Ibid.—

But abbat or bish-p may discontinue; for they are sole seised in fee, &c. *Contra of the parson*; for he has not the fee simple to every intent. Br. Ibid.

10. The *dean and chapter of Eaton*, by name of the dean and chapter of the college of Eaton, made a lease, whereas they were incorporated by the name of the *dean and chapter of the college of St. Mary of Eaton*; for which reason 'twas agreed to be void. And. 23. pl. 47. Eaton College's case.

Mo. 13. S. C.—D. 150. pl. 84, (85.) S. C.—Jenk. 214. pl. 54.

11. So of a lease made by the dean and chapter of the cathedral church of Peterborough, where they were incorporated by the name of the dean and chapter of the cathedral church *Sancti Petri Burgensis* (or Peterburgensis). This was held a void lease; for they ought to be named by their names of incorporation, as they were founded without omission of any part material of it. \* And. 23. pl. 47. cites P. 3 & 4 P. & M.

A lease by the dean and chapter of the cathedral church of the Holy and Undivided Trinity at Carlisle, made by the name of

dean of the cathedral church of the Holy Trinity in Carlisle, and the whole chapter of the said church, and adjudged good, notwithstanding the variance; per six judges against three. Dy. 278. pl. 1. — \* Bendl. 45. pl. 80. S. C.—Mo. 13, 14. cites S. C. contra, that it was not void.

12. The dean and canons of Windsor were incorporated by act of parliament, by this name, *the dean and canons of the King's Free-chapel of his castle of Windsor*; and they make a lease by name of the dean and canons of the *King's Majesty's Free-chapel of the castle of Windsor, in the county of Berks*. This lease was held good enough by all the justices, notwithstanding the variance. For though the King himself in parliament should call it *his castle*, yet when another speaks of it, it is more proper to call it *the castle*, and though there are more words in the lease than in the words of incorporation, yet it is not prejudicial, if every word is true. As if he had added of the castle of New Windsor, where the chapel is of St. George the Martyr, because it is true, and there is not any other Windsor \* known, or any other St. George the Martyr, and though it might be otherwise, yet it shall not be intended. Mo. 71. pl. 195. Trin. 6 Eliz. Anon.

\* [ 29 ] Mo. 230 reports this case, cited by Clark J. thus, that H. 6. incorporated the dean and canons of New Windsor by the name of the dean and canons of the King's Free Chapel, and that they in the time of

Queen Mary, made a lease by the name of dean and canons of the *King and Queen's Free Chapel* of Windsor, and that it was void.—Hob. 124. cites S. C. and that it was made in King Philip's time; and Hobert says, that this was a variance in the body and substance of the name, (not in an excrescence) though it was in some sort true, and cites it as the case of Hale v. Win-

gate.

gate.—Le. 162. cites S. C. and says it was incorporated by E. 4. but recites the variance wrong, (as it seems) but says, that it was held to be a variance in substance, 29 Eliz. B. R. Hall v. Wingate.—10 Rep. 124. b. cites Mich. 29 and 30 Eliz. B. R. S. C. That the words (King and Queen's Free-chapel, &c.) was a variance in substance, but that the other were variances in syllables and words, and not in substance, & *parum differunt quæ re concordant*.

The grants, &c. of a corporation must be by the name of incorporation; for it is as the name of baptism, which cannot be changed; per all the judges of C. B. Bendl. 45. pl. 80.—S. P. And. 197. in case of Fisher v. Boys.

13. A corporation may be *known by two names*, and if it hath been so known *time out of mind*, a grant made by either of the names is good. Cro. E. 351. Vaughan v. E. of Bedford, Bishop of London, & al.

Le. 159. S. C. by the name of Marriot v. Paschall.—And. 202. S. C.—Hob. 125. 14. A corporation, being incorporated by the name of the *master and chaplains of the hospital of the Savoy*, made a lease by the name of the *master and chaplains of the hospital called the Savoy*; and per two judges against one, the lease was held void, but a writ of error was brought, and the parties compounded. Hill. 29 Eliz. Mo. 228. Fanshaw's case.

Says this was a hard judgment; for things shall be supposed to be named according to truth.—S. C. cited 10 Rep. 123. b.

15. Merton college in Oxford was incorporated by the name of the *warden and scholars of the house or college of Merton in the university of Oxford*; and made a lease by the name of the *warden of the house or college of Merton, and the scholars of the said house in Oxford*, misplacing the word (scholars) and leaving out the word (\* university) but it was adjudged, that it being the same in substance, the variance is not material. Trin. 30 Eliz. Mo. 266. Fisher v. Boys.

\* And. 196. S. C. says, that for this variance the lease, as he had heard, was adjudged void; for the college (in the *university of Oxford*) and the college (in *Oxford*) are not the same in sense, nor does the one contain the other, and though in fact the (university of Oxford) and (Oxford) were the same, and the one contained the other, yet as they may be different, the court, who are to judge upon the matter before them, cannot intend them to be the same.—S. C. according to And. 196. cited Le. 162. in case of Marriot v. Paschall.—10 Rep. 125. a. cites S. C. and says the lease was held void for the omission of the word (scholars) after the word (college) the name of incorporation being (warden and scholars of the house or college of scholars of Merton, &c.) But that the omission of the word (university) and the misplacing of the word (scholars) were held not material, and that the reporter was counsel in the case.—Hob. 125. cites S. C. as adjudged upon the omission of the word (scholars) according to 10 Rep. 125. and calls it a hard case; for since they were named the scholars of the house in one part of the name, it must follow, that it was the house of the same scholars (which was all that was wanted) as (*burgesses of Lynne*) implied that Lynne was a borough.

Egerton Solicitor General said arg. that he was a counsel in Merton College's case, (al. Fisher v. Boys) and he knew that the judgment, in the case, was not given for the cause alleged by Cook, but because that this word (scholars) was left out of the lease. Le. 165. in case of Marriot v. Paschall.

16. The *provost, fellows and scholars of Queen's College in Oxford*, are *guardians of the hospital*, or maison de dieu in Southampton, and they make a lease of land parcel of the said hospital to H. for a term of years, by the name *præpositus socii & scholares collegii reginalis in Oxonia guardianus hospitalis, &c.* Judgment being given in ejectment, it was objected in arrest thereof, that the word *guardianus* ought to have been *guardiani*: because the college consists of many persons, and every person is capable, and is not like

like an abbot and covent. But per tot. Cur. the exception was not good; but that as well the lease as the declaration was good; for the college is one body, and as one person, and so guardianus is good enough. 1 Le. 134. Hill. 30 Eliz. Queen's college in Oxford's case.

17. *Master of the house or college of St. Thomas of Acons in London*, made a lease by the name of *master of the house or hospital*, &c. some of the justices conceived that there is not any material variance, (but if the parties would, it might be found by special verdict) for by them *college and hospital are all one*. Le. 215. Mich. 32 & 33 Eliz. C. B. Cheny v. Smith.

[ 30 ]

18. If a *town* be incorporated, and afterwards is *made a city* and they grant land *by the name of a city*, it is good. per Cur. Mich. 36 & 37 Eliz. Cro. E. 338. in case of Button v. Wightman.

19. A corporation incorporated by the name of *minister Dei pauperis domus*, made a lease by the name of *minister pauperis domus Dei*; whether this variance was fatal or not, the court was divided? Mich. 37 & 38 Eliz. Mo. 539. Sherborne v. Lewes. —Goldsb. 121. S. C.—Afterwards by two judges against one it is a good lease. Hob. 124. S. C. by the name of Pitts v. James. —Mo. 865. S. C.

Though there be more in the lease than in the words of incorporation, yet it will not vitiate if every

word be true, per Cur. Mo. 72. pl. 195. Anon.—And a lease by the said college was made by the consent of *the whole chapter of the said house*, instead of being said to be made by the *dean and chapter*, which was a mistake of the clerk. Toth. 192. cites Brook v. Dean and Chapter of the cathedral church in Oxon and Daniel. But says not how decreed.

20. *President and scholars of Corpus Christi college in Oxford*, by the name of the president and scholars of Corpus Christi college in Oxford, *in the county of Oxford*, made a lease to the plaintiff. This was held not to be a material variance to make the lease void. Cro. E. 815, 816. Pasch. 43 Eliz. Dumper v. Symes.

21. The *prior of St. John's of Jerusalem* omitted *Jerusalem* in the grant, yet the grant was good. Jenk. 214. pl. 54. (where he much reprehends the avoiding leases for the misnomer of the corporation granting it.) and again, (233. pl. 6.) (235. pl. 10.) (and 270. pl. 88.)

A grant by a corporation, as dean and chapter, mayor and commonalty, &c. not

saying of *what place*, is not good; per Popham Ch. J. Poph. 56. in case of Button v. Wrightman. —The name of the place is *like a surname* of a man, which must be inserted to make the grant good. Ibid.

## (A. 2) What is a Grant,

1. **T**HE dean and chapter of Bristol made sundry *leases*, misreciting the *name of their corporation*, and an intricate case of sundry such leases made of one thing to divers men; wherein the Lord Chancellor said, that it was fit to help such leases in Chancery, being for *reasonable time and upon good consideration*;

*sideration*; contra of long leases, without consideration of fine or good rent; and that judges might have done well at the first to have expounded the law so, with *averment that they were the same parties*, and so was the old law till now of late, especially where the *mistaking rose on their part who had the keeping of the evidences*, the which the lessee could not see, but must take a lease by the college clerk. In a writ where you may have a new one, it is no harm to abate it for a misnomer; and yet in that case sometimes in old times, an averment of *conus per le un ou le auter*, where they were sued by others, and not named so by themselves. Cary's Rep. 44, 45, cites 23 Nov. 1 Jac.

2. That cannot be a grant which is *made by one who has no interest* in himself to grant; and an authority only is not sufficient; per Holt Ch. J. in delivering the opinion of the court. Trin. 10 W. 3. 12 Mod. 200. in case of Saunders v. Owen.

So in case of partition; if rent be assigned for equality of partition,

3. So a rent assigned in lieu of a dower may be by parol without deed, though it be a freehold created de novo, and though a rent lies in grant; because this is not properly a grant, but an appointment. Trin. 10 W. 3. 12 Mod. 201. Saunders and Owen.

if there be three partners, and rent assigned to two, if it were a grant, they would be jointenants, and the rent would survive; whereas, it being but an appointment, if either of them dies, the rent shall go to the heir of the deceased, and not survive. Trin. 10 W. 3. 12 Mod. 201. Saunders and Owen.

\*[ 31 ]

(A. 3) By what Names of Corporation a Grant may be made *to a Corporation*, and not avoided by Misnomer,

A devise to a college by a name known, though it be not by the very name of the corporation, is good. Hob. 32. in case of Counden v. Clarke. — cites 10 Rep. 57. the University of Oxford's case.

1. A Grant made to a corporation by other than their true name is void; for they know their own name. Jenk. 214. pl. 51.

2. Variance in the name of a corporation, shall not lose the obligation, if it be of one and the same effect. Br. Variance, pl. 80. by Brook.

3. As in debt the writ was præcipe *W. W. prior of the house of St. Mary and St. Thomas the Martyr, de novo loco juxta Guildford, in the county of Surry*, and the obligation was, *we R. A. prior of the priory novi loci juxta Guildford, in the county of Surry, and covent of the same place*; Pole demanded judgment of the writ; for it should be (of the priory) according to the obligation, and not *de novo*; but per Prisot, all is of one effect, and the writ shall be accorded to the foundation; but Pole said, yet it ought to accord *ut dictus*. But per Prisot, this need not be; for neither the defendant nor the plaintiff are estopped, and therefore answer; per Br. Variance, pl. 80, cites 28 H. 6. 8.

A particular patent made to the mayor, aldermen, and commonalty



mentality of S. is void, if there was *no mayor at the time of the grant.*

Br. Corporations, pl. 58. cites 13 E. 4. 8.

5. Bond made to the *mayor of London* is not good; for there is *no such corporation*; per Catesby. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67. But bond made to the abbot of D. is good, and

bond made to *J. N. mayor of L.* is good, by reason of his proper name expressed. Br. Ibid.

6. The *chapel of St. Stephens* was incorporated by the name of *dean, canons, and vicars*, and after a man granted land to them by name of *presbiteris sive capellanis Sancti Stephani & successoribus suis*, and this grant was adjudged void. Br. Corporations, pl. 65. cites 21 E. 4. 55, 56.

7. If a vill be *incorporated by name of mayor and bailiffs*, and after they have *confirmation by name of mayor and burgeses*, the confirmation is void, per Brian and Wood. Br. Corporations, pl. 35. cites 14 H. 7. 1.

8. A corporation being incorporated by the name of the *mayor and burgeses of the king's borough of Lynne Regis*, a bond was made to them by the name of the *mayor and burgeses of Lynne Regis*, and held good, for the words (*burgesses of Lynne Regis*) imply that (*Lynne Regis*) is a borough, and the words (*Lynne Regis*) implies it is the King's borough. Mich. 11 Jac. 1. 10 Rep. 122. b. The Corporation of Lynne Regis's case. And though in the patent it was expressed, that they should be called and named by the same name, and not by any

other name, it was resolved, that in grants and conveyances it was sufficient, if the name of the corporation be the same *re & sensu*, though it be not so *syllabis & verbis*. 10 Rep. 124. Mich. 11 Jac. C. B. S. C.—S. C. cited Hob. 125.—1 Brownl. 57. has a short note of the S. C.

9. Grant made to the King by the name of *Sovereign Lord* [ 32 ] *James*, omitting the word (*king*) is good enough. 11 Rep. 21.

(A. 4) Good. Made by *general Names*, as Poor of A. &c.

1. **D**EVICE of land to *W. N.* for life, remainder to the church of *St. Andrew in Holborn*, is taken good to the parson, by the words *aforesaid*; quære. Br. Corporations, pl. 77. cites Fitzh. Devise, 27. anno 21 R. 2.

2. In ancient time a grant made *abbathie beatæ Mariæ, &c. et monachis ib. Deo servientibus* had been good; so had it been of a grant made \* *Deo & ecclesiæ*, of such a place. But such grants are not good at this day, because there is *not a person named who can take by force of the grant*. Perk. S. 55. cites 39 Aff. p. 20. 33 H. 6. 23. Br. Grants, pl. 9. cites 33 H. 6. 22. S. P.—S. P. Br. Grants, pl. 119. And the reason why

the ancient deed is good, is, because of the *long continuance in possession*.——\* S. P. Br. Tail & Domes, &c. pl. 21. per Brook, contra at this day, unless it has the word *successors*.

3. If a man gives land *per dedi & concessi ecclesiæ de D.* this goes to the parson and his successors, per Thirn. Br. Estates, pl. 49. cites 11 H. 4. 84.

But a grant made to three or four of the parishioners, of the parish of St. Mary, in such a

4. A gift of *chattels* to the parishioners of D. is good without any other name, and the churchwardens shall have action; for it was to the use of the church, *though* they be not incorporated, per Cur. See Br. Grants, pl. 54. and Br. Corporations, pl. 73. cites 37 H. 6. 30.

place is not good. Perk. S. 55.——A gift of goods to the use of the parishioners is good; but a feoffment of lands to the use of the parishioners is void; for as to things which have continuance, as feoffments, leases, &c. they have no capacity to take by that name. Br. Feoffments al. Uses, pl. 29. cites 12 H. 7. 27.——Bro. Corporations, pl. 52. cites S. C. pl. 77. cites 37 H. 6. 30.——Br. Done, &c. pl. 50. cites 12 H. 7. 28.——Pl. 17. cites 37 H. 6. 30.

Grant of the king, probis hominibus of

5. Note, that it was held in C. B. that if the King gives land in fee farm, *probis hominibus of the vill of Dale*, that this is a good corporation. Br. Corporations, pl. 54. cites 7 E. 4. 14.

the vill of Dale, which is not incorporated before, rendering a fee-farm, is good, contra without a fee-farm reserved. Note the diversity. Br. Patents, pl. 85. cites S. C.

6. So where it is given to the *burgesses, citizens, and community*; and they by such name may have action of things touching their farm, and the writ shall be ad respond' probis hominibus, &c. and the like. Br. Ibid.

7. A grant made unto the *Bishop of Winchester*, without other name, is a good grant; and a grant made unto the *next of blood of J. S.* is a good grant. Perk. S. 55. cites 20 E. 4. 2. 12 H. 4. 3.

Toth. 94. S. C.

8. Gift to the poor, because it is no corporation, is void, yet was relieved in chancery. 42 Eliz. Toth. 69. Mayor of Reading v. Lane.

A grant made to the churchwardens of such a church, without naming of their names is good. Perk. S. 55.

[ 33 ]

9. An action of debt was brought upon a bond made *guardianis & supervisoribus pauperum Adderbury*; the defendant pleaded, that there were other churchwardens not named; the plaintiff replied, that there were not, and upon this there was a demurrer; and it was moved by Pollexfen, that the defendant might answer over; but Blencow on the other side said, that the bond was made *guardianis ecclesie paroch. Adderbury, &c.* and no person named, and so incertain; for it ought to shew who were churchwardens; but it was answered, that it was well enough; for it is a description, as to the Bishop of London. Mich. 1 Jac. 2. Skin. 243. Dolby and Harris.

(B) By what Names such Persons who are liable to Grant, may grant [*Name of \* Baptism and Pleadings.*]

\* See (A) pl. 2, 3.

Fo. 43.

See (D) pl. 1. S. C. and the notes there.

And such things as pass by

[ 1. ] If a man be baptized by the name of J. and is known by another name, if he grants by this known name it is good. 46 E. 3. 22. ]

2. The grants of such persons which are good without name of baptism, notwithstanding that such persons name themselves by contrary



*trary names* of baptism, yet their grants shall be good. And therefore if, an *abbot* grants common in his lands, by the name of Richard abbot, &c. and his name is Robert, this is a good grant, if there be not any more abbots of the same name of foundation. Perk. S. 42.

*livery, as land, &c. notwithstanding the deed of feoffment be made of*

that by *contrary name of baptism* of the feoffor, and by *contrary name of baptism* of the feoffee, it is a good feoffment, if *livery* of seisin be made by the feoffor unto the feoffee, and it takes effect by the livery, and not by the deed, &c. Perk. S. 42.—*And if a man give unto me his horse by word and makes to me a writing of the same, by a contrary name of baptism, and by my contrary name of baptism it is a good gift by word, but not by the writing, &c. Perk. S. 42.*

3. A man cannot have 2 *christian names*, as A. al. B. S. Noy. 135. Loyd's case.—S. P. but he may be known by 2 surnames. Br. Misnomer, pl. 47. cites 1 H. 7. 28.—Br. Nofme, pl. 22. cites 14 H. 7. 11. pl. 27. cites 9 E. 4. 44. per Jenny.

\* There is a great difference between a mistake in the name of

*baptism*, and in the *surname*; for a man † can have but one name of baptism, but may have 2 surnames. Pasch. 29 Eliz. B. R. Cro. E. 57. Disply v. Sprat.—The christian name must always be perfect. Poph. 57. in case of Button v. Wrightman.—\* S. P. per Cokain. Br. Estoppel. pl. 3. cites 3 H. 6. 25.—Br. Misnomer. pl. 2. S. P. cites 2 H. 6. 5.—† Cro. J. 558. Pasch. 15 Jac. in Cam. Scacc. Watkins v. Oliver.—Per Clark J. Mo. 229.—Cro. E. 328. in case of Humble v. Glover.

4. Debt was brought in London against *Edward P.* (which was his right name) and he removed himself into the King's Bench, and put in bail by the name of *Edmund P.* and judgment was had against him by name of *Edward*. It was said, that because he had removed himself by the name of *Edmund*, he is estopped to say the contrary. But if it was upon an original writ here in B. R. it were otherwise; and afterwards the plaintiff declared against him de novo, by the name of *Edmund*. Trin. 31 Eliz. B. R. 4 Le. 102. Barlow v. Pierson.

5. A grant to one *not naming his christian name* is void; for it is uncertain to whom the grant is, except it be one, that by reason of his *dignity* or *office* it is known, that there is no other of the same name; as to Popham, Ch. J. or Glanvill, Serjeant; and yet in that case it must be *averred*, that there are no other of that name. Trin. 36 Eliz. B. R. Cro. E. 328. Humble v. Glover.

If a person be so described that he may be certainly distinguished from other persons, the omission, or in some

case the misprision, of the name of baptism, shall not avoid the grant, as gift omnibus filiis J. S. or primogenito filio J. S. or uxori de J. S. &c. 11 Rep. 21. Dr. Ayrey's case.—S. P. Buls. 31 Pasch. 8 Jac. in case of Lord Ewers v. Strickland.

6. A conveyance was made to *Rodolph Ewers, Kt. Lord Ewers*, and held good, notwithstanding the falsity of knight, which shall not take away the description of the true person; for that constat de persona, he being sufficiently expressed by the name of *Lord Ewers*. Pasch. 8 Jac. Buls. 21. Ld. Ewers v. Strickland.

So if a grant be made to *John Bishop of W.* where his name is *Peter*, it is a good grant;

for there is but one bishop of W. and therefore he is sufficiently described by that addition. Arg. Mich. 8 W. 3. 5 Mod. 302. in case of the King v. Bishop of Chester.—But if it was to J. S. and M. his wife, and *John his son*, where his name is *Peter*, 'tis void as to the son for the misnomer; but if he only said son, it had been good; per Ayliff J. 4 Le. 64.

7. *Piers* and *Peter*,—*Sanders* and *Alexander*,—*Joane* and *Jane*, are the same names. But *Agnes* and *Anne*,—*Gillian* and

*Julian*,

[ 34 ]  
Evison for  
Evison is  
good. Sti

153. Ty-  
son's case.  
—And. 212.  
S. C. cited  
N. Lutw.  
276. in case  
of Clerk v.  
Isted. —  
—Godb.  
283. pl.  
405. —  
And. 197,  
212. —Ed-  
mund bound  
himself in a  
bond by the  
name of  
Edward, 'tis  
expressly  
void. Mich.

*Julian*, are different names. Pasch. 15 Jac. Cro. J. 425.  
Griffith v. Middleton.—*Randolphus* for *Randall* is not good.  
3 Buls. 162. Cook v. Lancaster.

8. *Ellen* for *Elleanor*, in a release, was pleaded to an action of debt on a bond entered into, by the name of *Ellen*; and issue was joined upon non est factum, and found by verdict non est factum; per omnes J. They had several times resolved, that none can make obligation, or other writing by a *contrary name of baptism*, nor can be known by 2 names of baptism; and said, non est factum was an apt issue, and the jury, in finding non est factum, have found according to law; and if the jury had found the special matter, yet the deed shall not be adjudged to bar the plaintiff. But if by way of pleading, it so happens that the party may rely upon a conclusion or estoppel, then he may be aided, otherwise not. Hill. 17 Jac. Mo. 897. Panton v. Chowles.

32 and 33 Eliz. Owen 48.—D. 279. b. Marg. Leverfuch's case.—\* Plaintiff must sue the defendant by the name he is bound by, and if he appears, and pleads non est factum, he shall be concluded by the bond. D. 279. Shotbolt's case.—S. C. cited Le. 322.—S. P. Br. Misnomer. pl. 50. cites 5 E. 4. 46. 65. For he cannot plead such misnomer contrary thereto.—\* The action ought to be brought according to the bond. Cro. J. 640. Maby v. Shepherd.—Debt on bond, the declaration was against Sir Robert, naming him John, and signed Robert; non est factum pleaded. Verdict that the defendant Sir Robert sealed and delivered. Judgment pro Quer' but reversed in the Exchequer Chamber. Sed quære rationem. Hill. 2 and 3 Jac. 2. B. R. 2 Show. 504. Isted v. Clarke.—Lutw. 894. S. C. Clerke v. Isted.

9. A judgment in an action on the case was set aside, because the action was brought by the name of *Sibil*, and the judgment was entered by the name of *Isabel*. Hill. 17 Jac. B. R. Poph. 151. Westerman v. Everfall.

10. 'Tis not a good plea in abatement for a defendant to say, that he was baptized by another name, but he must likewise shew, that he was always known by it, and not put the plaintiff to shew how his name was altered to enable him to sue him. Said per Brotherick and Darnell, to have been so held. Hill. 2 Annæ, B. R. 6 Mod. 116. in case of Walden v. Holman.

### (C) To what Person it may be made.

[ 1. ] If an Englishman goes into France, and there becomes a monk, yet he is capable of any grant in England; because such profession is not triable; and also, because all profession is taken away by the statute; and by our religion now received, such vows and profession are held void. I have heard, that this was resolved accordingly, by all the justices at Serjeant's Inn, in 44 Eliz. in one Ley's case. ]

2. An infant may be a grantee, lessee, obligee, or recognizee. Perk. S. 47.

3. An alien born may well purchase land, and the purchase is good; but the king may seize. But religious cannot purchase; for the one has capacity, and the other not. Br. Corporations, pl. 16. cites 11 H. 4. 26.

4. If an *abbot purchase to him and his heirs, and after is de-  
rained* and dies, his heir shall not have the land; for he *had not  
capacity to him and his heirs at the time of the purchase* of the land.  
Br. Estates, pl. 48. cites 9 H. 5. 9.

5. *Debt by the vicar of D. and 2 others upon an obligation; the  
defendant said, that the one of the plaintiffs, who is named vicar, is  
a chanon professed in such a place, in such religion, under the obedi-  
ence of such, &c. Judgment if he shall be answered, and the  
plaintiff would have stopped him by the obligation, and could not.*  
Br. Nonabilitie, pl. 2. cites 3 H. 6. 23.

6. But it was held, that if *fine be levied to a monk by a strange  
name*, that this shall conclude. But contra of an obligation; for  
he may as well say, that he is professed, notwithstanding the obli-  
gation, as he may say *non est factum*. Ibid.

[ 35 ]

And it was  
held, that  
obligation  
made to a

*monk is void*, for want of capacity, and the sovereign shall not sue it. Ibid.—And if *a man, who  
has an obligation enters into religion*, his executor shall sue it. Ibid.

(C. 2) By what Persons, and to what Persons.  
Corporations. By the Head to the Corporation,  
or the Corporation to the Head.

1. **T**HE *master and confreres cannot present the master to a  
benefice; for he cannot present himself, nor give to himself  
nor can the master and confreres infeoff the master, and make letter  
of attorney to deliver seisin to him; for though he has two capacities  
to take of another, yet none has this capacity to take of himself.*  
Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

Br. Error.  
pl. 83. cites  
14 H. 8. 2.  
—It was  
held to be  
a void pre-  
sentation  
and judg-

ment was after affirmed upon a writ of error. 12 Mod. 688. Hill. 13 W. 3. per Holt C. J. in  
case of the City of London v. Wood.

2. The dean and the greater part of the chapter make the cor-  
poration, and their act is the act of all, though the other will not  
agree; and therefore the dean and chapter may give to one of the  
chapter, because there is a *perfect body without the dean; but \* the  
dean, or other head of the corporation, cannot be severed from the  
corporation; for then it is not a perfect body.* Per Moor justice.  
Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

S. P. For if  
that mem-  
ber were  
set aside,  
yet still it  
would be a  
corpora-  
tion; and  
when they  
present a

member, it is a setting aside, or an exclusion of him, for that purpose from the corporation.  
But if the master, who is the head, be set aside, then it ceases to be a corporation, and by conse-  
quence cannot do any corporate act. Per Holt, Ch. J. 12 Mod. 688. in case of the City of Lon-  
don v. Wood.—\* S. P. Jenk. 200. pl. 18.

3. A *mayor and commonalty cannot enseoff the mayor by deed,  
with a letter of attorney.* Jenk. 200. pl. 18.

4. But they may enseoff one of the commonalty; for the corpora-  
tion remains without him. So of the dean and chapter. Jenk.  
200. pl. 18.

So one of the  
commonalty  
may enseoff  
the mayor

and the commonalty. Br. Corporations, pl. 4. cites 3 H. 6. 43.

5. If

5. If master or *president of a college*, by his will devise any land to the house, of which he is president, and dies, the devise is void, and without their head they cannot receive to the use of their house; for then the body is imperfect. Per Serjeant Cholmly & al. and Plowden. 3 Eliz. Dal. 31. pl. 13.

(C. 3) By Corporations and Colleges to Strangers.

1. **NOTA.** It was agreed by all, that at this day, corporation of *mayor and commonalty*, or of *bayliffs, burgessees, &c.* may, by their common seal, grant their lands, &c. *for life or years, or in fee*; and this shall be good, and shall bind their successors. Mich. 15 Car. 2. Sid. 162. Anon.

[ 36 ] (C. 4) Grants, to what Persons good. Feme Coverts.

So it seems where the demandant recovers the land against the baron and feme by judgment before the disagreement of the baron, for if the demandant enters before the disagreement, there 'tis executed also. *Quod nota.* Br. Feoffment de terre, pl. 36; cites 1 H. 7. 16.

1. **I** F I *enfeoff* a feme covert, and after the *baron disagrees*, the feoffment is void. per Catesby; to which Brian agreed; for the feoffment was never good without the agreement of the baron. Quære of this opinion; for it seems that 'tis good 'till the *baron disagrees*, and quære what relation the disagreement shall have; for it seems that the *profits, taken mesne between the disagreement and the livery, shall not be rendered* to the feoffor; and quære, if a *præcipe quod reddat* had been brought against the baron and feme after the livery, and then the *baron disagreed pending the writ*, it seems clearly, that the *writ shall abate*, and yet the *mesne profits may be justified, for this is executed.* Br. Feoffment de terre, pl. 36. cites 1 H. 7. 16.

(C. 5) Good, to what Persons. Persons not in Esse at the Time, in Respect of the Description.

1. **I** F a man *purchases to him and his wife*, and he *has no wife at the time*, &c. though he afterwards has a wife, she takes no estate. Br. Feoffment, pl. 20. cites 1 Ass. 11.

2. But it is said if it be *by livery of seisin*, it is otherwise. Ibid.

(D) By what Names Grants may be made to such Persons.

[ 1. ] If a man be *baptized by one name, and \* confirmed by another* name, he may be grantee by the name confirmed. † 46 E. 3. 22. b.] Br. Misnomer pl. 75. cites 12 R. 2. \* 2

Brownl 49. in Sir Edward Ashfield's case.—† Br. Grants. pl. 22. cites S. C.—Where a man is baptized by one name and confirmed by another, he shall have both names; per Frowike; but Fineux contra; but he does not say, what name he shall have. Br. Nofme, pl. 22. cites 14 H. 7. 11.—A patent of certain lands is made to J. S. and afterwards J. S. is confirmed by the bishop, by the name of T. S. notwithstanding the change of his name, the land remains with T. S. But if after the confirmation a *patent* had been made to J. S. it had been void; for confirmation by the bishop is a second baptism, and changes his name. Jenk. 100. pl. 94.

[ 2. If confirmation be made to *such an one and his wife*, *\* without naming her name of baptism*, she shall take well enough. 46 E. 3. 22. b. ] Br. Nofme, pl. 9. cites 2 H. 4. 25.—S. P.

Br. Nofme. pl. 23. cites 15 H. 7. 14. Per Vavasor, Frowike, and Hasket; and so of grant to the *eldest son*, without other name.—\* Br. Nofme, pl. 36. cites 12 Aff. 16.—S. P. Br. Grants, pl. 75. cites 12 Aff. 16.—Br. Pleadings, pl. 138. cites 30 E. 3. 18.

[ 3. If confirmation be to the baron *and Mariot his wife*, where *her name is Mary*, she shall take nothing by this deed. 46 E. 3. 22. ] Br. Misnomer, pl. 18. Br. Grants, pl. 22. cites

S. C.—If land is given to J. S. and his wife, it is good without expressing the name of his wife. Br. Fines, pl. 72.

[ 4. If the King grants to T. and Elen his wife, where her name is *Emelin*, yet it is a good grant to them; because she is named the wife of T. 2 H. 4. 25. adjudged. ] [ 37 ] Br. Nofme. pl. 9. cites S. C.

[ 5. If a grant be to J. S. knight, of a thing which lies merely in grant, as of rent-charge, if he be not a knight, nothing passes. 4 H. 6. 1. b. ] A grant made to J. S. Knt. where he is

not Knt. is void. But an obligation made to J. S. of D. where there is no such vill, is good, and so it was agreed. And so there seems to be a diversity between an addition which goes to the person, and that which goes to the vill. Br. Grants, pl. 50. cites 4 H. 6. 1.—Br. Misnomer, pl. 38. S. P. cites S. C.—He that is a *reputed knight*, and yet is not a knight, cannot take by that name; for where a man takes by a name of reputation, there must be some foundation to ground that reputation upon, as there is in case of a *bastard*, who takes by name of a son, but there is no foundation for a man to be a knight who is no knight. 12 Mod. 186. Hill. 9 W. 3. The King v. Bishop of Chester & al.—But it may be objected, that *names of dignity may be supported by reputation*, as the *eldest son of a duke* hath the title of *marquess* or *earl*. Now suppose a grant was made to the eldest son of a duke, by the name of *marquess*, that grant would be good, because there is a foundation for it: for by the laws of heraldry, every duke's eldest son takes place as *marquess*, that is, after all real *marquesses*; and the common usage of the realm, gives them those titles in all writings now a-days; but the old conveyances were cautious in so doing, they called them such a one *esquire* commonly called *marquess*, &c. and even in modern conveyances, they are always mentioned to be the *eldest son of such a one*. Hill. 9 W. 3. 12 Mod. 186. The King v. Bishop of Chester & al.

[ 6. If a remainder be limited to J. S. where there is not any man known by such name in *rerum natura*, it is a void remainder 39 E. 3. 11. ]

[ 7. If

But if J. S. has issue two sons and a [ 7. If a remainder be limited to the son of J. S. if J. S. has not any son, the remainder is void. 39 E. 3. 11. ]

rent is granted unto the first son of J. S. and not by any other name, it is a good grant, if the deed be delivered. Perk. S. 54. cites 30 E. 3. 18. 2 E. 3. 1.

But if J. S. hath not any issue, and a rent is granted unto him, who shall be the first issue of J. S. whether it be son or daughter, this grant is void; causa patet. Perk. S. 54.

Cro. E. 509. S. C. Noy. 35. S. C. 6 Rep. 65. 3 Le. 49. [ 8. But if a remainder be limited to J. S. the son of W. S. though he be a meer bastard, and no mulier by the law spiritual, yet if he be known for his son the remainder is good. 39 E. 3. 11. M. 38 and 39 El. B. R. agreed. per Cur' between Bloodwell and Edwards. ]

Hob. 32. Contra.— [ 9. If a grant be to A. son of B. and C. If he be their bastard, it is void. 41 E. 3. 19. ]

One may take by name of son or daughter, if so known, though there was no marriage between the father and mother. Hob. 32. cites 27 E. 3. 85. a. h. — But then he must be called by a surname. 3 Le. 49.

\* Br. Grants, pl. 17. cites S. C. and held a good name of [ 10. But if B. and C. have a bastard, and afterwards intermarry, this bastard, because he is a mulier in the spiritual law, may be a grantee by name of their son. \* 41 E. 3. 19. 6 Rep. 65. Sir Moyle Finch's case. ]

purchase though he be a bastard, and the more so, because a bastard may have a mother certain.

Mo. 430. S. C. Cro. 509. E. 510. S. C. Noy. 35. S. C. 6 Rep. 65. 67. 77. \* Orig. Rent. [ 11. If A. makes feoffment in fee, to the use of himself for life, the remainder to the issue male of one Mary Lloyd of her body begotten by A. the feoffor, whether it be lawfully begotten, or otherwise, so that it be reputed the son of the said A. and so from eldest issue to eldest issue, and to the heirs of the body of the said issue; it is sufficient for J. S. to intitle himself to this \* remainder, to say that he is the son of the said A. begotten of the body of the said Mary Lloyd, and that he is so reputed in the common reputation of the country, though he was not born and in esse at the time of the remainder granted, and though peradventure there are lawful issues between them, who are younger than the bastard. For the person who shall have it, is certainly enough described. For a bastard of a feme, is certainly known to be her issue, and this is limited to the \* eldest issue, and a bastard may be, in reputation, the son of man. M. 38 and 39 El. B. R. between Bloodwell and Edwards ]

\* Fol. 44. [ 38 ]

[ 12. If an estate for life be made, the remainder to the issue of the body of J. S. or of him begotten of the body of A. S. if he has after an illegitimate issue, yet this issue shall never take this remainder, because he cannot have a reputation of issue before he is born. Co. Litt. 3. b. ]

[ 13. But if a man has a bastard, and after by continuance of time, he is known for his reputed son, then a remainder limited to him after by name of reputed son is good. Co. Litt. 3. b. ]

See Fines (L. a 2) \* Orig. (Appell.)— [ 14. If a man gives land by fine to R. and Sibil his wife, where his wife is \* named Isabel, she shall not take any estate by this fine. 1 Ass. 11. adjudged, but quære. ]

S. C. cited Hill. 17 Jac. B. R. Pop. 151. Westerman v. Everfall.

[ 15. The



[ 15. *The right heir of J. S. being dead, is good name of purchase without \* mentioning any name of baptism of him. 2 E. 3. 28. b. adjudged; 27 E. 3. 87. ]*

the time of the grant the grant is nothing worth; for then there is no such person at the grant. For J. S. cannot properly have an heir during his life. Perk. S. 52.

[ 16. Sir William Penson being *made a herald*, and by the patent he is called *Chester*, an obligation made to him by the name of Chester without any other name is good; for it is sufficient to describe the person in grants. H. 5. Ja. B. per Curiam. ]

[ 17. *So a remainder may be limited to the right heirs of J. S.— J. S. being alive at the time, if he dies having an heir before the death of the lessee 27 E. 3. 87. ]*

who may take immediately in the beginning of the lease; but if an immediate estate is granted to the right heirs of J. S. the remainder over to a stranger, the remainder over is not good. See Perk. S. 52, 53. cites S. C.

[ 18. If a grant be made to Robert Earl of Pembroke, where his name is Henry, or to George bishop of Norwich, where his name is John, and so of an abbot, &c. of these and of such like, there may be but one name of dignity, and therefore such grant is good though the name of baptism be mistaken. Co. Litt. 3.]

Rolls. Pasch. 1723. 2 Wms's Rep. 142.—(But otherwise) a grant made to a man by a *wrong christian name* cannot be good; it must *constare de persona* not in the plea only, but in the grant itself. 12 Mod. 186. King v. Bishop of Chester and al.

A grant made to R. abbot of D. where his name is T. is good; for his name is full without the word R. Br. Corporations, pl. 80. cites 27 E. 3. 85. and Fitzh. Grant, 67.

[ 19. If A. seised of the manor of Blacon in fee in right of his wife leases it for years, and after he and his wife die, by which the lease is void in law. But the lessee continues possession by colour of the lease, and after D. the heir of the feme to whom the land is descended by indenture recites the said lease of the said manor of Blacon, and then grants the reversion of the said lease of and in the said manor of Blacon, with all and singular other the premisses (except timber trees) whereof he is seised in fee to E. habend' the said manor and all and singular other the premisses with the appurtenances, from the time that the said manor shall revert, to the hands and possession of him or his heirs, by way of surrender of the said lease, forfeiture of it, expiration, and determination of the said term of years therein specified, or otherwise, till the end of the term of 60 years then next ensuing. In this case this is a void grant, and shall not enure as a lease to commence immediately, nor to have any effect; because he had not then any reversion, and he has granted the reversion of the said recited lease where there was not any such lease and though there are the words in the premisses of the grant (with all and singular other the premisses) yet this does not better the case; because the manor of Blacon is mentioned before, and therefore by the words (other the premisses) it is to be intended another thing than the manor which was mentioned before, and though the habendum be habendum the said manor of Blacon yet this will not aid it, in as much as it was not granted in the premisses of the deed. Hill.

10 Car.

\* Orig. (Mistake)— But if J. S. be living at the time of

Because there is one named in the lease,

11 Rep. 21. —12 Mod. 187. S. C. cited— S. C. cited per Master of the

Cro. C. 397. S. C. —Jo. 354. S. C.—R. 11. Estate (Z. a.) pl. 8. S. C.

[ 39 ]

10 Car. B. R. between *Miller and others* against *Mainwaring* adjudged per tot Cur. viz. Jones, Croke, and Barkley in writ of error upon such judgment, to the same intent in Chester, which concerned Sir Randall Crew, and the first judgment affirmed accordingly I being of the council of the plaintiff in error. Intratur Tr. 10 Car. Rot. 321.]

Fol. 45.

[ 20. If a copyholder makes a lease for years by indenture by licence of the lord reserving a rent, and then surrenders the reversion of the copyhold to another who is admitted accordingly. In this case the surrender by the name of the reversion is good though the lease was not made by surrender but by indenture; for it is the lease of the copyhold and not of the lord. Hobart's Reports 239. resolved per Cur. between Swinnerton and Miller. ]

\* Orig. (al pasture.)

[ 21. If A. seised in fee grants *pasturam of the close*, the close passes \* the pasture, and not the vesture only to be taken by his beasts; for he shall have *clausum fregit*. Mich. 14 Ja. B. R. between Mountjoy and Terdern, per Cur. adjudged upon demurrer; for there was pleaded that A. leased the pasture of the close for years without deed, and adjudged good for the reason aforesaid. Intratur Tr. 14 Car. Rot. 1291. ]

[ 22. If an abbot, before the dissolution, seised in fee of a *rectory appropriate* of D. to him and his successors granted to J. S. *advocationem & patronatum* D. by those words, the advowson cannot pass, and the appropriation cannot be severed from the abbot and his successors. Mich. 23 & 24 El. in the Exchequer, between Bostock and Monyns adjudged upon a demurrer for the church of Waldershare in the county of Kent. ]

23. A. seised of a rent charge in fee grants the same rent unto B. for life, and the tenant of the land attorns. &c. and afterwards by another deed grants the reversion of the same rent unto the right heirs of J. S. who is alive; this grant is void; because there is not any person who can take, but if J. S. had been dead at the time of the grant, then it had been good, so that these words (right heirs) may be the name of the grantee. Perk. S. 53. cites 2 E. 3. 1.

24. A grant made unto the next of blood of J. S. is a good grant. Perk. S. 55.

Ibid. pl. 76. cites S. C.

25. Where the grantee, or other person is misnamed in a deed, which takes all its operation by the deed, it is void. Br. Misnomer, pl. 38: cites 4 H. 6. 1.

If a feoffment by deed be

26. As grant to make livery of seisin by letter of attorney to J. N. chaplain who is no chaplain, &c. Ibid.

made to a man by a wrong name, but livery is made to him in person, there the feoffment is good because *constat de persona*. And the books put a difference between a grant that has its operation by a deed itself, and where it is by livery; in the former it cannot be good; in the latter it is. 12 Mod. 186. the King v. Bishop of Chester and al.

So of a charge out of the same church, by such name. Ibid.

27. Grant of the *advowson of the church of Saint Peter*, where it is *Saint Peter and Paul*, the grant is void. Br. Misnomer, pl. 9. cites 35 H. 6. 5.

Ibid.——So by name of *Peter and Paul*, where it is *Saint Peter only*. Ibid.

[ 40 ]

28. If a person be so described that he may be certainly distinguished from other persons the omission, or, in some cases, the misprision, of



of the name of baptism shall not avoid the grant. Hill. 11 Jac. 11 Rep. 21. Dr. Ayrey's case.

(D. 2.) Mistake in the Description of the Person.

1. IF A. S. reciting by her deed that she is a *feme covert* (and in truth she is a *feme sole*) grants an annuity, &c. it is a good grant; for that is but a *void recital*, and the grantee need not put that in his writ, and that cannot be a conclusion to him, when he sheweth the deed. Perk. S. 40. cites 3 E. 3. Itin. Not. 132.

2. The name of the grantor is not put in the deed to any other intent, but to make certainty of the grantor, and therefore if the duke of Suffolk, by the name of the duke of Suffolk, without his name of baptism, grants an annuity, rent, common reversion, &c. it is a good grant, because there are no more dukes in England of that name. Perk. S. 36. cites 8 E. 4. 14.

3. If father and son are of one name, and the father grants an annuity by his name without any addition, this is a good grant; for when there is no addition, it shall be intended the grant of the father. Perk. S. 37.

And if the son, in such case, grants an annuity by his name

without any addition (I conceive) such grant is good; for if the grantee bring a writ of annuity against the son, he can't help himself, by any means; for if he deny the deed it shall be found against him, &c. Perk. S. 37.

4. A bond made to J. S. *filio* & *heredi* G. S. where in truth J. S. was a *bastard*, or to A. N. wife of J. N. where A. N. was a *widow*, or vice versa; these words are but *nugation* & *surplusage*. Arg. D. 119. b.—cites 9 E. 4. 29. b. 9 H. 5. 5. 7 H. 4. 23. 48 E. 3. 12.

(D. 3) Where the Misnomer is of the Surname, and Pleading thereof.

1. DEBT by the name of *Adderly* and recovery by the name of *Adderby*, the bail is not liable, till the record be amended; because the condemnation is at the suit of another person. Cro. E. 458. Framson v. Delamere.

2. Misnomer of an *obligee* relieved in chancery. Mich. 43 & 44 Eliz. Cro. E. 847. Coulston v. Carr.

3. Assumpsit against *Germin*; defendant pleads his name is *Jermy*, absque hoc that it is *Jermin*, per Cur. it is a material variance but cured by defendants appearance; but defendant ought to plead *quod Jermy qui implacitatus est per nomen Jermin dicit*, that his name is *Jermy*; so judgment quod Resp. Ouster. Hill. 4 W. & M. B. R. Cumb. 188. Tallent v. Jermy.

4. Bond made by *Elin* subscribed *Elwin*, the variance is not material. 2 Salk. 462. Cromwell v. Grunsdon.

5. *A. binds himself by name of B. and he is accordingly sued by name of B. he may plead misnomer, and the other may reply that he made the bond by name of B. and estop him by demanding judgment, if against his own deed, he shall be admitted to say his name is A. and then he may rejoin, and say, he made no such deed, and this he must do without oyer; for if he pray oyer, he admits his name to be B. per Cur. Mich. 3 Annæ, B. R. 1 Salk. 7. Linch. v. Hook.——6 Mod. 225. Fox v. Tilly. Litt. R. 184. per Richardson Ch. J.*

[ 41 ]

Common bail  
given by a

wrong name is an estoppel, if plaintiff plead comperuit ad diem. Mich. 6 Annæ, B. R. 1 Salk. 8. Stroud v. Lady Gerrard.

6. *Feme covert*, after arrest and bail bond given by a wrong name, may plead the misnomer. Mich. 3 Annæ, B. R. 1 Salk. 7. Linch v. Hooke.

Vid. tit.  
Misnomer.

#### (D. 4) Misnomer. Grant by Nomen Cognitum, and Pleadings thereof.

1. *A. Had issue two daughters, Amy and Agnes, and by continuance Amy was called Agnes, the father devises to his daughter called Agnes, and adjudged that Amy shall have the legacy; because Amy is called Agnes, and the other is Agnes really, and cannot take by the name of his daughter called Agnes; per Clark J. Mo. 230. Hill. 29 Eliz. in Fanshaw's case——cites 5 E. 3.*

2. Names of *dignity, office, &c.* are good names of purchase; and land will pass to one by the name of son, though he is a *bastard*; and this even by conveyance, and so by the name of *wife*, though she be not lawful, if they are so *reputed*, or known by that name. Hob. 32. Hill. 10 Jac. in case of Counden v. Clerk.——cites 27 E. 3. 85.

3. If I am *known* by the name of Edward *Williamson*, where my name is Edward *Anderson*, and lands are given to me by the name of Edward *Williamson*; the same is a good name of purchase; per Anderson. Godb. 17. Pasch. 25 El. B. R.

4. An indenture is recited to be between the plaintiff and J. Barber, whereas it should have been Barker; per Roll. J. it may be, he is *known by either name*, and then it is well enough. Trin. 24 Car. B. R. Sti. 128. Anon.

5. The defendant *pleads* misnomer, the plaintiff *replies tam quam & hoc paratus est verificare*, and ruled that it is well either way, whether the plaintiff concludes to the country, or with a *hoc paratus*. But where the defendant in his plea *traverses absque hoc*, there the plaintiff in his replication must conclude to the country. Cumb. 308. Mich. 6 W. & M. B. R. Allen v. Syms.

## (E) Things [or Names] in Reputation.

[ 1. ] If there are *not any free tenants of a manor, but diverse copyholders* of the manors, but it *has been known by name of a manor*, yet it shall pass by the name of a manor. Mich. 22 and 23 El. B. R. between *Vines and Durham*. Cites \* Co. 6. Sir Moyle Finch. 67. adjudged. ] 1 Lev. 28. \* 6 Rep. 65. b.

2. If a man *lease land* by indenture in July, to have from Mich. next for 11 years, the lessee may grant over his term before Mich. but *not surrender it*; for he had not possession before. Br. Grants, pl. 110. cites 22 E. 4. 37.

3. In the case of a grant by the *King*, lands shall be reputed *parcel of a manor*, if it be so taken by the *rentals*, or other evidence or records, and shall pass as such. Agreed per tot. Cur. Pasch. 24 Eliz. Savil. 26. *Doddington v. Ford*.

4. In avowry for a rent charge. *Rent* reputed *parcel of a manor* will pass by reputation, if the *bailiffs of the manor had always received and accounted for the said rent*, and the *lessees of the said manor had enjoyed it as parcel thereof*; for this had been good matter to induce a reputation, and to have incorporated the said rent with the said manor; per Gawdy J. And of such opinion (as was affirmed by Wray) was Anderson Ch. J. of C. B. and Manwood Ch. B. of the Exchequer; but judgment was given against the avowant for want of setting forth thereof. 1 Le. 15. Pasch. 26 Eliz. B. R. *Forman v. Bohan*. Mo. 190. S. C. argued. [ 42 ]

5. King E. 6. seised of the manor of C. of which a wood was parcel, granted the said wood in fee, which afterwards escheated to the King for treason. Queen Mary granted the same wood to another in fee, who granted it to the now Queen, who granted the said manor, *Et omnes boscos modo vel ante hac cognit. vel reputat. ut pars membr. vel parcel. maner. predict.* to J. S. And it was resolved in the Exchequer, that, by that grant the said wood did pass to J. S. for it was part of the manor in the time of E. 6. at which time, (*ante hac*) without the word (*unquam*) shall be extended, ad quodcunque tempus præteritum, and reputation needs not so ancient pedigree to establish it; for general acceptance will produce reputation. Cited by Gawdy J. Pasch. 26 Eliz. 1 Le. 15. as the E. of Leicester's case.

6. *Manor in esse* may acquire a *new name* to pass by in a few years. 6 Rep. 65. b. Mich. 4 Jac. C. B. in Sir Moyle Finch's case.

7. An *avowry* was made for *amerciament* in a court leet, and shews that he was seised of the manor in fee, and that he and all, &c. have had a court leet, and the plaintiff traverses that he was seised of the manor in fee; it was held, that if he had a reputed *manor*, it would maintain the avowry, though in truth he had no manor. Brownl. 170. Mich. 8 Jac.

8. A *manor* in reputation, which is not a manor in truth, does not pass by the name of a manor in a *fine or recovery*; for they are Cro. E. 524. 707. Mallet v. E 2

Mallet.— are grounded on original writs, which ought to be certain, and not  
 See Prece- to be taken by intendment. But *otherwise* of a grant \* or feoffment;  
 dents. (B) for there the intent of the parties shall help it. Noy 7. Johnson v.  
 \* Br. Feoff- Heydon.  
 ment de  
 terre,

pl. 14. cites 22 H. 6. 39.—Savil. 113. Thetford's case.—A manor in reputation only  
 will pass by the name of a manor, though not demandible by it. Lat 63. in case of Hems v.  
 Stroud.— A recovery is suffered of a manor, and all lands parcel, or reputed parcel; Hide  
 Ch. J. Pasch. 16 Car. 2. delivered the opinion of the court, that the *lands reputed parcel passed by*  
*the recovery* as well as the others; and said *so they would in a conveyance, or in the case of the King*;  
 for he had made grants of the manor of St. James's, which is only a manor in reputation.  
 Lev. 27. 28. B. R. Thinne v. Thinne.—S. C. adjudged accordingly. Vent. 51. and Sid. 190.

9. A. having three acres in a place called Broad, has another  
 piece of land *separate by a hedge* from it, but adjoining to the  
 said three acres, and this had been so separated for 40 years, but  
 anciently had been part of Broad, and of late the *hedge was taken*  
*down*, and it was laid to the three acres; then A. makes a *feoffment*  
*of the three acres in Broad*, and adds these words, (be it more or less)  
 and it was held, that the parcel once separate, though it had been  
 annexed now 10 or 20 years, shall not pass by this conveyance,  
 because this may have gained another name during the separation.  
 Clayt. 46. Rushworth's case.

Le. 207. S. 10. If the manor of D. be holden of the manor of S. and to the  
 P. Long v. manor of D. as an advowson appendant, and that the *manor of D.*  
 Hemmings. *has escheated to the manor of S.* so that the demesnes of one is  
 become parcel of the demesnes of the other; yet the advowson  
 shall be still said appendant to the manor of D. as it was at first.  
 And the manor of D. shall continue in reputation a manor in  
 respect of such things as are appendant thereunto. Dod. of  
 Adv. 28.

Palm. 376. 11. A little time, (viz. two years) is sufficient for the gaining a  
 if there are reputation of lands, being *parcel* of a manor, in chancery, Pasch.  
 circumstances 9 Car. Cro. Car. 308. Simmonds v. Green.  
 to enforce the reputation. Trin. 21 Jac. B. R. Loftes v. Barker.—2 Roll. R. 347. S. C.—6 Rep. 65. b.  
 Sir Moyle Finch's case.

12. Bargain and sale of a *manor, &c. and all that his chase of W.*  
 with all profits, &c. thereunto belonging, or have been used, &c.  
 as parcel, or reputed or known, or as part or member thereof.  
 [ 43 ] Adjudged that though *woods lying adjacent thereto* did not pass by  
 these words (*all that his chase of W.*) yet it passed by the ensuing  
 words (*or reputed, &c.*) there being sufficient proof to ground a  
 reputation upon, viz. That the deer used to browse, and the keeper  
 had his walk there for 60 years. 2 Sid. 1. Mich. 1657. B. R.  
 Dodsworth's case.

(E. 2) Time. At what Time a Grant may be  
 made.

1. **T**HE *marshall* of fee in B. R. may grant over his office to  
 another for life, but, after such grant he cannot grant to the  
 grantee

grantee to make a deputy : and so it seems, that if the authority be not given in the first grant, to exercise by him or by his sufficient deputy, he cannot grant it after; quære as to the first. Br. Grants, pl. 61. cites 39 H. 6. 34.

2. If there is mayor and commonalty of D. and the mayor dies, a grant made to the mayor and commonalty of D. is void; because the body politick, which is capable, is not compleat, but wants the head. Co. Litt. 264.

3. Goods forfeited cannot be granted before seifure. Coke thought that they are not forfeited before seifure. Pasch. 12 Jac. Roll. R. 7. Cullom Betts, &c. v. Sherman.

### (E. 3) Void by Matter Ex post Facto.

1. A. Seised in right of M. his wife of a reversion in fee, expectant on an estate for life of J. S. granted the reversion, after the death of J. S. to W. R. for life, and J. S. attorned, and then A. died. M. granted the reversion to B. and J. S. attorned, and after died, and B. entered. The grant of A. to W. R. was void, because he died before M. and also before J. S. the tenant for life. See Br. Traverse, per, &c. pl. 233. cites 10 E. 4. 8.

### (F) What Things may be granted, [In respect of the Thing.]

[ 1. A Man may grant a deer in certain. 18 E. 4. 14. b.]

Br. Done,  
&c. pl. 34.  
cites 18 E. 4. 14.

[ 2. A right of a term cannot be granted. D. 2 and 3 Ma. 116. 72. ]

A bare right  
is a thing  
in action

which cannot be sold nor granted by the law. Arg. And. 77.——A right or title of entry cannot be transferred. Arg. Show 378.——A right shall not pass by way of grant, unless by extinguishment, &c. and by release it may be extinguished. Perk. S. 85. cites 21 E. 4. 2. 6 H. 7. 8.

[ 3. If a man has a rent service or rent charge he may grant over part of the rent, and it shall be good if the tenant attornes, 9 H. 6. 13. ]

So he may  
by devise,  
without at-  
tornment.

Cro. E. 651. Ards v. Watkins.

[ 4. Grantee of a next presentation may grant it over. 7 H 4. 34. b. 36. b. adjudged. ]

[ 5. The church being void, \* by the 21 H. 8. of pluralities, the presentation is not grantable. D. 3 Ma. 129. 66. 24 E. 3. 30. adjudged. ]

[ 44 ]  
D. 129. b.  
pl. 66.

Agard v. Bishop of Peterburgh & Denton.——A lapse cannot be granted over as a grant of a next lapse of such a church, neither before it falls, nor after. Hob. 154. Colt & Glover v. the bishop of Coventry.

Coventry.—\* The same law is if it be any otherwise void. See D. 26. pl. 165.—129. b. pl. 66.—182. b. pl. 28.—For it is a thing in action and privity, and vested in the person of the grantor. Jenk. 236. pl. 13.

Things in  
action can-

[ 6. *Chose en action* is not grantable over. 21 E. 4. 84. ]

not be granted but to him that has the *possession*, and that by *release* or *confirmation*. Fin. Law, 8vo. 107.—S. P.—10 Rep. 48.

Though a  
thing in

[ 7. *As a contract* is not grantable. 21 E. 4. 84. ]

*action* cannot be transferred over, nor devised, yet a *contract*, which arises from an interest in land, or which is an interest, may be well transferred over; per Popham. Mich. 40 & 41 Eliz. Cro. E. 638. in case of Ards v. Watkins.—Cro. E. 651.

Jenk. 236.  
pl. 13.

[ 8. An *obligation* is not grantable: 21 E. 4. 84. ]

2 Roll. 31.

Faits (A.

a) pl. 3.

cites S. C. contra.

[ 9. *Charters* are not grantable without the land. Contra 10 H.

6. 20. b. ]

An annuity  
may be  
granted

[ 10. An *annuity for life* is not grantable over, 21 E. 4. 43. b. 22 E. 4. 6. ]

over though it charge the person and not the land, if it be generally granted, or be by prescription; contrary of an annuity, granted *pro consilio impendendo*, per Catesby J. Br. Grants, pl. 178. cites 21 E. 4. 20.—*Annuity pro consilio impendendo* for term of life of the grantor may be granted over. Het. 80. Hill. 3 Car. C. B. Gerrard v. Boden.—Perk. S. 87. Quære.—So if it was *pro consilio impensa*. Mo. 6. Trin. 3 E. 6. Baker v. Broke.—pl. 65. S. P. but no judgment.—But not, if it be not granted to him and his assigns. D. 1. b. Marg. D. 1. cites 21 E. 4. 83. b. Quære de ceo. 36 Afl. 3.—Perk. S. 101. S. P. and makes a quære, even if the word assigns had been added.

\* It seems  
it may well  
be granted  
over. For

[ 11. But \* *annuity in fee* is grantable. 21 E. 4. 43. b. 41 E. 3. 27. b. Because it shall descend. 3 H. 4. 8. by the King. Grantee of a *common of pasture* may grant it over. 7 H. 4. 36. b. ]

it is not merely a *chose en action*, but is mixt with *reality*; for if it be granted in fee, it may descend to the heir, contrary of a *debt*. Br. Grants, pl. 109. cites 21 E. 4. 93.—S. P. per Askue J. quod nemo negavit. But Brook says, quære, if it be not but a *chose en action*. Br. Deputy, pl. 6. cites 19 H. 6. 42.—Br. Annuities, pl. 19. cites S. C.—S. P. by the best opinion. Br. Deputy, pl. 15. cites 21 E. 4. 20.—S. P. Perk. S. 87. cites S. C. But says, Quære; for the grantee has not any remedy to have it, but by way of *action*.—S. P. Br. Annuity, pl. 8. cites 41 E. 3. 27.—S. P. per Thorp, but Belk. contra. For it is only a *chose en action*, as *debt*. Br. Deputy, pl. 2. cites S. C.

S. P. Br.  
Grants, pl.  
109. cites

[ 12. A *corodie uncertain* is not grantable to several. 8 E.

4. 17. ]

21 E. 4. 9.  
pl. 1.

—S. P. unless it be granted to him and his assigns. D. 1. b. Marg.

S. P. Br.  
Grants, pl.

[ 13. But otherwise it is of a *corodie certain*. 8 E. 4. 17. ]

109. cites 21 E. 4. 9.  
D. 1. b. Marg. pl. 1.

—S. P. Br. Deputy, pl. 15. cites 21 E. 4. 20. per Coloie.—S. P.

Unless the  
grant be to  
him and his  
assigns.  
Perk. S.  
103.

[ 14. A *corody uncertain* is not grantable over; for per-  
adventure, grantee will have more sustenance than grantor.  
21 E. 4. 43. b. Curia. 22 E. 4. 6. and to several 8 E. 4. 17.  
Curia. ]

\* Fol. 46.

[ \*15. A *common sans number in fee* is grantable to another. 21  
E. 4. 84. For the word *heirs* implies assigns. ]

[ 16. But

[ 16. *But common for life or years, without number, is not grantable; for it may be a prejudice to the tenant of the land.* 8 E. 4. 17. but quære. ] But grantee, of common of pasture coroly\*

*or of an advowson, or of a villain, or rent, or the like, may grant the same over, notwithstanding the grant be not to him and his assigns, unless there be a special proviso in the grant, that he ought not so to do, &c.* Perk. S. 103.

[ 17. *Estovers uncertain, that is to say, so much as I will use in my chimney, are not grantable over.* 22 E. 4. 6. ] Perk. S. 104. —  
S. P. Br.  
Grants, pl. 109. cites 21 E. 4. 9.

[ 18. [If] I grant my horse to you to ride to York you cannot grant it to another. 22 E. 4. 6. ] S. P. Br. Trespass, pl. 362.  
cites 22 E. 4. 5.

[ 19. A lease at will is not grantable over. 22 E. 4. 6. ] S. P. For it is no estate. Br. Grants, pl. 158. cites 27 H. 6. 3.

[ [19.] Grantee of a way for life upon my land cannot grant it over. 7 H. 4. 36. b. ] S. P. Br. Licences, pl. 10. cites

12 H. 7. 25. — So of a way appendant; for none can have the profit of such way but he who has the land to which such way is appendant. Br. Grants. pl. 130. cites 5 H. 7. 7.

[ 20. If the King grants a warren to another and his heirs, in his manor, the grantee may grant the manor with the warren over to another in fee; for this liberty *inhæret solo & solum sequitur*. 21 E. 1. Libro Parliament. 47. b. agreed. ]

[ 21. So if the King grants to another and his heirs, in certain manors or vills, a fair or market, the grantee may grant over the manors or vills with the fair or market. Dubitatur. 21 E. 1. Liber Parliamentorum. 47. b. ]

22. A man may have a hundred by prescription in gross, but he cannot grant it over, no more than of other franchises, which the King grants, the grantee cannot grant them over. Quære inde. Br. Grants, pl. 176. cites 6 E. 2. For it is admitted 32 H. 6. 24. that warren may be granted over. Br. ibid. pl. 144. Br. Franchises, pl. 38. cites S. C.

23. The lord granted for himself and his heirs, to his tenant, who held in chivalry, that he nor his heirs shall not take ward of the defendant, nor of his heirs, and a good grant, and the tenant may by this re-butt the lord by way of plea. Br. Grants, pl. 175. S. P. ibid. pl. 153. cites 19 E. 3.

24. If a man seised of land, leases the same for life, the remainder to the right heirs of J. S. who is living, this remainder takes effect presently, but is in no person to grant, because it is in abeyance, viz. in the consideration of the law, &c. Perk. S. 87. cites 27 E. 3. 87.

25. It was agreed, that he in reversion in tail may grant his reversion over, and if the tenant in tail attorns, this is good, and it shall pass; per Finch. J. clearly, which Belk. who was of counsel against the fine denied. Br. Tail and Dones, &c. pl. 5. cites 43 E. 3. 29.

26. A man may grant to his lord to distrain for his rent, by which he holds of him, scilicet, to distrain for the same in other lands, which



which is not held of the same lord; and if the lord be an abbot, this is not mortmain; for he shall not have more rent than he had before; but he has a distress more than he had before. Br. Grants, pl. 131. cites 9 H. 6. 9.

*Nemo dat  
quod non  
habet. Vid.  
Maxims.*

27. A man cannot make a good grant, unless the *thing* be *in him at the time of the grant*; as if I grant to you, that if you make to me an obligation, it shall be void, and afterwards, you make to me an obligation, the obligation is good, and the grant is void; per Fortescue, to which Fray agreed, and none denied. Br. Grants, pl. 40. cites 19 H. 6. 62.

[ 46 ]

28. But by Markham. If I grant to my *tenant*, that he *shall not be impeached of waste, or that he shall not be punished by cessavit*, this is a good grant, and the tenant may *rebutt* by it, and shall not be put to his writ of covenant, which two others agreed. Br. Grants, pl. 40. cites 19 H. 6. 62.

29. It was agreed, that where *rent* is *reserved for equality* of partition, that the coparcener may grant it over, and the grantee may distrain. Br. Grants, pl. 41. cites 21 H. 6. 11, 12.

\* Common  
of pasture  
appendant,  
cannot, by  
grant or  
otherwise,  
be severed

30. \* *Common appendant* cannot be granted over, nor made in gross. Otherwise of † *common appurtenant*, and *advowson appendant*; for none can have the profit of such common but he who has the land to which such common is appendant. Br. Grants, pl. 130. cites 5 H. 7. 7.

from the land to which it is appendant, if it be in esse. Perk. S. 104.—† S. P. Br. Grants, pl. 109. cites 21 E. 4. 9.—*Sole pasture* is grantable over at this day. 1 Mod. 75. Mich. 22 Car. 2. In case of Hoskins v. Robins.

31. If a *trespassor* takes my goods, I may release them to him, but not give them to him, for he hath a right to them, but not a property in them; per Brian J. Br. Done, &c. pl. 24. cites 6 H. 7. 9.

So of a  
licence to  
enter into my  
house, to eat  
and drink;  
this cannot  
be granted  
over. Ibid.  
—\* S. P.  
Arg. Bridg.  
115. cites 18 E. 4. 14. and Dyer 34 H. 8.—Br. Licence, pl. 25.

32. Trespass of *chasing in his park*, and killing and carrying away his deer, the defendant justified by *licence* given to J. S. his master, by which he as servant to the said J. S. and by his command, entered, and did the trespass, &c. And per Keble, licence does not extend but to him to whom it is given, and \* cannot be granted over; for licence is only at pleasure. Br. Licences, pl. 10. cites 12 H. 7. 25.

The posses-  
sions an-  
nexed to  
the duke-  
dom are  
not trans-

33. The King creates a man a duke, and gives him 20l. *annuity, for maintenance of his dignity*, he cannot give this to another; for it is *incident* to his dignity. D. 2. Mich. 6 H. 8. in case of Oliver v. Emsonne.

ferrable over but by special act of parliament. Arg. Godbolt. 397. Pasch. 3 Car. in case of Whittie v. Weston.

A rent in  
suspense  
cannot be

34. A *thing suspended* may be granted. Arg. 3 Le. 154. Mich. 29 and 30 Eliz. in case of Cadee v. Oliver.

granted to any, nor by any, for it is not in any person in the world during the suspense. Br. Grants, pl. 173 cites 16 H. 7. 4.

Election  
cannot be  
transferred

35. *Election* cannot be transferred to the prejudice of another person; as if a rent de novo be granted to the father in fee, who dies



dies before election, the heir cannot make it an annuity to defeat the dower of the wife. Mich. 29 and 30 Eliz. 3 Le. 154. in case of Cadec v. Oliver. to another, per Doderidge J. Jo. 136. cites

... Bullock's case. ——— Mo. 86. Bullock v. Burdett. S. C.

36. If *tithes* are granted by way of interest to the owner of the land for life by deed, he may grant them over; but not if the grant is by way of discharge only. For this is a privilege annexed to the land. Trin. 6 Jac. Yelv. 131. Edmonds v. Booth.

37. Grant by deed of *all my trees within my manor of D. to one and his heirs*; the grantee shall have inheritance in them without livery and seisin. 11 Rep. 49. b. Mich. 12 Jac. in Liford's case.

38. *Foundership* not grantable. 11 Rep. 77. Pasch. 13 Jac. in case of Magdalen College.

39. By the grant of a manor, cum pertinentiis, the court baron *passes*; for it is an incident inseparable from a manor; and a man cannot grant his court. But he may grant the profits of his court. Trin. 13 Jac. Brownl. 175. Brown v. Goldsmith.

40. A writ of error is a chose en action, and not transferrable over. Arg. Godb. 378. Pasch. 3 Car. in Brooker's case. cites 3 Rep. Marquis of Winchester's case, and 1 Rep. Albany's case. [ 47 ]

41. If A. grants the *stewardship of the manor of D. to B. and his heirs*, B. cannot grant it over; so of a *bailiwick*. Arg. Het. 80.

42. A relief is not grantable over. Jenk. 236. in pl. 13.

43. So of arrears of rent. Jenk. 236. in pl. 13.

S. P. Raym. 201. Mich.

22 Car. 2. Guillems v. Munnington.

44. Lease is of a house excepting a *chamber pro usu suo proprio & occupatione*; he may assign. Vent. 87. Trin. 22 Car. 2. in case of Wilson v. Armourer. ——— cites 1 And. 129.

45. *Conusee* cannot assign his interest after extent and liberate, if *conusor continues in possession*; for by this, conusee's estate is turned to a right. Trin. 3 W. & M. B. R. 2 Salk. 563. Hammond v. Wood.

## (G) Choses en Action.

[ 1. *A Debt* which I have by obligation cannot be granted over, Perk. S. 86. because it is a chose en action. ]

[ 2. If A. be bound to B. in 20 l. B. may give and deliver this obligation to a stranger, and the stranger may justify the detaining of the obligation by this gift against the obligee; for though the debt cannot be granted over, yet the \* parchment may. ] \* S. P. and so may the wax, to another who may cancel and use the

same at his pleasure. Co. Litt. 232. b. ——— But such donee cannot bring an action thereupon in the name of the donee. Perk. S. 86.

[ 3. If an obligee makes two executors, and dies, and one executor gives and delivers the obligation to a stranger in satisfaction of a debt which Cro. E 478. 496.

*which he himself owes to him, and dies; though the debt does not pass by this to him, yet the parchment passes, and the donee of it may justify the detaining of it in a detinue brought by the surviving executor; for the one executor has as full power as both. Mich. 38 & 39 El. B. R. adjudged between Kelsick and Nicholson. ]*

[ 4. *So a baron, possessed of an obligation in right of the feme, may give it to a stranger and the donee may justify the detaining of it against the feme after the death of the baron. Mich. 38 & 39 El. B. R. per Fennor. ]*

5. If a *disseisee* of land grants his right unto a stranger, it is nothing worth, but if he *releases* all his right unto the disseisor it is good if it be by deed; and if he *confirms* the estate of the disseisor, the confirmation is good. Perk. S. 86.

6. Right in action shall not be transferred by *act in law*; as lord by *escheat*, or lord of villein, shall not have choses en action. 10 Rep. 48. Mich. 10 Jac. in Lampet's case.

7. Liberty to *dig for coals*, quære if grantable over by lessee. Lat. 189. Hill 2 Car. Goderick v. Gascoyne.

8. A *lease* is not assignable without a writing signed by the parties by the statute of frauds. Trin. 2 Annæ, 3 Salk. 171. Queen v. Goddard.

## (H) Things of Trust.

S. P. Ow. 115. in case of Sapland alias Shopland v. Rider. [ 1. **G**UARDIAN in *socage* may grant the *wardship* over to another. 17 E. 3. 42. b. 26 E. 3. 65. Com. 293. b. admitted. Osborn v. Carden and Joy. ]

[ 48 ] [ 2. *But such grant shall not be effectual after the death of the grantor, because by the law of nature it belongs to the nearest of the blood. Com. 293. b. Contra 26 E. 3. 65. b. admitted. ]*

But the grantee of an office of [ 3. Office of trust cannot be granted over by the grantee, *unless it be sibi et assignatis suis.* Br. Deputy, pl. 9. cites 11 E. 4. 1.

\* *parker* may grant it over; for this is not such trust. Ibid.—But office of the *chamberlain of the Exchequer*, is an office of trust; for he keeps the records of the king. Ibid.—\* Br. Grants, pl. 108. cites 21 E. 4. 20. contra, that an officer, as *parker, steward*, and such like, cannot grant such offices over, for it is of trust, and must be done in person.—Br. Deputy, pl. 15. cites S. C. per Pigot and Catesby.

\* Br. Grants, pl. 109. cites 21 E. 4. 93. 4. Office of *filazer* is not grantable or assignable over; because it is office of *trust*. Trin. 28 H. 8. D. 7. b. pl. 10.—nor office of \* *carver* at my table ut supra.

5. *Powers* are not transferrable over. Arg. Mo. 520.

6. Things annexed to the person cannot be transferred, nor executed by another; as *arbitrement, suit at court, homage, fealty*; Arg. and he also agreed that *tenant for life, with power to make leases*, cannot make *livery by attorney*; nor *executors that have power to sell*; but where they have interest it is otherwise. Arg. 2. Roll. R. 393. Mich. 21 Jac. B. R. in case of Warner v. Hargrave.—cites 9 Rep. Combes's case.

7. *Trust of a possibility* is assignable or declarable, Hill. 13 & 14 Car. 2. 1 Chan. Cases 8. Goring v. Bickerstaff,

8. The

8. The Lord Keeper cannot *delegate his jurisdiction* to another, as by referring a matter in judgment before him to another. Hill. 19 Car. 2. Arg. Chan. Cases. 96. in case of Thomas v. Porter and the Bishop of Worcester.

(H. 2) What is a good Grant, in Respect of the Manner.

1. **I**F the debtor grants to the creditor to levy his debt upon his land in D. and C. yet he cannot levy it; per Belknap, which was not denied; by which the defendant concluded, and so he owed nothing. Br. Grants, pl. 15. cites 41 E. 3. 7.

2. A. by indenture inrolled *bargains and sells* land to B. with a way over other land; the grant of the way is not good; for nothing but the uses pass by the deed, and there cannot be a use of a thing which is *not in esse*; as a way, common, &c. which are *newly created*; and till they are created no use can arise by bargain and sale Mich. 5 Jac. Cro. J. 190. Bewdly v. Brooks.

(H. 3) Good. In respect of the Manner. Joint or several.

1. **T**HERE must always be *one named in the beginning* of the grant who may take by force of the grant, otherwise the grant is nothing worth. Perk. S. 52. cites 10 E. 3. 45. Mich. 27 E. 3. 87. 32 H. 6. 9. Trin. 1 H. 7. 31.

2. If the king has a *corody* of so many loaves, and so many gallons of ale, &c. to which one man used to be presented; yet when this is void he may grant it to 2 or 20 men; for this is certain, and they shall have no more than the certainty; per all the justices. Br. Grants, pl. 95. cites 8 E. 4. 17.

granted to 20 men; but e contra of a corody to sit at the table every day in the hall, this cannot be granted, unless to one only; per all the justices. Br. Grants, pl. 95. cites 8 E. 4. 17.

So of a common certain for 20 beasts or of estovers certain for 20 loads; this may be

(H. 4) Uncertain Grant made good by Relation. [ 49 ]

1. **T**H E R E is a difference, where a thing is uncertain, to which a certainty is added, and where it is certain. See Pl. C. 191. b. Wrottesly v. Adams.

2. If I have 2 manors of D. and I levy a fine of the manor of D, circumstances may be given in evidence to prove what manor I intended, as appears 12 H. 7. 7. Pl. C. 85. b. in case of Partridge v. Strange.

3. A.

3. *A. leases to B. for so many years as J. S. shall name*; though by the naming the lease will be good, yet such naming *must be in A.'s life time*; because the interest ought to pass out of the lessor during his life time, and the deed have its perfection. Arg. Godb. 25. Trin. 26 Eliz. in Savill and Cordell's case.——cites D. 273.

So reversi  
oner  
granted the  
same rent to  
one and his  
heirs as the

tenant for life has granted, this is a good grant of such rent newly to commence after the decease of the tenant for life. Arg. Mo. 379. Mich. 36 & 37 Eliz. in Perrot's case.——cites 14 E. 3. . . . and 6 Aff. pl. . . .

G. Equ. R.  
160. Pasch.  
8 Geo. 1.  
§. C.

5. *A. having power to make a jointure of 500 l. per ann. covenants by marriage articles to settle 500 l. per ann. and afterwards a draught of a settlement is prepared, in which lands of 500 l. per ann. are specified, but A. dies before the settlement is executed*; this power being bound by the articles, the very *draught of a settlement* is a good designation of what lands should be settled, and a determination of A.'s election to raise the 500 l. per ann. out of and by virtue of his power. Mich. 9 Geo. 9 Mod. 15. Lady Coventry v. Lord Coventry.

### (H. 5) Uncertain, made good by Election, and what shall amount to such Election.

As if a man  
grant unto  
me 20 s. of  
rent-charge,  
or 40 s. of  
rent-

charge, I may distrain for which of these rents I will, but I shall not have both. So shall it be if rent or common be granted, &c. Perk. S. 74. cites 9 E. 4. 39. 11 E. 3. Annuity 27.

1. **O**F every thing uncertain, which is given or granted, election remains to him, to whose benefit the grant or gift was made, to make the same certain, unless it be in special cases. Perk. S. 73. cites 5 Ed. 3. 31.

2. If a *feoffment* be made unto a man of two acres, viz. of one acre in tail, and of the other in fee, and doth not shew in certain in which acre the feoffee shall have fee, nor in which acre he shall have an estate tail, and a precipe is brought against the feoffee of both acres, and he lose by default, and afterwards he brings a writ of right of one acre, and that is put in view, and brings quod ei deforceat of the other acre, and that is put in view, &c. it is at the determination of the will of the feoffee in which acre he will have fee, and in which acre he will have an estate in tail, &c. Perk. S. 75.

3. But if a man seised of two acres lease them for life, the remainder of one acre unto a feme sole, and does not shew in certain in which acre, and afterwards the woman takes husband, the tenant for life dies, and the husband enters into one acre, and thereof doth enfeoff a stranger by metes and bounds, and dieth; now the wife shall not enter into the other acre and choose; for that it was her  
her

her folly to take such a husband, who would do such an act when the remainder fell, for as much as the title to the remainder did begin by the grant, which was before the marriage, &c. Perk. S. 76.

(H. 6) What shall be said a good Grant, and immediate or, \* *in Futuro*. [ 50 ]

\* See (K. a) pl. 3. to 7.

1. **I** F a release be made of *all right*, title, &c. which I have vel, *quovis modo habere potero*; these last words are void in law; for no right can pass by a release, but what the releffor has at the time of making it. Co. Litt. 265. a.

Though this was never denied, yet there are some ex-

ceptions to the rule, as to releases of future rights, that is, in some cases: man may release a future right, though by the bare release it can never pass; as 1 Inst. 265. If the son disseises the father, and being in possession makes a feoffment in fee, in the life of the father; though no right or estate is yet descended upon him from his father, yet this feoffment will bar him of this future possible right, when it does descend. But this is, because he had more than a mere right; for he had the possession, and therefore might make a legal conveyance thereof: and by this feoffment he did not convey a bare right only, but the estate likewise. So that the feoffee might by law make a feoffment thereof, and by implication, upon such feoffment and livery, all future rights of the feoffor are extinguished; for being in possession and conveying the land itself, he conveys all rights attending thereon, whether present or future. But yet this does not bar his heir at law; for he may enter notwithstanding, and as to him, the right is not absolutely extinguished, though at the same time the feoffment is good against him that made it. Another exception is in the case of a feoffment with warranty, which will bar a future right, and extends even to bar the heir; but that is to avoid circuity of action; for if the heir should recover the land against his father's grantee; this land, when descended, would be affets, and liable to the warranty; so that it extinguishes by way of rebuttal. But there is no case in law, that, by any legal conveyance at common law, a man could convey lands that he had no right to, nor was in possession thereof at the time of the conveyance; per Trevor Ch. J. in delivering the opinion of the court. Hill. 6 Annæ, C. B. 11 Mod. 151. Archer v. Bokenham.

2. A. granted to W. N. the office of mower in the manor of D. and to take 20 quarters of corn for executing the said office for his life; and by another clause in the same deed, it was, and the aforesaid A. granted to the feme of the said W. N. the aforesaid office, habend' after the death of her said husband, percipiend' ad totam vitam suam sicut prædictus vir suus percepit in omnibus, and it was awarded a good grant, and thereof the feme, after the death of her husband, might maintain an assise. Br. Grants, pl. 127. cites 30 Ass. 4.

3. If a parson sells his tithes which shall grow in a future year, or if the lord grants the profits of a court, which shall arise in a future year; these are good sales, and yet the donor had it not in him, nor is it in esse at the time, &c. and the same law seems to be of such grant of such thing. Br. Grants, pl. 132. cites 21 H. 6. 43.

But a grant of all his woods which shall grow in time to come, is not good, because 'tis of

a thing not in esse; per Harper. Mich. 15 Eliz. 3 Le. 30. Anon.

4. A grant of an advowson habend' after the death of the grantor, is not good, because he had fee simple in himself at the same time. So of a rent whereof he is seised, and yet a lease to hold from Mich. next for 20 years is good. Br. Grants, pl. 141. cites 38 H. 6. 38.

So, if a man be seised of an advowson in fee, and grants it habendum after the

death of J. N. this is a void grant; for he has no reversion in it, and he is seised in fee in the mean time, per Choke and Prisot. Br. Grants, pl. 60. cites 38 H. 6. 34.

5. If

5. If a man grants a rent out of his land, to commence after the death of J. N. 'tis a good grant; for this rent was not in esse before. But where a man seised of rent grants habend' after the death of J. N. or from Mich. 'tis not good; for he has a fee in the mean time, and yet such lease for years is good; per Fineux, Fisher and Vavifour. Br. Grants, pl. 86. cites 8 H. 7. 2.

6. Lessee for years gives the said lease thus, *I give my lease of and in, &c. after my decease to my son A. and B. his wife*, 'tis not good. And. 122. Kingwell's case.

7. Reversioner on estate for life, grants a rent-charge after death of grantor, the grantee shall distrein for all the arrearage incurred after the grant, even during the life of the grantor. Mich. 25 & 26 Eliz. Le. 13. in case of Rearsby v. Rearsby.

[ 51 ]

S. C. cited  
per Coke

Ch. J. Mich.

8. A. enfeoffs B. *habend' post mortem A.* adjudged a void habend' and a good feoffment in present. per Warburton J. Mo. 881. cites Hogg v. Crosse.

13 Jac. Roll. R. 254. in case of Simpson v. Southwood.

The estate  
being fully  
limited be-  
fore. Hill.

34 Biz.

Cro. E. 269.

Underhay

v. Under-

hay.

9. Lease for 3 lives to A. after lessor grants the reversion to B. for his life, to commence after the decease of the three lives; resolved the words, (to commence) are void, and the grant of the reversion good in present. Mo. 881. per Warburton J. cites it as resolved. Hill. 34 Eliz. B. R.

10. A difference is between *estate or interest*, which none can take without present capacity and power; and liberty or *franchise* or thing *newly created*, which may take effect in futuro. Mich. 10 Jac. 10 Rep. 27. b. Sutton's Hospital's case.

## (H. 7) What amounts to a Grant.

So a refer-  
vation of a  
way by  
feoffor on

a feoffment, is clearly as a grant of a way, per Doderidge J. 2 Buls. 121.

1. **I**N diverse cases a reservation shall enure as a grant; per Coke Ch. J. Roll. R. 321, 322. in case of Blandford v. Blandford. ——— cites 50 E. 3. 27.

But there  
is a diver-  
sity to be

observed where the determination of the rent is expressed in the deed, and where it is implied in law; for when tenant for life grants a rent in fee; this, by the law, is determined by his death, and yet a confirmation of the grant by him in the reversion makes that grant good for ever, without words of enlargement, or clause of distress, which would amount to a new grant; and yet, if the tenant for life had granted a rent to another and his heirs, by express words, during the life of the grantor, and the lessor had confirmed that grant, that grant should determine by the death of the tenant for life. Co. Litt. 301.

2. A release, confirmation or surrender, &c. can't amount to a grant, Co. Litt. 301. b.

3. If a lease be made to J. S. except Green Close to J. D. who is a stranger, the exception is good, and J. D. shall have it; per Manwood J. 3 Le. 35. Mich. 15 Eliz. anon.

S. P. per  
Jones J.  
Jo. 20.

4. A condition was, not to grant. A forfeiture is no grant to break the condition; as if A. grant advowson to B. for life, upon condition not to grant the next avoidance; he becomes reculant, and



and the king seises it, 'tis no breach; for 'tis not a grant, and this is proved. Trin. 17 Eliz. D. 343. Ld. Arundel's case.

5. *Proviso* *semper*, and the *vendee covenants with vendor* his heirs and assigns, *that vendor his heirs and assigns may dig for ore in the waists of the manor sold*; this is a new grant of an interest to vendor to dig in the waists, and not a bare covenant, but vendor cannot divide such interest, viz. To grant to another to dig one part of the waist, &c. But this grant does not exclude vendee, his heirs and assigns from digging there too as owners of the soil, and vendor may assign his interest to several; but such assignees must not work severally, but with a joint stock. 25 Eliz. 4 Ls. 147. Ld. Huntington v. Ld. Mountjoy.

6. Where the thing granted is a *chattel*, a *covenant* may enure as a grant; per Coke Ch. J. Pasch. 8 Jac. 2 Brownl. 338. in the case of the Earl of Rutland.

daughter, *B. shall have such a flock of sheep*. B. marries the daughter. The property of the sheep is presently in B. because it was but a *personal thing*, and the covenant is a grant, per Tanfield J. Cro. J. 172. in case of EVANS v. THOMAS, cites 44 E. 3. Monstrans de Faits, 144.——A covenant may change property or possession. As if A. covenants with B. that if B. pays A. 10 l. each day, then B. shall have A.'s beasts at D. or A.'s lease of the manor of D. In such case, if B. pays A. the 10 l. at the day, B. shall have the beasts, or may enter into the manor. Br. Covenant, pl. 2. cites it as agreed, and not denied \*. 27 H. 8. 16. 28. And Brooke says, it seems to be law; for by diverse covenants men commonly alter the use of lands and tenements.

A. *articles that B. shall have a way*; this amounts to a grant of a way. Resolved by Pollexfen and Rooley only in court. 3 Lev. 305. Trin. 3 W. & M. C. B. Holms v. Peller.

\*[ 52 ]

7. A. possessed of an exchequer annuity for 96 years, *covenants to pay an annuity of 14 l. per ann. issuing out of the exchequer, to the feme for her life* for her separate maintenance, and after to the survivor of baron and feme, and then to the children of the marriage; and if no child, *then to the benefit of A. baron and feme die leaving a son, and then the son dies*: the question was, to whom the residue of the term belongs, whether to A. or the administrator of the son? Harcourt said, that A. has not assigned the order, nor transferred the property, but has only covenanted to pay, and a court of equity must not carry the covenant (being a *free gift*) beyond the letter. Tr. 1715. 2 Vern. 692. Basse v. Grey.

But the reporter adds a quere; for that if such distinction be allowed, settlements of terms hereafter will be done by way of covenant, with such remainders

over, as cannot be done by way of limitation of an estate or trust. Ibid. 694.

8. *Writing on the back of a lease of tythes, that J. S. should have them*, can't pass the tythes; for they can't pass without deed. Pasch. 13 Jac. Roll. R. 174. Sorrel v. Grove.

9. In some cases a *recital* may amount to a grant, or have the same effect.

10. *As where a widow intitled to certain shares of her husband's estate*, by the custom of London, assigned the same for her separate use, in case of her marrying again, for her life, and afterwards for such purposes and such persons as she should appoint by deed, to be attested by two witnesses, and for want of such appointment, to her children by the first marriage, but if the husband she should marry should survive, then he to have 2000 l. out of the shares. Afterwards she *having agreed to marry the plaintiff, by indenture, to which the plaintiff was a party*, and attested by two witnesses,

x

reciting

*reciting that she had before settled her shares, and that in case she should make no appointment of them, they would belong to her then intended husband the plaintiff, she assigned the same in trust for the plaintiff during their joint lives, but she to have the management thereof during the coverture, or by any writing duly attested to appoint it over; and the plaintiff covenanted to settle a leasehold estate on her for life, and after to the issue of the marriage. They inter-married, and she afterwards died without issue by him, and without making any appointment; Ld. C. King much doubted at first, whether the husband should have only the 2000*l.* and the children the residue, or the husband to have all. And though he had notice of the first deed, yet being a purchaser of the shares, and it being recited in the last deed, that if she died without making any appointment, the plaintiff, the second husband, would be intitled thereto, which (though but a recital) shewed the intention and agreement of the parties and amounted to an (unformal) appointment; and as no strict form is requisite to constitute such appointment, and since the later deed varied the power reserved to her, the first deed requiring two witnesses, but by the later the power of appointment, being by any writing duly attested (so that a writing would be duly attested, though it had but one witness) his lordship, though with some hesitation, decreed the shares to the plaintiff; and this decree was afterwards affirmed in the House of Lords upon an appeal.— 2 Wms's Rep. 533. Trin. 1729. Poulson v. Wellington.*

### [ 53 ] (H. 8) By what Persons a Grant may be. In Respect of Capacity.

\* A man attainted of felony or murder, &c. may make a grant of a rent or common, or a feoffment, &c. and the same shall bind all persons but the king, for his time, and the lord of whom the land is holden, when his time is come. Perk. 11, 12. S. 26. cites 8 Aff. 25—† See Deaf, Dumb and Blind.

I. **W**Hosoever is disabled by the common law to take, is disabled to enfeoff, &c. but many that have capacity to take, have no ability to infeof, &c. As men \* attainted of *treason, felony or præmunire, aliens born, the kings villeins, traitors, felons, &c.* He that has offended against the statutes of præmunire after the offences committed, if attainders ensue. *Idiots, madmen, a man † deaf dumb and blind* from his nativity, a *feme covert*, an *infant*, a man under *durefs*; for the feoffment of these may be avoided. But an *heretick*, though he be convicted of heresy, a *leper* removed by the King's writ from the society of men, *bastards*, a man, deaf, dumb, or blind, so that he has understanding and sound memory, albeit he express his intentions by signs, villein of common person, before entry or the like, may infeoff, &c. Co. Litt. 426.

Perk. 11, 12. S. 26. cites 8 Aff. 25—† See Deaf, Dumb and Blind.



(H. 9) What Persons may grant, in respect of their *Estates or Interest*.

1. **A** Grant cannot be unless the grantor has *an interest in himself to grant*. 12 Mod. 200. Trin. 10 W. 3. in case of Sanders v. Owen.

2. A fine was levied of land *to D. for life, remainder to K. for life, the remainder to the right heirs of D. and B. [D] granted to K. by his deed, that she might cut trees to build or repair, or sell at pleasure*; and the opinion of the court was, that it was a good grant, though D. had only for term of life in possession; for the remainder was in his right heirs, and if K. dies, living D. then D. is seised in fee. Br. Grants, pl. 49. cites \* 24 E. 3. 7.

*And D. may alien by feoffment, but by Thorpe, e contra by release. Br. Grants, pl. 49.—\* This seems misquoted.*

3. A *parson of a church* may grant his *tithes* for years, and yet they are not in him for a time. Perk. S. 90. cites 38 E. 3. 6. and 24 E. 3. 25.

4. The gift of a *parker or shepherd* is not good, otherwise of the gift of a *servant of a vintner or mercer*, giving to me wine or silk; for such have authority to sell it, contrary of the gift of a *servant*, who has no *authority to sell*; but a gift by my *bailiff* is void, quære inde. Br. Done, &c. pl. 56. cites 2 E. 4. 4.

5. Note, if land be *leased to A. for life, remainder to B. in tail, remainder to the heirs of A. and A. grants a rent-charge in fee, and dies, and B. dies without issue*; the heirs of A. shall hold charged. Br. Charge, pl. 36. cites 5 E. 4. 2.

6. A *feoffment by the heir, in the life of the ancestor, without warranty*, is no bar after the ancestor's death; per Brian and Catesby, e contra Tremayle. Br. Bar, pl. 86. cites 21 E. 4. 81.

7. *Tenant at will* cannot grant; per Gawdy J. Cro. E. 156. in case of Sweeper v. Randall.

8. *Tenant in tail and his son join in a grant of a next avoidance*; tenant dies; adjudged the grant was *void against the son and heir that joined in the grant*, because he had nothing in the advowson at time of the grant, neither in possession or right, nor in actual possibility. \* Hob. 45. Wyvel's case.

Brownl. 165. Wivel v. the Bishop of Chester. —\* S. C. cited Pasch.

4 W. & M. Show. 383. in case of Symonds v. Cudmore.

9. When tenant in tail makes a grant *of the thing itself intailed*, this grant is not void by his death, for that the same may be made good, it being only voidable; otherwise 'tis of a *thing granted out of an entailed thing*, as of a *rent* granted out of land intailed, this grant is *void* by the death of the grantor tenant in tail, and the same can never be made good after. Arg. Trin. 8 Jac. 1 Bull. 32. Walter v. Bould.

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10. A. possessed of a term, *assigns his interest to four persons, on trust and confidence, to the use of himself for life, and after to such uses and purposes as he shall declare by his last will*. A. by his will, devised this to B. his son, and to the heirs of his body begotten, remainder over to J. S. and makes B. executor; B.

for 1600 l. sells this to C.—B. dies; the four assignees are all dead; administrator of surviving assignee (B. dying without issue) grants his interest to D. and he in remainder (who had annuity out of the term, and who by deed sold it to C. and who released to C. all his right in the term) joined with him in the grant to D. Per. tot Cur. the assignment was not void against C. by 27 Eliz. 4. and the remainder to J. S. was void, and yet the sale of B. to C. had been good, if no assignment had been;—but the assignment made it ill. Mich. 5 Car. E. R. Jo. 213. Baker v. Sir William Lee.

Farr. 18. S. C.—Holt. denied. Saund. 260. Took v. Glascock.

11. *Bargainee* of tenant in tail has a *descendible fee*, and not an estate only for the life of the tenant in tail; so also in case of a *covenant to stand seised* by tenant in tail, the *covenantee* has a base fee determinable by the *entry of the issue* in tail, but not before. For before the statute de donis, he had a fee simple conditional, and the statute doth not alter the nature of the estate, but restrains the power of alienation, and makes the estate *voidable*. Trin. 1 Annæ, B. R. 2 Salk. 619. Machil v. Clerk.

(H. 10) Not good. But made Good by Relation.

But the grantee shall not have any rent by force of the said grant, before the last delivery, viz. when it took effect as the deed of the woman, and so to such purpose and intent, it shall not have relation to the first delivery, viz. When it was delivered as an escrowle, &c. Perk. 5, 6. S. 10.

1. IF a single woman, being seised of land by deed, grant a rent-charge out of the same land, and she delivers the same deed unto a stranger, as an escrowle, upon condition that if the grantee go to Rome, and return back again before Easter then next following, then he shall deliver the same escrowle as her deed unto the grantee; she marries, and before Easter, and during the coverture, the grantee goes to Rome, and returns back, and the stranger delivers the escrowle unto him as the deed of the woman; this grant is good, notwithstanding that the husband was seised of the land in the right of his wife, before the grant took effect, as the deed of the woman; at which time she was married to the husband; because unto some purpose, it shall have relation unto the time from the first delivery, viz. when it was delivered as an escrowle; insomuch that if the wife, in such case, had infeoffed a stranger of the said land before the condition performed, and afterwards the grantee had performed the condition, and the stranger had delivered the escrowle as the deed of the woman, unto the grantee, the feoffee should have holden the lands charged, &c. because that at the time of the delivery of the deed as an escrowle, she was a single woman. Perk. 4. 5. S. 9.

2. Lessee for years being outlawed, granted his term, and after reversed the outlawry, this makes not the grant good by relation, it not being in the grantor at the time of the grant. Went. Off. Executors, 248. cites it as the opinion of Sir Edward Coke.

(H. 11)

(H. 11) Good; Though it may continue longer than the Estate of Grantor.

1. **T**HERE is a vast difference between an office by custom, as the secondary of B. R. which is only in the grant of a superior officer, and an office derived out of the interest of another. The office of marshal of B. R. is an office of inheritance, and the under offices are derived out of it; and therefore if that office that is an inheritance, be granted for life, all the under offices that are inferior to, and derived out of his estate, and in the gift of him that has the estate for life, are determinable upon his estate, and there can be no custom to the contrary; because the superior office being an inheritance, could not stand in need of the support of a custom. Per Holt Ch. J. Mich. 13 W. 3. 12 Mod. 557. in Sutton the Marshal's case.

(H. 12) Construction; When the Grant shall take Effect.

1. **A** Man leases [to C.] for life, rendering 13s. per annum; and after, the lessor by deed grants 13s. per annum, of rent, issuing out of the same land, to J. S. and his heirs for life of the grantor; Fitzh. and Shard held, that this is a new rent, which shall take effect after the death of the tenant for life, and is not the rent which was reserved upon the lease. Br. Grant, pl. 77. cites 33 Aff. 4.

Reversioner depending upon an estate for life may grant a rent-charge out of the same land, and charge the reversion;

but it shall not take effect, till after the death of tenant for life. Br. Charge, pl. 30. cites S. C. — Perk. S. 92. cites 37 H. 6. 11.

2. But note, that the deed was only that the lessor granted 13s. rent issuing out of the tenement which C. held for his life, of the demise of [the lessor to] J. S. the grantee for term of the life of the lessor, and no words of heirs [of J. S.] was in the deed. Br. Grants, pl. 77. cites 33 Aff. 4.

3. If a man leases for life, and after grants a rent-charge to a stranger, this is a good grant to charge the reversion, but the grantee cannot distrain the tenant for life in his life; nevertheless, it is said there, that after the death, or surrender of the tenant for life, he may distrain for all the arrearages. Br. Grants, pl. 118. cites 5 H. 5. 8.

S. P. Le. 13. Mich. 25 & 26 Eliz. in case of Rearby v. Rearby. — Reversioner in fee,

on an estate for life, grants a rent-charge to commence immediately; the lessee surrendered the lease to the reversioner; it was questioned, if the rent now became in esse, because the estate for life which privileged the land from distress, is now determined in the hands of the grantor himself; but per Crook J. if the reversion had been granted over to a stranger before the surrender, it would be clear, that the suspension should be for the term. Het. 51. Mich. 3 Car. C. B. Peito v. Pemberton.

4. If a man give me all his goods by deed, in my absence, and the deed is not delivered to the donee, yet the gift is good, and he may

If a gift be made to one that is absent

it takes no effect in him till he assent. Dr. & St. 2. Part. cap. 33. 248.

may justify to take the goods by the gift, though *notice be not given to him of the gift*, and if the donee commits felony before notice of the gift, yet the king shall have the goods; for his *notice shall have relation to the gift*; but the court said, that such gift is not good in the absence of the donee, without notice, for a man cannot give to me against my will. Br. Done, &c. pl. 30. cites 7 E. 4. 29.

5. If I give to you my horse, so that you do not take him till after the year, this is void, and it passes presently. Dal. 30. 10. 3 Eliz. —Mo. 27. pl. 87.

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S. P. 1 Salk. 346. Mich. 3 W. & M. B. R. Ger- man and Ux v. Or-

6. A *termor* reciting by indenture his term and lease, grants all his term, estate, and interest, *habend' sibi & assignatis suis immediate post mortem* of the termor; adjudged, that the habendum was void, and the premises of the grant good, to make the entire estate pass to the grantee immediately. Pasch. 10 Eliz. D. 272. pl. 30. Lilley v. Whitney.

Richard. —Le. 276. Coriton als. Curriton v. Gadbury. —Mo. 88r.

7. A. granted to B. a rent-charge out of his lands, to begin when J. S. died without issue of his body; J. S. died, having issue, which issue died without issue. Per Dyer, the grant shall not take effect; for J. S. having issue at the time of his death, the grant cannot begin then, and if not then, then not at all. Per Manwood, if the words had been *to begin when J. S. is dead without issue of his body*, such grant should take effect, when the issue of J. S. dieth without issue, &c. Pasch. 26 Eliz. 3 Le. 103. Anon.

8. Where an estate is given to one by a lawful act, it shall be adjudged in the party *before agreement*, until it be disagreed unto; and if the party do once agree, he cannot afterwards disagree unto it. Arg. Trin. 28 Eliz. B. R. 2 Le. 72. in case of Curtis v. Cottle.

9. Where a man takes in the second degree, as in a remainder, the same vests presently *before agreement*, but where he takes immediately, it is otherwise. Trin. 30 Eliz. B. R. Le. 130. in case of Colebourn v. Mixstones.

S. P. Br. Grants, pl. 122. cites 15 H. 7. 7. —S. P. Arg. 3 Le. 155. cites S. C. —Winch. 96. per Hutton J. cites 14 H. 7. 22.

10. Grant of the *third presentation*; grantor dies, and his widow is endowed. The heir shall present twice, the widow the third time, and grantee shall present the fourth. 2 And. 175. per Anderson Ch. J. in case of Williams v. Bishop of Lincoln.

11. A. covenants that B. shall have *all his trees now standing*, it refers to the trees standing at the time of the *delivery of the deed*, and not to the time of the date, and if any are felled after the date, and before the delivery, B. has no remedy for them; per Fleming Ch. J. Mich. 8 Jac. Cro. J. 264. in case of Offley v. Hicks.

12. A. grants such a *spring wood* in White-acre to B. and before this is cut down, C. cuts down a tree; it was held on this evidence, that B. in this case cannot maintain an action of trespass for cutting this tree down, because it is *not his own till cut down*, it being growing on the soil of the grantor. Clayt. 151. Sir Richard Pilkington's case.

13. Two several *leases* had two several determinations; a third lease was made to commence after the end of the said two leases. The third lease shall not wait the determination of both the other, but shall begin when the one expires, and the other respectively. Jenk. 272. pl. 90.

The case was, that A. was seised of 3 acres in fee, and made a lease of one acre

to B. for life, of another to C. for life, and of another to D. in tail: and afterwards reciting the estates, covenants with his brother, that after all the estates ended, he and his heirs should stand seised of the said 3 acres, to the use of his brother in tail. By the death of B. or C. the brother shall presently have this acre, and not wait till the other estates are ended. But reddendo singula singulis, by the covenant the estate in the several acres, vests presently in the brother, without any expectancy, but to take effect in possession as they fall. Per Coke Ch. J. 2 Buls. 132. Mich. 11 Jac. in case of ROBERTS v. ROBERTS. cites 5 Rep. 8. b. justice Windham's case.

14. Where an interest depends on a precedent estate, there the person to whom it is limited must take it, upon the determination of the first estate, or else he shall never take it; per Haughton J. Hill. 13 Jac. B. R. Roll. R. 319. Blandford v. Blandford.

15. Grant of rent-charge to A. for life, to have, &c. during the natural life of the said A. at two feasts, viz. &c. by equal portions; the first payment to be made on the first of the said feasts, which should happen after the term of eight years ended, and specified, and declared in his last will. There is no term specified in his will; in the premises of the deed, it is recited thus; in fulfilling the will of me the said R. bearing date such a day, I have given, &c. per. Cur. the grant is present, if no term is contained in the will. Hill. 16 Jac. Brownl. 171. Burton v. Coney.

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16. Where the time of executing estates is left to the operation of law, the law respects no time but the soonest, and executes the estate as soon as may be. Arg. Buls. 27. cites 6 Rep. 34, 35. Bishop of Bath's case.

17. When uses are limited to persons in esse, and not in esse; the uses limited to those persons that can take, shall take; and when the other persons come to be in esse, they shall take. Cart. 201. Pasch. 19 Car. 2. C. B. in case of Richardson v. Chilcot.

18. A. tenant for life, reversion to B. in fee; B. makes a lease for years, and then tenant for life, and he in reversion join in a fine; the lease shall take effect presently; not but that the estates passed severally, according to BREDON's case; but they are now consolidated, or else if the conusee should die during the life of the conusor, there would be an occupant. Hill. 5 W. & M. 1 Salk. 338. Simonds v. Cudmore.

19. The king grants an office to A. durante bene placito, and afterwards grants the same to B. to commence after the death, surrender, or forfeiture of A. The latter grant is good, and if the king had turned out A. the grant to B. may take effect, though not immediately, yet after the death of A. and the king shall appoint another in the mean time. Trin. 7 W. 3. 2 Salk. 466. the King v. Kemp.

20. A. seised in fee makes a gift in tail, and if donee died without issue, that it should revert to donor for life, remainder over in fee; it was adjudged, that the reversion to himself was void and by consequence it should remain over immediately. 12 Mod. 285. Pasch. 11 W. 3. C. B. in case of Scattergood v. Edge.

See Devise,  
(K. c) and  
Remainder  
(N) S. C.  
and the  
notes there.

21. The father grants a *term for 500 years* to trustees, and their heirs, executors, &c. on such *trusts as by his will* should be declared; and *from the détermination*, &c. thereof, then to *the eldest son of the eldest son* of the grantor, and *the heirs male of his body*; and for default of such issue, to the use of *the said grantor's second son, and the heirs male of his body*, &c. The father died, his eldest son having no issue, the second son shall take immediately on his father's death; for the eldest son having no son born, his son cannot take by way of remainder, because there is no particular estate to support it, nor by way of executory devise; so that if the fee simple should descend on the heir at law of testator, and vest in him till the contingency happen of his having a son born, it would tend to a perpetuity. Tr. 8. Geo. 9 Mod. 4. Gore v. Gore,

### (H. 13) Construction of Grants in general.

But one part  
must not be  
taken, and  
another left  
out. And.  
225 in case  
of Baldwin  
v. Martin.

1. **WHERE** there are *sufficient matters to guide the intent* of the party, in such manner that lay persons may understand it, or sufficient matter is contained in the deed, to *shew the intent*, there the deed, and the words therein, shall be taken to make the deed good, rather than destroy it. And. 60. in case of Windham v. Windham.

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Where the  
form and

2. Deeds ought to be construed so, that things may pass by them according to the *meaning of the parties*. Arg.—Mich. 25 & 26 Eliz. Le. 7. in case of Stonely v. Bracebridge.

the effect cannot stand together, the form shall be rejected and the effect stand. per Harpur J. 2 Le. 17.—2 Le. 219.—In an indenture between A. and B. whereby A. was intended to grant to B. though the words *but granted* is without the grantor's name preceding it. 2 Vent 142. Tretheway v. Ellefson.—And though the deed was tripartite, and [hath] was in the singular number, so that the doubt was to whom the [hath] referred; yet, because the grantor might be collected from the whole deed, it was held good; for deeds must be construed, as much as possible, according to the intention of the parties. 10 Mod. 45, &c. Lord Say and Seal's case.

3. No construction shall be made contrary to the very express words of the grant. Mich. 20. Jac. C. B. Arg. Winch. 47. in case of Gloucester, (Bishop) v. Wood.

4. Where words are *capable of different expositions*, that shall be taken which supports the declaration or agreement, and not that which defeats it. Trin. 2 Annæ, 1 Salk. 324. Wyatt v. Aland.

But a  
strained  
construction  
ought  
never to be  
followed  
contrary to  
the intention  
of the party;  
Per King  
C. Hill. 4

5. Though construction ought not to be made against the letter of a deed, yet in some cases a *strained and secondary* interpretation may be admitted; if the letter will bear a second, and less genuine interpretation, it may be admitted, *ne detur absurdum*. But where the intention of the party is not clear and plain, but in *æquilibrio*, the words are to be expounded after the most proper and natural construction; per Bridgman Ch. J. Cart. 109. Mich. 18 Car. 2. in case of Bosworth v. Farrand.

Geo. 2. Gibb. 222. Fitzgerald v. Ld. Falconbridge.—It hath been lawful for a court of equity in some cases, and upon special circumstances, to expound a deed *otherwise than the letter seems to import*, yet this ought never to be done, *so as to make a deed*, but only to avoid some extremity. Fin. R. 101. Hill. 25 Car. 2. Check v. Ld. Lisle.



6. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* 2 Saund. 167. Trin. 22 Car. 2. In case of Langon v. Carne.

7. 'Tis reasonable, that when *part* of a deed *tends one way, and part another way*, a reasonable intendment should be taken upon the words. And. 68. in Sir Richard Lee's case.

8. Words in deeds ought to have a *reasonable construction*. *As, grant of common, in his lands* 4 Le. 143. Arg. in Sir Francis Englefield's case. commonable, not in gardens and orchards, &c. *ibid.*

9. *Money to be paid by feoffee* ought to be paid soon; but if by *feoffor*, and he on payment to re-have the land, there he may pay it at any time during his life; for 'tis to his loss, and not to feoffee's; per And. Ch. J. 2 And. 73.

10. Grant of *annuity of 20 l. per ann. to A. 'till A. is advanced* to a benefice, ought to be a benefice of the same value. Het. 90. Pasch. 4 Car. Bibble v. Cunningham. *S. P. for a benefice of half the value will not determine the annuity.* 4 Le. 352. Arg.—*So of a litigious benefice. Ibid.*—*So if annuity be granted, to a man of law for his counsel, he is not bound to give counsel but in the law; and the same of such grant to a physician, he need not to give any counsel, but in physick, and not in other matters, though he well can; for it shall be in that, in which he is maxime expertus.* Br. Grants, pl. 174. cites 16 H. 7. 10.

11. Every grant shall be expounded, *as the intent was at the time of the grant*; as if I grant an annuity to J. S. until he be promoted to a competent benefice, and at the time of the grant, he was but a mean person, and afterwards is made an archdeacon; yet if I offer him a competent benefice according to his estate at the time of the grant, the annuity ceases. Cro. E. 35. Mich. 26 and 27 Eliz. Mildmay v. Standish.

12. The law for the true construction of grants hath *respect to the estate of the grantor*; per Doderidge J. 3. Buls. 125. Mich. 13 Jac. 1. in case of Gough v. Howard. [ 59 ]

13. *Ancient charters* are to be taken according to ancient *usage*; per Montague Ch. J. Mich. 12 Jac. 2. Buls. 298. in Briggs's case. *Arg. Lat. 47. cites 10 H. 7. 13. 12 H. 4. 23.*

9 Rep. 28.—Note, that 'twas said for law, that there are many *ancient grants*, generally and insufficiently made, so that such deeds at this day would be void; but *because* they were made *before time of memory*, and have been used since, therefore they are good; and many liberties and franchises used thereby are likewise good. Br. Grants, pl. 89. cites 5 E. 4. 121.—*Ancient grants are to be construed, as the law was at that time when they were made.* Pasch. 1651. Arg. Sti. 268. in case of Cremer v. Burnett.

14. Construction of words shall be taken according to the vulgar and usual sense and *manner of speech in those places, where the words are spoken.* Trin. 9 Jac. Buls. 175. Hewitt v. Painter.

15. Where a thing is granted by *obscure words*, it shall be construed by *usage afterwards*. Arg. Palm. 222. Mich. 19 Jac. Ward v. Britton.

16. Words in grants shall be construed according to a reasonable and easy sense, and *not strained* to things unlikely and unusual. Mich. 16 Jac. Hob. 304. in case of London v. the Collegiate Church of Southwell. *4 Le. 143. Arg.—Buls. 100.*

So of an obligation to be paid at two feasts; per Hill. Ibid.

17. In avowry; *rent was granted to be paid at two feasts, and it was not said by equal portions*; and yet, in the law, this shall be expounded to be by equal portions. Br. Obligat. pl. 91. cites 13 H. 4. and Fitzh. Avowry, 240.

18. *Verba posteriora, propter certitudinem addita, ad priora, quæ certitudine indigent, sunt referenda.* Wing. 167.

Per Doderidge J. Godb. 198. S. C. and cites 4 E. 4. 29. b. where a bond was *moverint univrsi, me J. S. teneri, &c. A. B.*

19. If *certainty once appears* in a deed, and afterwards, in the same deed, it is spoken *indefinitely*, reference shall be to the certainty, which appears. And therefore, if by an indenture lands are given to A. & *hæredibus masculis*, and afterwards in the same deed it appears to be *hæredibus de corpore suo*, it shall be an estate tail. Because the *first words were indefinite, and the last certain*, by which it appears, that he passed but an estate in tail; per Doderidge. Mich. 19 Jac. 1. C. B. 4 Le. 248. in case of Hix v. Coats and Fleetwood.

in 101. *Solvend' eidem J. &c.* It was held, that the bond was not void; because it appeared by the premisses, to whom the 101. was, in law, to be paid, and the intent so appearing, the plaintiff might declare of a solvendum to himself, and the word J. shall be *supplu'j'ge*.

Pl. C. 106. Hill v. Grange.

20. *Ex præcedentibus & consequentibus optima fit interpretatio.* Buls. 101. Turpin v. Forreigner.

21. *Subsequent words shall not confound precedent*, if by construction they may stand together; per Nicholas J. Pasch. 1657. Scacc. Hard. 94. in case of Cother v. Merrick.—cites 5 Rep. 112. Mallorie's case, the word successors,—and the words, executors and assigns, in Shury and Brown's case.

22. An *insensible clause* doth not make the residue of the deed vicious, which is sensible of itself. Hill. 20 and 21 Car. 2. 1 Saund. 320. in case of Pordage v. Cole.

23. A deed may be *good in part*, and void in part; as if a deed be read to a man unlearned, and part of it is interlined; this is good for so much as was read, and void for the residue; per Hutton J. Ley. 79. Pasch. 1 Car. 1. In case of the Bishop of Chichester v. Freeland.

24. When an act is to be done with *reference* to other thing, which is *impossible, illegal, or variant*, the act shall stand, and the reference shall be void. Hill. 2 Car. C. B. in case of the King v. Eaton. Litt. R. 25. Arg. cites 10 Rep. 26. b.

There is a difference between an authority and an interest; in an interest the first sentence shall be taken. per Coke Ch. J. Pasch. 14 Jac. Br. Roll. R. 376. in case of Berrie v. Perry.

25. When there are *two clauses* in a deed, of which *the latter is contradictory* to the former, there the former shall stand; per Nicholas J. Hard. 94. Pasch. 1657. in Scacc. cites 2 E. 2. Feoffments and Faits, 24. 4 H. 6. 22. of a gift in frankmarriage rendering rent, the reservation is void.

per Coke Ch. J. Pasch. 14 Jac. Br. Roll. R. 376. in case of Berrie v. Perry.

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26. *One part of an assurance shall stay its operation, 'till another part has its perfection.* Arg. Lane 38. Hill. 6 Jac. Scacc. cites 5 Rep. 79. b. Fitzherbert's case.

27. Grant of *reversion generally* passes estate for life of grantee only. And. 284.

28. The law for construction of grants hath *respect to the ability of the grantee*, and this sometimes shall rule and direct the grant, where



where *no estate is expressed*. As a grant made to an abbot and convent, without saying more, they have a fee simple; cites 11 H. 4. 84. So if a grant be made of land to a mayor and commonalty, they have fee simple. 11 H. 7. 12. So if it be to a dean and chapter. 27 H. 8. 15. Mich. 13 Jac. 3 Buls. 125.

29. The law sometimes hath *regard to the consideration, which leads the estate*. As a devise of land, paying 100*l.* gives a fee simple, so of a bargain and sale of land for money, without limiting any estate, it is a fee simple, because of the consideration; per Doderidge J. 3 Buls. 126. cites 27 H. 8. 5.

30. The law also sometimes *respects the recompence and loss, which is sustained*. As if lessee for 20 years makes a lease for 10 years, rendering rent, and no time for the continuance of the rent expressed; by construction of law the same shall have continuance for 10 years, because the rent is the consideration of the term; per Doderidge J. 3 Buls. 126. Mich. 13 Jac. 1. in case of Gough v. Howard.

31. A grant shall not *pass things divisim*, where the intent was to pass them conjunctim. Fin. Law. 8vo. 58. 2 Brownl. 201. per Coke Ch. J.  
cites the case of \* *Ld. Cromwell v. Andrews*.—\* Godb. 130. S. C. cited—3 Le. 193. Long's case.—Sav. 103. Long v. Bishop of Gloucester and Hemmings. S. C.—2 Roll. R. 91. Atwell v. Harris.—Jenk. 265. pl. 68.—2 Buls. 8.—Mo. 496. Arg. cites Bosom's case.—and Sir Rowland Heywood's case.—Yelv. 124.—2 Roll. 56. pl. 5. Bozoun v. Futter.—Savil. 62. S. C.—11 Rep. 48. Liford's case.—Construction shall not be by *fructions*, and divided where the *intention* was, that it should be entire, &c. Arg. Skin. 72. cites 2 Rep. 75. Poph. 95. Where if the party had made *election to take one acre by bargain and sale*, he shall not take the residue, or any other part, by conveyance at common law. Arg. Skin. 72.—By Periam J. in 13 H. 4. the difference is taken betwixt a grant of a manor *una cum advocatione*; and a grant of a manor, & *alterius*, a grant of *the advowson*. In 14 Eliz. D. 311. In the case of the Lord Cromwell and Andrews, if a man bargain and sell, give and grant, a manor and advowson to one, and afterwards levies a fine, or inrolletb the deed, Dyer held, that the advowson shall pass by the bargain and sale, as in gross, before that the deed be inrolled. But Periam conceived, that it cannot pass, if the deed be not inrolled, and then it shall pass as appendant, by reason of the intent of the parties. Godb. 130. in case of Green v. Harris.

32. One clause may be explained by another. Mich. 5 Jac. 7 As where the K. granted  
Rep. 41. (42) Berisford's case.  
*debts, duties, arrearages, and sums of money*, in one part, the word *arreages* being mixed with those other words, must be intended of *personal things*, and not of real; but where there was a proviso, that grantee should take no benefit of arrearages of any rents, reliefs, &c. until J. S. be satisfied, and paid 10,000*l.* this explains what arrearages the king meant, viz. of rents, &c. 12 Rep. 86. Stockdale's case.

33. Clauses in company have other constructions, than when they are alone. Hob. 275. Mich. 13 Jac. Earl of Clanrickard's case. And are to expound one another. Vent. 91. Lion v. Carew.

34. General words will *discharge a general thing*, but to discharge a *special thing*, there must be special words. Arg. Pl. C. 334. case of mines.

35. Where *general words* are, which have *reference to a certainty*, there, if the general words were *not parcel of the certainty*, the grant is void; as if the grant was of all lands and tenements in D. which were *in the occupation of J. S.* if they were not in the occupation of J. S. they do not pass; so of all lands which descended to me from my mother, &c. Mich. 24 & 25 Eliz. Savil. 37, 38. in case of the Queen v. May,

36. General

36. *General words* shall have a special understanding, if the special construction may agree with the proper signification and sense of the general words. Arg. 3 Le. 244. Mich. 32 Eliz. B. R. in Harris and Wing's case.

37. General words do not imply any *certainty*, nor shall *conclude* any common person to say, that he has nothing there; and the difference between general *grants* and particular appears in Pl. C. 191. Wrotesley's case.——20 Ass. pl. 8. 9 H. 6. 11. 12. 2 E. 4. 27. b. 2 Rep. 33. b. 34. in Doddington's case.

38. There is no difference where words are *particular* and where they are *general*, if the general words *cannot be satisfied without* passing a real estate, though the particular words are only of things personal; per Holt. Ch. J. Hill. 2 Annæ, B. R. 6 Mod. 107. Countess of Bridgewater v. Duke of Bolton.

Arg. Bridgm. 102.——but an  
39. *Words subsequent* may \* qualify and abridge, but *not destroy* the generality of the words precedent. Mich. 8 Jac. 8 Rep. 154. b. in Altham's case.

express estate limited before in a deed, cannot be altered by any *implication*, which can, or may be made in a subsequent clause. Arg. 5 Mod. 267. in case of Leigh v. Brace.——But the difference is where it is *one intire sentence*, or several. Ibid. and judgment accordingly.——\* As power to executors to *dispose, let, and set*, gives no power to grant, though the word (*dispose*) would carry it. Arg. Show. 152. cites Keb. 511.

Subsequent words shall not controul general precedent words, but both shall be construed as general and *independent clauses*; per Holt Ch. J. 12 Mod. 150. in case of Winter and Loveday—cites Le. 119. the Queen v. Lewis.——and as cited there Bronker v. Robotham.  
40. *Quando charta continet generalem clausulam, posteaque descendit ad verba specialia; quæ clausulæ generali sunt consentanea, interpretand' est charta secundum verba specialia*; but 8 Mod. 250. Saund. 59. 60. distinguishes between where it is one entire sentence, and where the covenants are distinct. Gainsford v. Griffith.

41. *Antecedent* general words shall be *restrained by particular words following, but not e contra*. But if *general words follow particular words*, they shall be taken in the *largest sense*; for otherwise the general words would be insignificant and void. Arg. Carth. 120. Mich. 1 W. & M. B. R. in case of Knight and Donning v. Cole and Ux.——cites 8 Rep. Altham's case.

42. General words in the beginning or end may be *restrained* by latter or prior particular words according to the *intent*, or particular thing expressed. Arg. Show. 151. Pasch. 2 W. & M. Knight v. Cole.

43. *General power* of revocation in the *preamble*, or introductory part of a deed may be *abridged by a special power in the operating part* of it; per Reynolds Ch. B. Hill. 4 Geo. 2. Gibb. 214. Fitzgerald v. Lord Falconbridge.——Ibid. 221. per King C.

Show. 151. Arg. cites Saund. 60. Gainsford v. Griffith. S. P.——It was admitted, that in deeds (though otherwise in wills) subsequent clauses which are general shall be governed by precedent clauses which are more particular. 4 Mod. 69. in case of Thomas v. Howell.  
44. *Generalis clausula non porrigitur ad ea, quæ antea specialiter sunt comprehensa*; so that when the deed at first contains special words, and after concludes in general words, both words as well general as special shall stand. Mich. 8 Jac. 1. 8 Rep. 154. b. in Altham's case.

45. Where

45. Where *particular words* are in the *end*, the middle shall never be taken general. Pasch. 3 Car. Het. 15. Abree's case.

46. The rule, that the *general words subsequent* shall be *restrained by the precedent particular words*, is good and general, especially where the particular words comprehend and express a thing of an *inferior nature* to the general words subsequent, and that the general words are put *without their dividing differences*; for there indeed the generality of them shall be controuled by the bounds of the particular precedent words. But where the general words do put the proper difference of particulars, and besides *take a higher species than the particulars* mentioned before; as where the devise was of all his plate and jewels, and all other his estate real and personal, &c. there the *general words shall over reach the particulars before*, as if in the ARCHBISHOP OF CANTERBURY's case in 2 Rep. the words had been, and all the ecclesiastical persons of superior or inferior rank; they would have taken in archbishops, bishops, &c. Per Holt Ch. J. Hill, 2 Annæ, B. R. 6 Mod. 107. Countess of Bridgwater v. Duke of Bolton.

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47. When *words* contained in a deed go to *several senses* and purposes, the deed shall be taken according to the sense of the words, without taking or expounding any word to be *vain*, or *confounding the sense* of it; as if in the deed be contained *dedi, remisi, &c.* this may be a deed of grant, feoffment, release, or confirmation, or all these as the case requires. 2 And. 20. Earl of Pembroke v. Barkly.

48. When *words of diverse natures* are inserted in a conveyance; the grantee has election to use which of them he will. 2 Brownl. Arg. 292. Hill. 7 Jac. in case of Smallman v. Powis.——cites Sir R. Heyward's case. Godb. 128.

49. In many cases the *præterperfect tense* is taken for the *present tense*. Trin. 11 Jac. 10 Rep. 67. Church-wardens of Saint Saviour's case. 2 Vent. 57. contra in case of a will,

Wright v. Wyvel.——Exposition shall be made of deeds sometimes *contrary to grammatical construction*, per Withens J. 2 Show. 334 in case of Fountain v. Guavers.

50. *Two negatives* may be construed as a negative in grants, but not in *pleas*; for they are to be in Latin, and must be construed as Latin ought to be. Trin. 2 Annæ, 1 Salk. 328. Dillon v. Harper.

51. *Words needless* shall not impeach a clause certain and absolute without them. Trin. 17 Jac. Hob. 313. in case of Kybet v. Lee.

52. Addition of *useless and impertinent words* shall not hurt the obligation and condition which were perfect before. 2 Saund. 79. Pasch. 22 Car. 2. Maleverer v. Hauxby. Nor a record, especially a common re-

covey. 2 Saund. 96. Pasch. 22 Car. 2. Hesketh v. Lee.——But words that are *sensible* in a deed shall not be taken as vain; for that is to confound the intent of the parties. And. 236. in case of Onfley als. Onesby als. Onfely v. Filke.

53. When words in a deed, plea, or record, are so *repugnant*, that the true sense thereof cannot be known to the court, what is to be When there is a repugnancy

between the words of a deed, be judged or construed upon them, all shall be taken to be void; said to be a rule in law. Arg. Bridgm. 102.

the law regards the first words. Arg. Lat. 264. cites 2 E. 2. Feoffments 94.—So lease to two *habend'* jointly and severally; they are jointenants; because the first words have the pre-eminence. Arg. Ibid. cites 5 Rep. 19.—Though sometimes constructions by equity shall be admitted, yet the law never will allow such, as will utterly defeat what is before granted, or is repugnant to the grant. Arg. 2 Jo. 30, 31.

54. The law will construe that part of a grant to *precede*, which ought to precede. Mich. 10 Jac. B. R. 10 Rep. 28 Sutton's Hospital's case.

55. If a man makes a lease reserving rent habendum for 20 years, so that the *reservation is placed before the habendum*, yet it is good, and the judges by their construction, are so to marshall the words, as to make it to be a reservation of the rent for the whole term; per Coke Ch. J. 2 Buls. 282. Mich. 12 Jac. in case of Attoe & al. v. Hemmings.

Ibid. cites 2 Rep. Lord Cromwell's case. 56. A deed ought to be expounded so that *all parts of it may stand together*, and it being a common assurance, the judges shall break the deed in pieces to fulfil the *intents* of the parties; per —And. Archer J. Cart. 98. cites 9 Rep. 47. Earl of Shrewsbury's case. Hob. 168.

Stukely's case.—And for that purpose it is frequent to have a *transposition of words*. Agreed per Bridgman Ch. J. Cart. 112. per Archer J. 150. and says the law will take a *clause* at the latter end of a deed, and couple it in its due place, cites HILL AND GAWDY'S CASE, and Cromwell's case.—Per Tirrel J. Ibid. 155.—Lord C. Parker said that surely it is a rule both in law and equity so to construe a deed, as that *every clause should have its effect*. Wms's Rep. 457. Trin. 1718. in case of Butler v. Duncomb.

[ 63 ] 57. Lord of a manor grants by copy to A. and his heirs *subboscum* in M. Wood and M. Grove *annuatim succidend' per 4 vel 5 acras at least*; all the underwood (though not the soil) passes by the copy in property, and nothing remains to the lord, and the words *annuatim succidend'* by 4 or 5 acres is the order appointed for the cutting only, and not to go to the restraint of the grant; adjudged as above. Pasch. 36 Eliz. Mo. 355. Hoe v. Taylor.

58. The case above is not like to a *liberty to take underwood for fuel*; for there the lord may cut, leaving sufficient for the tenant. Pasch. 36 Eliz. Mo. 355. Hoe v. Taylor.

59. Every *restraint does imply* (especially in a will) that the party, in case he was not restrained, had power to do that, which it prohibits, which is the cause that it restrains them. Hill. 8 Jac. in Cur. Ward. 9 Rep. 128. in SONDAY'S case, cites Bridgm. Arg. 137. in Marg.

60. A *condition annexed* to an estate given is a *divided clause from the grant*, and therefore cannot frustrate the grant precedent, neither in any thing expressed, nor in any thing implied, which is of its nature incident and inseparable from the thing granted; per Hobart Ch. J. Hill. 12 Jac. Hob. 170. in case of Stukely v. Batler.

61. When first there are *general words*, and after an *exception of some particular*, all that is not within the particular shall be within the general; what is not excepted, is within the grant; and this rule holds where the general words by themselves will not pass a thing,

thing, there by intendment of the exception they shall pass; as if a man grant common for all manner of beasts, yet the grantee shall not have common for goats and hogs, and yet if he grant common for all manner of beasts, except goats, the grantee shall have common for hogs; so if he grant *all trees* yet fruit trees do not pass, but grant of *all trees except apple trees*, will pass all other kind of fruit trees, as cherry trees, pear trees, &c. Hill. 20 Jac. B. R. Arg. 2 Roll. R. 280. in case of Lord Zouch v. Moor.

62. There is a great difference, when a clause of *restraint* is in one and the same sentence, and when it comes in a *distinct sentence*. Arg. Litt. R. 186. Mich. 4 Car. C. B. in case of Trenchard v. Hoskins ———cites Harris v. Wing.

63. If a *restrictive clause* be in the first or last part of a sentence, or at the beginning of the first or end of the last sentence, which in good sense may be applied to either, there it shall extend to both sentences; but e contra, if such sentence be placed in the middle of one or two sentences. Sand. 60. Pasch. 19 Car. 2. Gainsford v. Griffith.

In a conveyance every restriction hath its proper operation, and general

words in a grant may be overthrown by words restrictive. Godb. 236. Clay v. Barnet. ——— A restriction may be in a special grant, as in 5 Rep. O'NEIL's case. — But if the restriction doth not concur and meet with the grant, then the restriction is void. Godb. 237. Clay v. Barnet.

64. *Talis interpretatio fienda est, ut evitetur absurdum & inconueniens.*

65. It is said by some men, that, if in a deed indented made between two, both speak by words within the deed; but the words which one speaketh be in the first person, and the words which the other speaketh are in the third person; in this case they say that all the words in the deed shall be said to be spoken by him who spoke in the first person, which saying is nothing to the purpose. Perk. S. 160.

An indenture between two is the deed of both, and every word in it is spoken by both parties. Le. 246. Thomas v.

Green. ——— Contra of a deed poll. Arg. 8 Mod. 312. in case of Skipwith v. Green. ——— But where the person is named, that speaks them, it cannot be taken that any other speaks them. Arg. Roll. R. 30. — But if not they shall be accounted to be his, who may most properly speak them. Ow. 251. Dennis v. Henning, alias Jennings. ——— cites 26 H. 8. 2. 22 H. 6, 58. 28 H. 8. 6.

66. A second grant of the same thing to the same person by the same person, and reciting the first grant, must not be pleaded as a grant, but as a confirmation. Trin. 13 Eliz. Arg. Pl. C. 397. a. b. in case of the Earl of Leicester v. Heydon.

67. One thing in gross cannot contain another thing in gross; and a word which signifies a thing in gross, cannot pass another thing. As if a man grant *all his services in D.* it is to be intended services in gross, and if he have not any services, but those which are parcel of a manor, nothing shall pass by those words; per Clench. J. Mich. 27 Eliz. B. R. Godb. 38. in case of Futter v. Borome, al. Bozom's case.

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68. *Exception* is no agreement; for nothing shall be said an agreement in a deed, but that which passeth in interest. Hill. 7 Jac. Arg. 2 Brownl. 213. in case of Proctor v. Johnson.

69. Words

69. *Words spoke in one sense*, and by one party, shall be *taken in another sense* diverse times by construction of law; as a reverter for a remainder. Arg. 2 Buls. 282. Mich. 12 Jac. in case of Attoe & al. v. Hemmings.

70. To say that lands have been *demised and demisable*, the words shall be taken *distributive*. Per Glyn Ch. J. Trin. 1655. Sti. 480. in Yates's case.

71. The law will never make construction *to the prejudice of the inheritance*, (of which it is so tender) if the grant can be otherwise satisfied; Arg. and judgment accordingly. Hill. 28 Car. 2. B. R. 2 Jo. 72. Asty v. Ballard.——cites 11 Rep. Lyford's case.——Co. Litt. 54. b. 5 Rep. Saunder's case.

72. A remainder in a settlement, with power of revocation, was to B. and the heirs male of his body; but in the deed of revocation, the *recital* of the former limitation *omitted* the words *of his body*, but directed that *the said estate* in the said deed mentioned should be to the use of B. and his heirs male. Adjudged, that the same words in the *new limitation* shall have the same construction, which they have in the recital, and shall make new estate tail. Trin. 1 Jac. 2. C. B. 3 Lev. 213. Gilmore v. Harris.

73. A deed ought to be *expounded by itself*, and by what appears in it, where there is no reference in the deed to any thing foreign to it; per Holt Ch. J. Mich. 1700. 2 Vern. 399. in case of Attorney General v. Mayor, &c. of Coventry.

#### (H. 14) Construction as to Continuance, in respect of the Words.

\* And livery shall be intended. Ow. 118. per two justices, in case of Butler v. Rudley.—If no estate be expressed

1. **I** F *in the premisses lands be letten, or a rent granted*, the general intendment is, that an\* estate for life passes; but if the *habendum limit* the same *for years or at will*, the habendum qualifies the general intendment of the premisses; for it is a maxim in law, *quod quælibet concessio fortissime contra donatorem interpretanda est*, which is to be understood, that no wrong be done; for it is another maxim in the law, *quod legis constructio non facit injuriam*. Co. Litt. 183.

in the grant, the grantee shall have an estate for life; but yet if there be such words in the grant which may declare the will of the grantor, and his will is not contrary to the law, the estate shall be according to his intent and will, unless in special cases. Perk. S. 104. cites 5 H. 7. 1. 7. Gr. 58. 26 H. 8 4.——If no *habendum* be in the deed to express any certainty of time, the lessee shall be tenant *at will*, unless *livery* be made. Per Manwood justice. 9 Le. 33. Anon.

2. Therefore, if *tenant for life make a lease, generally*, this shall be taken, by construction of law, an estate for his own life, that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion. Co. Litt. 183. 2. 183. b.

3. So if *tenant in tail make a lease generally*, the law shall construe this to be such a lease as he may lawfully make, and that is for term of his own life; for if it should be for the life of the lessee, it



it should be a discontinuance and consequently the estate, which should pass by construction of law, should work a wrong. Co. Litt. 183. b.

4. Assise of *common*, the plaintiff shewed a *deed of an assart and common of turbary, in 100 acres of moore in T. to dig and carry at will*; and the assise well lies; for these words, *at will*, are referred to the taking, and not to the estate; and so see that of a thing which lies in grant, if no estate is limited, he shall have for term of life, for the livery of the deed is as a livery of the land. Quod nota bene. Br. Assise, pl. 421. cites 7 E. 3. 43. and H. 1 E. 3. Fitzh. Assise, 134.

5. If *tenant for life charges the land and infeoffs him in remainder*, he shall hold it charged during the life of tenant for life, and no longer; for this is a surrender. Br. Charge, pl. 6. cites 50 E. 3. 6.

So if he in remainder recovers the land by writ of waste. Br. Charge ut sup.

6. If *two marks of annual rent* be granted unto a man *until ten marks are levied*, the grantee shall have an estate in this rent but for 5 years; for the intent of the grantee cannot be otherwise, and the words in the grant are sufficient to satisfy the same intent, &c. Perk. S. 105.

7. If a *villain be granted for life*, the grant is good; and in the same case, if the *villain purchase lands in fee*, and the grantee enters into them as into lands purchased by his villain, he shall keep the lands to him and his heirs, and yet he hath no estate in the villain but for life; but the reason is, because he hath the same as a *perquisite*, &c. Perk. S. 94. cites 5 E. 4. 61.

And to that purpose there is a difference, when a man shall have one thing in

respect of another thing; and when in the place of another thing, and when by reason of another thing. Perk. S. 94.

8. If a man *leases his land for years*, rendering rent, and after *grants the rent to J. S.* and the termor attorns, and after the *termor surrenders*, yet the grantee shall have the rent during the term; per Brian. Br. Grants, pl. 128. cites 20 E. 4. 13.

9. *Lease was made for forty years* by indenture, and lessor *covenanted that lessee might take convenient fireboot, &c.* in a certain parcel of land not then leased, *from time to time*; but *no time was limited in certain*; agreed by three justices, that the lessee shall have it during the term. P. 3 E. 6. Mo. 6. pl. 23. Anon.

10. By articles A. was to have *annually, for six years then next, 20 s. towards the keeping and honest education of B.* and bond of 20 l. was given for payment. The payment shall be for 6 years, though B. should die in the mean time. D. 329. pl. 13 Mich. 15 & 16 Eliz.

11. Fine levied to the use of himself for life, remainder to his executors, *till they have levied 300 l.* for performance of his will. Per Popham and Anderson, the estate of the executors may determine by their own negligence, and the words are intendible, till they conveniently might have levied. Mo. 556. Rosse's case.

12. A lease



Poph. 99.  
S. C.—  
Mo. 400.  
S. C. and  
disting-  
uishes be-  
tween  
words of  
condition,  
and words  
of limitation.

12. A lease was made to a widow for 40 years, *si tam diu vixerit sola & inhabitaverit* within the said house; the lease determines by her marriage or death; but where the words were for 40 years *sub conditione quod si tam diu, &c.* the lease would have been absolute; for those words having no (tunc) to refer to, are uncertain, and so surplusage. Mich. 37 & 38 Eliz. B. R. Cro. E. 414. Sayer v. Hardy.

Goldsb. 179. S. C.—Ow. 107. S. C.

And. 151.  
pl. 199. 3  
Le. 151.  
Roll's  
case.—  
Cited 2  
Vent. 74.  
in case of Bailes v. Wenman.

13. A feoffment was made to A. *to the use of A. and his wife, dispunishable of wast, during their lives*, one died, and survivor committed wast; action lies not by him in reversion, for it is a privilege annexed to the estate, which shall continue as long as the estate continues. Godb. 132. pl. 150. Mich. 29 Eliz. C. B.

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Cro. E.  
721. Mich.  
41 & 42.  
C. B. S. C.  
—2 And.  
130. S. C.

14. A rent is granted to two during the life of J. S. *to the use of J. S.* grantee dies, the rent remains to J. S. for the grantees have an estate during the life of J. S. and by the 27 H. 8. the use is raised and conjoined with the possession, whereby the rent itself is carried to J. S. by which J. S. has an absolute estate for his life, and the life of the grantees is not material. As if rent be granted to two for the life of J. S. if he does not grant over the rent, their lives are not material; and if they *grant over* and die, the rent shall not cease, but the grantee shall have it during the life of J. S. And here the Stat. 27 H. 8. vests this in *cestuy que vie*; otherwise had it been before the statute of uses. Quod fuit concessum per Cur. Owen 126. Crawley's case.

15. A. was tenant in tail by devise, with power to grant a rent-charge of 4l. per annum to B. *the remainder-man in tail* of the lands, and his heirs in fee. A. accordingly grants such rent to B. in fee. B. assigns the rent to J. S. A. dies without issue; yet J. S. has the rent in fee, and it is not determined with the estate tail of A. but issues out of all the estate which was the testator's, and charges the whole inheritance. Trin. 15 Jac. Cro. J. 427. Dutton v. Ingram.

Per Coke,  
Ch. J. He  
shall have  
the rent

16. Termor grants a rent to J. S. and limits no estate; he shall have this for all the term, if he lives so long. Per Dodderidge J. 3 Buls. 122, 123.

during all the term, and if he dies during the term, his \* executors shall have it; but if one grants a rent out of his own land to J. S. and limits no estate in this rent, he shall have this rent for his life. Per Doderidge, if one grants a rent to J. S. without saying any more, this shall be for life; but if he goes farther, and says that his executors shall distrain for 10 years for this rent, by this it shall be only a rent for 10 years, and cited 5 Aff. Coke agreed this to be so, because it is an explanation of his meaning. Ibid.—Per Croke justice, contra. Ibid. 127.—  
\* Haughton justice distinguished between a grant by deed, and a devise; that in a grant it shall be taken strongest against grantor. Ibid. 124. Per Coke Ch. J. it is the same in a devise. Ibid. 129.—In case of a devise, it was decreed to continue as long as the term, and to go to the executors of devisee. 2 Vern. 35. Gosley v. Gifford. Hill. 1688.—So in case of a grant. Roll. A. 831. pl. 5.

Sid. 151. S.  
C. reports  
the cove-  
nant to be

17. Covenant on marriage of his daughter to B. to pay 10l. annually, and says not how long. The court inclined it should be for life, but if for the life of the baron, or the feme, was not determined,

terminated ; & adjournatur. But some thought for the life of the baron, because it is in lieu of the portion, and shall be taken most strong against the covenantor ; others for the life of the feme, because it is for her marriage provision. Pasch. 15 Car 2. B. R. Lev. 102. *Hookes v. Swain.* to pay to his son in law and daughter, 20 l. a year, and that upon two several

debates it was held per tot cur. that it should be for their lives, and that the maintenance should be as lasting as the marriage.—So feme widow covenanted, on marriage with her baron, that he shall enjoy the lands of the feme during their joint lives, and the baron covenanted with the femes trustees to *pay them annually 20 l. without saying how long, and adjudged for their two lives, as the covenant of the other part was for the enjoyment of the lands of the feme. Lev. 103. cited as Trin. 3 Jac. 2. C. B. the case of Death v. Benins.—Lutw. 459. S. C.*

18. If letters patents are *to chuse a town-clerk* generally, it gives an estate for life ; but if it be *to chuse one, provided they may turn him out at their will and pleasure*, yet they cannot do it without shewing cause. But if it be *to chuse him durante bene placito*, he may be removed at any time, and without any cause shewn, as *Twisden* said. Trin 22 Car. 2 Vent. 82. *Dighton's case.*

19. The *lien of a covenant* may be measured by *the estate in the rent*, or thing granted. Per Wythens J. Mich. 35 Car. 2. B. R. 2 Show. 334. in case of *Fountain v. Guavers.*

(H. 15.) Construction as to \* Continuance where it is casual.

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• See Rent (B). p. 7.

1. **L**AND given to A. and his heirs, *so long as B. has heirs of his body.* The donee has a fee, and may alien it, notwithstanding there be a condition that he shall not alien. 2 And. 136. Arg. cites 13 H. 7. 11 H. 7. 21 H. 6. fo. 36.—So if the words are, *so long as J. S. or his heirs shall enjoy the manor of D.* these words (so long) are vain words, and do not abridge the estate, 2 And. 138. cites 11 Aff. 8.—So to *A. and his heirs, during the life of J. S. or for years.* Those words, (for life) or (for years) are vain words, if livery be made ; for the donee has a fee, ut sup. Some hold that it is not a fee, but if it be, those words are vain, and do not limit the estate. Ibid.

2. *Baron* seised in jure uxoris grants *totum statum suum* to J. S. he shall have it only during the life of the husband, if she outlive him ; but if she has issue by him, then J. S. shall have it for the baron's life absolutely. Arg. Goldsb. 68. cites it as a case put by Baldwin in time of H. 8.

3. A. in consideration of marriage to be had with M. made a feoffment to the use of himself for life, remainder to the use of M. for, during, and until some son, which he should beget on the body of M. should accomplish the age of 21, and from and after such son should attain the age, then to the use of M. during her widowhood. They marry, and the baron dies without issue by M. She enters, and continues sole. Adjudged without argument, that the estate

in remainder to M. is good, though she never had a son. D. 300. pl. 39. Pasch. 13 Eliz.

4. A. makes a feoffment to B. and his heirs, 'till 1000 l. is paid by J. S. if J. S. dies without payment, B. shall hold the land absolutely for ever. D. 300. b. pl. 39. Pasch. 13 Eliz.

5. Feoffment to the use of himself for life, and after to the use of A. his son, *provided if he die, the said A. being under 23 then the grantees and their heirs shall be seised to them and their heirs, until A. hath accomplished the said age, remainder after to J. S.* The feoffor dies, A. being then but 14. Per Anderson Ch. J. an absolute interest vests for 9 years, determinable on the death of A. or rather, they are seised in fee determinable on A.'s attaining his age of 23. But per Rhodes and Windham J. here is an interest determinable on the death of A. within the term, for if A. die within the term, the remainder is limited over to a stranger. Pasch. 28 Eliz. C. B. Le. 281. Baskerville v. Bishop of Hereford.

And. 151.  
S. C. —  
Goldsb. 31.  
S. C. but  
there it is  
durantibus

vitis ipforum, and reports the opinion of the court to be, that the survivor shall not be impeached of waste, because of the *severance*, but otherwise if it had been *jointly*.

7. So in replevin, the case was, A. seised of the land made a lease at will to B. rendering 6 l. per ann. and by another deed, reciting this rent, he granted *eundem redditum* to J. S. the defendant for his life; the lease at will determines; the question was, if the grantee shall have this rent for his life, according to the words of the grant. And resolved that he should, for *eundem* shall be taken for *talem*, viz. *eundem* in specie, viz. 6 l. per ann. as in the Queen's patent, of a grant of *easdem* libertates to Islington, quas London, &c. this is not the same, but *tales* libertates; and it was afterwards adjudged for the avowant, that the rent shall continue during his life. Trin. 33 Eliz. B. R. Cro. E. 241. Kindler v. Leverage.

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8. Covenant to stand seised to the use of himself for life, and after to his wife for life, so long as she should be effectually ready to demise it to his heir at 50 l. rent, when she should not dwell on it herself, and for so long as she should not dwell on it. The husband died, and the wife married, and did not live upon it. Yet she need not make any demise, unless the heir demands it, there were other points in this case, but no other adjudged. Mich. 43 and 44 Eliz. Mo. 626. Sir Cha. Rawleigh's case.

9. A recovery was suffered to the use of A. and his wife, and the survivor of them, and of the executors of A. for 40 years, if C. should so long live. A. dies, and C. dies, the question was? if by the death of C. the estate is determined, that is, whether the words, *if C. should so long live*, refer to all the estate; curia advisari vult. Hill. 6 Jac. Scacc. Lane 38. Catesby's case.

10. If I make a lease to J. S. during the minority of my son B. if B. dies, the estate shall cease, but it is otherwise in the case of a will, because of the intent, and there it shall be taken for enumeration of

of years. per Coke Ch. J. 2 Buls. 131 Mich. 11 Jac. in case of Roberts v. Roberts.

11. If a parson makes lease for 6 years of his tithes, it is implied by law, if he so long continues parson, and the mentioning of it, is no more than what the law speaks. Mich. 11 Jac. B. R. Cro. J. 328. Wheeler v. Heydon.

(H. 16.) Construction. As to Continuance; from the Nature of the Estate granted, after the Estate of the Grantor determined.

1. **I**F the King be seised of land in ward, and grants it as long as it shall happen to be in our hands. Yet the King may make livery within age. per Huls. Br. Livery, pl. 17. cites 8 H. 4. 17. But if the king be seised of land, by reason of escheat, by forfeiture for treason, and grants it over quam diu, &c. the king cannot oust the grantee, for he has a fee; per Gascoign. Quære thereof. Ibid.———But where the king grants the land of the ward, durante minore ætate, he cannot make livery within the age of the infant. Ibid. cites 3 H. 7. 3.

2. If cesty que use in tail, or tenant in tail, gives or sells trees, and dies, the vendee or donee may cut them. Br. Contract, &c. pl. 2. cites 27 H. 8. 5.

(H. 17) Construction. By Matters Dehors.

1. **P**UER in a recovery, and deed of uses, was by an after fine and deed of uses, in which the limitation was to the elder child, as the first was seniori puero, explained not to be meant of a son only, and so a daughter took before a son. 2 Le. 216. Pasch. 16 Eliz. B. R. Humphreston's case. Vid. this case. at Remainder. (F)—D. 337. S. C. —And. 40. S. C.

2. Lease to A. for life, remainder to T. the son of A. who has two sons named A. the elder shall have it, because the more worthy, but if afterwards, the donor declares his meaning for the younger, the same shall stand, &c. per Wray Ch. J. Pasch. 16 Eliz. B. R. 2 Le. 219. in Humphreston's case.

3. In debt on bond, it was averred to be for simony, but it being matter dehors, and not appearing within that deed, the plaintiff had judgment; for no such averment is given by the statute. Noy. 72. Gregory v. Olden. [ 69 ]

4. A jointure of lands of 400 l. per annum, was decreed to be made up 500 l. per annum, on the evidence of the widow's father and uncle, that the husband, when he proposed the match, offered to settle 500 l. per annum jointure, and that he took notice after the marriage, that the jointure was not of that value, and talked of making it up so much; but no covenant or agreement was proved to make a jointure of that value, and the portion was tantamount to such settlement. But the husband was trusted to draw the settlement. Mich. 1681. Vern. R. 17. Benson v. Bellasis.

5. When a *parol agreement* stands with, and doth not contradict the deed, you may sue at law. per North K. Trin 35 Car. 2. 2 Ch. cases 143. in case of Foot v. Salway.

Wms's  
Rep. 123.  
Trin. 1710.  
S. C.

6. Marriage *articles* directed lands to be settled, to be to the father for life, to the mother for life, remainder *to the heirs of the body of the mother by the father*; afterwards, a *settlement* was *to the heirs of their two bodies*, and the settlement is mentioned to be according to, and in performance of the marriage articles. Per Cowper C. it appears not that the parties intended to vary from the uses in the articles, but seems only an accident; neither party understood the limitation of the settlement or articles; but the articles happen to agree with the intention of the parties, and the settlement does not. Decreed to go according to the articles, though the settlement was *made before marriage*. Trin. 1710. 2 Vern. 658. Honour v. Honour.

7. Where an *absolute conveyance* is made for *such a sum of money*, and the *person to whom* it was made, instead of entering and receiving the profits, *demand interest for his money, and has it paid him*; this will be admitted to explain the nature of the conveyance. Mich. 1719. Ch. Prec. 526. Sir Geo. Maxwell v. Lady Montague.

8. *Private views*, which a person had at the time of making a deed, must be laid out of the case, and cannot controul the legal operation of it. Per Reynolds Ch. B. Hill. 4 Geo. 2. Gibb. 213. Fitzgerald v. Lord Falconbridge.

### (H. 18) Construction, Ut Res magis valeat.

1. **I**F *devisee enters into the term* devised to him, *without the executors assent*, by which he is a wrongful seisor and a disseisor, and after, he *grants his right and interest to the executor*; though the devisee has no term in him, but only a right to the term suspended in the land, and to be revived by the entry of the executor, yet 'twas adjudged to be a good grant, and that it shall enure first, as the *agreement of the executor*, by the acceptance of the grant, that the devisee had a term in him as a legacy; and secondly, the deed shall have operation by way of *grant* to pass the estate of the devisee to the executor, and so no wrong. Trin. 27 Eliz. Ow. 56. Carter v. Low. als. Lawes.

2. Grant of an *annuity out of the clear gains of allom works*. Though there is no clear gains; yet grantor is chargeable, and the words (out of the clear gains) are idle. Pasch. 14 Jac. Hob. 248. Smith v. Boucher.

Arg. 3 Le.  
247.

3. Judges have expounded conveyances, *though at one instant*, as several, to make all to stand together. Per Hutton J. Jo. 26.

4. If a deed *cannot take effect, as the parties express*, yet it shall take effect, as it may, rather than the deed shall be void. Pasch. 1653. Arg. Raym. 142. cites 1 Rep. 76.

5. An *ancient deed*, which cannot be proved, shall be intended to be delivered the last hour of the day, to make good the conveyance; per Roll. J. Mich. Trin. 24 Car. B. R. Sti. 119. in case of *Cornish v. Cawfee*. See Estate (Z. a) pl. 12.

6. Every thing in a grant shall be *intended to be good*, if the contrary doth not appear. Mich. 8 W. 3. 5 Mod. 303. in case of the King v. the Bp. of Chester. [ 70 ]

### (I.) Out of what Thing it may be.

[ 1. ] If a man *lease for life* certain land, he may grant a *rent out of the reversion*, and this shall be of effect after the death of the lessee. 33. Aff. 4. adjudged. ] Lease of lands at will at 10 4 per annum, determines; Eliz. C. B. Le. Kirdler v. Leverage.

(K) At what Time. Seisin, Possession. What shall be sufficient Seisin of a Thing to grant it. Fo. 47.

[ 1. ] THE grantee of a *common* may grant it over *before any seisin* of it by the mouth of his beasts. For the franktenement is in him by the grant. 38 Aff. 3. adjudged. ]

[ 2. So the grantee of an *advowson* may grant it over *before any presentment*; for he cannot have seisin till it voids, and he is seised of the franktenement by the grant to grant it over. 36 Aff. 3. ]

[ 3. So the grantee of a *rent* may grant it over *before any seisin* of the rent; for the franktenement is in him by the grant. Contra 36. Aff. 3. admitted. ] Dal. 82. pl. 26. The Grant is good. Perk. S. 91.

[ 4. If a *common* be granted to *baron and feme*, and to the heirs of the baron; after the death of the baron, the heir of the baron may grant the remainder over; for he has the estate. Contra 37 Aff. 14. ]

[ 5. If there be a *lease for years*, the lessee *before entry* hath such interest, that he may grant it over. Co. Litt. 46. b. ] Le. 119. Dal. 82. pl. 26.—So if the lease be to commence at Michaelmas next, he may grant it over before the day; per Dyer. Dal. 82, 26.—Perk. S. 91.

[ 6. If A. *lease land* to B. *for life*, the remainder to his executors *for years*; in this case the term vests in B. so that he may grant it over; for as ancestor and heir are correlatives as to the inheritance, so testators and executors, are correlatives as to chattels. Co. Litt. 54. Dy. 14 El. 309. Mich. 40 & 41 El. B. Rot. 2215. between Sparke and Sparke, Hill. 42 El. Sir John Savage's case in the court of wards, cited in Co. Litt. 54. aforesaid. ]

7. If *tenant in tail* be of land, remainder to his right heirs, he may



may grant this remainder, yet it is not executed in him, &c. Perk. S. 88. cites 17 Aff. p. 60.

But if lord and tenant be, and the tenant enfeoffs the lord of the

8. And if lord and tenant be, and the tenant leases the tenancy unto the lord for life, the lord may grant his seigniorie unto a stranger, and yet it is in suspense at this time, &c. Perk. S. 88. cites P. 5 E. 3. 16.

tenancy upon condition, the lord may grant his seigniorie, and yet 'tis not determined nor extinguished; for if the condition be broken and the tenant enters, the seigniorie is revived, but if before the entry of the tenant the lord enfeoffs a stranger of the tenancy, and then the first feoffor, viz. tenant enters, the seigniorie is not revived, but is determined, because that the lord doth depart with the tenancy to his feoffee discharged of the seigniorie. And so in the same case the lord may depart with his seigniorie by such means, &c. Perk. S. 89.

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9. If a man seised of land leases the same for life, the remainder to the right heirs of J. S. who is living, the remainder takes effect presently, but is in no person to grant; because it is in abeyance, viz. in the consideration of the law, &c. Perk. S. 87. cites 27 E. 3. 87.

But if a man take my goods out of my possession, and sell them unto me in open

10. If a man sells me goods, and I suffer them to be in his possession, and a stranger takes them out of his possession, and I grant or sell them unto the stranger, it is a good sale or grant, &c. Perk. S. 92. cites 36 Aff. p. 30. 33 Aff. p. 17.

market, the sale is void; for it cannot be good unless that the property be thereby altered; and that cannot be; for before the sale, and at the time of the sale, the property was in me, and then, if it shall be altered by the sale, it ought to be altered in me, and that shall be impertinent; for then it should be altered out of me immediately in me, &c. Perk. S. 93.

11. If lord and tenant be, the lord can't grant the wardship of the heir of the tenant living the tenant. Perk. S. 90. cites M. 30 H. 6.

Br. Grant, pl. 77. S. P. cites 33 Aff. 4.—Br. Charge, pl. 30. cites 6. C.

12. If reversioner upon an estate for life grants a rent-charge issuing out of the same, the grant is good to charge the land after the death of the particular tenant, &c. Perk. S. 92. cites 37 H. 6. 11.

So he may, though A. continues in possession, Cro. E. 127. Wheeler v. Thorpgood.

13. Lessee of a future term may, after the former term ended, grant over his term before entry though a stranger has entered by tort; but if such lessee had entered, and then been ousted, he must have re-entered before he could grant the term. Pasch. 25 Eliz. C. B. Cro. E. 15. Bruerton v. Rainsford.

14. Disseisee of a manor, to which an advowson is appendant, grants the next avoidance, and then enters, this shall not make the grant good. Arg. Buls. 33. Trin. 8 Jac. in Walter's case.

15. A. a disseisor infeoffs B. and C. and makes livery to B.—B. grants a rent-charge and dies, C. disclaims; this shall vest the land in the heir of B. ab initio by the relation, but yet it shall not relate to make the grant of the rent-charge good. Arg. Buls. 33. Trin. 8 Jac. in Walter's case.



(K. 2) By what Persons, to what Persons, in respect of their several Interests.

1. **I** N trespass, 'tis in a manner agreed, that where a man puts his beasts to another for a year to feed his land, and J. N. takes them out of the possession of the bailee, and after the owner sells them to the trespassor, this extinguishes the action of the bailee, and Hank. was precise in it, quod mirum! for the trespassor has property, and then the sale of the first owner is void, quod quære. Br. Contract, &c. pl. 9. cites 11 H. 4. 23.

2. Note, per Danby Ch. J. Needham and Moile J. If I bail goods to W. N. and a stranger takes them and gives them to another, this is a good gift, but Littleton denied it; because the stranger has property as trespassor; and per Danby, if a man take my goods I may have replevin, for the property is in me at my pleasure, but the law here seems to be that the property was in him at the time of the caption, but in the other case the property was not in him at the time of the gift; note a difference. Br. Done, &c. pl. 27. cites 2 E. 4. 16.

3. If a man bails goods to J. S. and after gives them to him, this is a good gift. Br. Done, &c. pl. 48. cites 21 E. 4. 55.

4. Contra if a man be in arrears of account in a certain sum, and he that ought to have the arrears, gives them to the accountant; for in the one case the donor has a property, and in the other not, but there a release is good. Br. Done, &c. pl. 48. cites 22 H. 6. 55.

Gift of goods bailed must be by deed. D. 91. pl. 10.

• (L) Before Election. [Where a present Interest [ 72 ] passes.]

[ 1. ] **I** F a man grants to another 200 faggots percipiendum of all his lands, or 20 s. for the same out of his lands aforesaid, habendum the 200 faggots or 20 s. to him and his heirs with clause of distress, to him and his heirs, for the one, or the other, at the election of the grantee. In this case the faggots pass in interest to the grantee, immediately before any election with a power to elect to have the 20 s. but the 20 s. do not pass in interest before the election; because it is granted for the same, that is, if he will not have the faggots. So that upon a general grant of all hereditaments, &c. the faggots shall pass before any election made. Mich. 37 El. B. R. adjudged, between Southwell and Wade.]

[ 2. If a man grants to another a rent out of his land, this is a rent prima facie in interest, with a power to the grantee to make it an annuity upon election. ]

[ 3. If a man seised of diverse woods bargain and sell 300 cords of wood out of his woods to B. and his assigns, to be taken by the appointment of the bargainor; by this bargain and sale a present interest,

Mo. 691. S. C. Cro. E. 819 S. C. Noy. 32. S.

C.—Goldsb. 184. pl. 123. says the better opinion was, that it is not grantable over; for no property vested before assignment, and if the grantor die before assignment, the grant is void and his executors shall not have it.

4. The same books and reasons which prove, that *when an election creates the interest, nothing passes till election*, prove also, that *where no election can be, no interest can arise*, per Hobert. Hob. 174. Hill. 12 Jac. in Stukely and Butler's case.

5. If I give *one of my houses*, nothing passes till the donee choose, and if he does not, his executors cannot; per Hobert. Hill. 12 Jac. Hob. 174. cites 2 Rep. 36. Hayward's case.

(M) At what Time they may be granted. Possibility. [*Things not in Esse.*]

\*Fol. 48.

(S) Inf. pl. 7 Hob. 132. S. C.

[ 1. ] If a man leases for 30 years in April, and in the deed the lessor covenants \* and grants with the lessee, that he shall have the emblements growing upon the land at the end of the lease, this is a good grant of the emblements, which shall be there at the end of the term, to pass the property; though it was, at the time of the grant, but a possibility, and at the will of the lessee if there should be any; because, though the lessor had it *not actually in him nor certain*, yet he had it *potentially* in him; for the land is the mother of all fruits, and therefore he who has the land may grant all the fruits which may arise upon it afterwards, and *the property shall pass as soon as the fruits are extant*. Hobart's Reports 178. adjudged between Grantham and Hawley.]

[ 2. So if A. lease land for years to B. and grants *that he shall have all the natural fruits*, as grass, &c. which renew annually, which shall be upon the land at the end of the term, this will pass the property. Hobart's Reports 178. ]

S. C. cited to Rep. 51. to be so held by Wray Ch. J. and tot. Cur. —Cro.

[ 3. If a lease be made to baron and feme for their lives, the remainder to the executors of the survivor of them the baron cannot grant over this term; because it is but possibility in as much as it is uncertain, which of them shall survive. Co. Litt. 46. b. cites Hill. 17 El. B. R. ]

E. 580. cites 15 Eliz. contra, but it seems to be misprinted. Cro. E. 841. S. C. cited by Popham as adjudged 17 El. —Goldsb. 168. per Popham. —*Lease to husband and wife, and for 40 years \* to the survivor of them, grant by them* is void; because at the time of the grant there was not any interest but only a possibility in either of them. Brownl. 136. in case of Clerk v. Sidenham. —The husband sold the term, the wife survived and died, and her administrator recovered the term against the vendee of the husband, per Coke Ch. J. 2 Buls. 131. —And if the wife had died living the husband, he should have the term against his own grant, per Popham Ch. J. Poph. 5. in case of Gente v. Locroft.

The husband can neither release, grant or surrender. S. F. cited per Popham to have been adjudged, but he said, that perhaps a *feoffment* by the husband might destroy the possibility. Cro. E. 580. in case of Hoe v. Marshall.

\*[ 73 ]

[ 4. If

[ 4. If a parson grants to another *all his tithes of wool*, which he shall have in *such a year*, though it may be he shall have nothing, yet it is a good grant. Hobart's Reports 179. ]

Hob. 131.  
S. C.—  
So tenant for life may sell

the profits of his land 3 or 4 years to come, and yet they are not in esse at the time, &c. per Patton. Br. Contract, &c. p. 13. cites 21 H. 6. 43.—And the parson of a church may sell the tithes of his lambs at Christmas next, which shall happen in his parish; and 'tis good, and yet at this time the lambs are not yeaned or fallen; per Patton. Ibid.—So a man may sell to me the profits of his court which are to come for 3 or 4 years ensuing, and 'tis good, and yet the thing is not in esse; per Ascue J. Ibid.—So a man, who has not any grain in esse, may sell 100 or 200 quarters to be delivered at a day to come, and well, and this is usual. Ibid.

[ 5. If a man grants *all the wool, which shall grow upon all the sheep, which he shall buy hereafter*, it is a void grant; for there the grantor has it not *either actually or potentially*. Hobart's Rep. 179. ]

Hob. 233.  
S. C.—But if a man grants unto me all the wool of his

sheep for 7 years, the grant is good. Perk. 9. 90.

6. Note, if land be leased to *A. for life, remainder to B. in tail, remainder to C. the heir of A. and A. grants a rent-charge in fee, and dies, and B. dies without issue, C. shall hold charged*. Br. Charge, pl. 36. cites 5 E. 4. 2.

7. in many cases a man may grant by deed a possibility to come. Arg. see Godb. 25. Trin. 26 Eliz. B. R. in the case of Savil v. Cordel.

3 Le. 154  
Arg. in case of Lade v. Oliver.—

But no possibility, right, title, or chose en action may be granted or assigned to a stranger. 10 Rep. 48. Mich. 10 Jac. in Lampett's case.—But if he that has possibility join in grant with him that has the land in fact, it may by this means be conveyed to a stranger. Arg. 2 Roll. R. 310.—As, possibility to be tenant by the curtesy is gone by the feoffment of baron. Arg. Godb. 25. cites 39 H. 6. 43.

8. If I let *sheep to A. for 2 years*, this is but a kind of possibility of a property, which cannot be granted over. Le. 43. Mich. 28 & 29 Eliz. C. B. in Wood and Foster's case, cites 11 H. 4. 177.

9. *Lease for three lives to commence after the death of J. S. if they so long live*; though J. S. by possibility may survive all the three, and so it shall never take effect, yet be it a possibility or not, 'tis such a thing as may be granted or forfeited, and that during the life of J. S. 2 Le. 55. Trin. 29 Eliz. in Scaec. Farrington v. Fleetwood.

10. A. lessee for years devised his term to B. his executor to pay debts and legacies, and after payment he devised the residue to his son. B. entered, which is an assent to the remainder; the son grants his interest; 'twas held void, because 'twas but a possibility, and so uncertain, and 'tis not sufficient, that it might be reduced to a certainty afterwards; for it ought to be reduced to a certainty at the time of the grant. Cited to have been adjudged, 19 Eliz. Arg. 3. Le. 157. Mich. 29 & 30 Eliz. in case of Cadee v. Oliver.

11. *Termor devised the profits of his term to A. for life, and after A.'s death to B. for the rest of the term, and dies*; A. enters by assent of the executor, B. during A.'s life assigns to C. adjudged that the assignment was void; for B. had but possibility during A.'s life which he cannot grant over. Hill. 33 Eliz. 4 Rep. 66. b. in Fulwood's case.

S.P. and the indenture being by way of assignment cannot pass by way of escheat; be-

cause an interest passes by it. Sid. 187, 188. Trin. 13 Car. B. R. Cook v. Bellamy. 10 Rep.

10 Rep. 47. b. Lampett's case—But he might *release* it. Mich. 10 Jac. 10 Rep. 52—Jo. 389. Johnson v. Trumpet.—Remainder-man has only possibility, *though the term be of a 1000 years.* 3 Lev. 265. Mich. 1 W. and M. C. B. Dowse v. Earle.—Jo. 417. Hill. 14 Car. B. R. Berry v. Borlace.—\* But where it after vested in possession in B. a *perpetual injunction* was granted against B. who would impeach her own grant. Mich. 11 Geo. 1. 9 Mod. 104. Theobalds v. Duffoy.—S. C. cited as decreed first by Lord Macclesfield, and afterwards affirmed by the present Lord Chancellor, and last of all by the House of Lords that such a possibility might be assigned even by the husband of B. alone. 2 Wms's Rep. (608) Trin. 1731. in case of D. of Chandos v. Talbot.

Yelv. 9. S. C. says the chief reason was because the term for 21 years was only a possibility.

12. Lease for life was made to A. and after for 99 years to B. after the death of A. if B. so long shall live, and if he die within the term, lessor grants that the land shall *remain to the executors and assigns for two years after the death of survivor of both the lessees.* Lessee for 99 years grants the lease for 21 years rendring rent, and dies intestate, having survived the lessee for life; administrator shall not have debt for the rent; for the term never was in the intestate himself to grant or dispose. Mich. 44 and 45 Eliz. Mo. 666. Sparke v. Sparke.

Godb. 146. S. C.

13. A. and B. jointenants, A. leases her own moiety for 60 years after the death of B. if A. so long shall live, and A. leases the *moiety of the other jointenant after her own death*, which is only possibility and not grantable. Trin. 2 Jac. Mo. 776. Whitlock v. Hartwell.

14. *Donee in tail aliened before the statute and before issue born*, and after had issue, and, after issue had, died without issue; the land shall revert; for he had no power to alien at the time of the alienation; but such alienation should bar the issue as is adjudged 19 E. 2. tit. Formedon 61. because he claims fee simple. Mich. 2 Jac. 7 Rep. 35. in Nevil's case.

15. Condition, that if lessee pay 10 s. within a year, he shall have for life, and if he pay 20 s. after the year, he shall have fee; yet he shall have but for life; for *possibility* cannot increase *on possibility*, and the fee simple cannot increase on the estate for years; for this is drowned by accession of estate for life. 8 Rep. 75. Trin. 7 Jac. in Ld. Stafford's case.

16. *Executory devise* has dependance on the first devise, and may be made to a *person uncertain*, and this possibility cannot be *defeated* by any sale by the first devisee. Trin. 7 Jac. 8 Rep. 96. b. Matthew Manning's case.

So devise of land in tail general to A. to have, &c. at his age of 25 years. After his age of 21, and before 25 A. levies *fine with proclamation*, and after A. attains to 25, and has issue; though the conusor had only possibility at time of the fine, yet the estate tail was barred. 10 Rep. 50.

17. Conusor of a *fine at common law* of lands in *ancient demesne* has only possibility of having the land again on the lord's annulling the fine; and yet by his *release or confirmation* by deed to the conusee in possession he shall establish the estate of conusee. 10 Rep. 50. Mich. 10 Jac. in Lampet's case.

\*Goldsb. 59. S. C. Hammington v. Oram.—

Le. 93. S. C. \*per

18. A. devised a term *to his wife so long as she continued sole and a widow, and after to his son.* The son cannot grant his interest over, so long as she continues sole. Mich. 10 Jac. 10 Rep. 52. in LAMPET's case, cites \* Hammington v. Rudyard.

Windham; this possibility might be *extinguished by livery*, as all agreed, but not by *release*, nor could be granted over, and says 'twas so adjudged in one Carter's case.—Mo. 759.

19. A possibility of *escheat* cannot be granted over. Arg. Roll. R. 318. Hill. 13 Jac. B. R. in case of Lane v. Pannell.

20. Sever the possibility from the right, and it doth not lie in grant or forfeiture, but unite them and then they may be granted or forfeited. Arg. Godb. 310. Pasch. 21 Jac. in case of Sheffield v. Ratcliff.

21. Lessee for 21 years grants his term to A. if J. S. live so long, he cannot grant over the possibility of reverter. But if he grant to A. for 20 years if he lives so long, and after grants to B. the reversion, this possibility passes with the reversion. Arg. Hill. 21 Jac. B. R. 2 Roll. R. 427. in the Serjeant's case.

22. Though a grant of a future possibility be not good in law, yet a possibility of a trust in equity may be assigned. 4 Car. 1. 1 Chan. Rep. 29. Warmistrey v. Tanfield.

[ 75 ]

23. A possibility of a remainder of a term may be released to reversioner in fee during the life of first devisee. Pasch. 13 Car. Jo. 389. Johnson v. Trumpard.

Release (H) pl. 4. S. C. — 4 Le. 135. S. P.

24. Where any person has the trust of a possibility in remainder of a term, he has good power to declare and make disposition of the trust of such possibility. Hill. 13 & 14 Car. 2. 1 Chan. Cases 8. Goring v. Bickerstaff.

Pollex. 32. S. C. But the limitation of a remainder in possibility of a

chattle real to the heir of the person limiting is a void limitation.

25. *Cesty que trust* of a surplus has but a bare possibility, and cannot sell it. Chan. cases 208. Tr. 23 Car. 2. Ld. Cornbury v. Middleton. Arg. — per Wild J. 211. contra.

26. *Specifick legacy* cannot be given or granted by such legatee till executor's assent is had to such legacy. Nor perhaps will executor's assent after the grant have such relation as to make good the grant precedent. Went. Off. Executor 28.

27. *Cesty que trust* of a term, on his wife's joining in a sale of part of her jointure, by deed directs and appoints, that his trustees, after his and his wife's death, should assign the residue of his term to his wife's daughter when she shall be 21 or married after the death of her father and mother. The daughter being married, she and her husband, in the life of the father and mother, assign to the plaintiff. Per Cowper, K. such a possibility is not assignable, though no reason for it, if res integra; but it may be released; and dismissed the plaintiff's bill, but without costs. Mich. 1706. 2 Vern. 563. Thomas v. Freeman.

28. 1000 l. charged on land was bequeathed to D. payable at her age of 25 years. D. married to J. T. and she and her husband before her age of 21 assigned the said 1000 l. to W. and afterwards D. attained her age of 25. This was held a good assignment, and that it being of a personal thing, an assignment by the husband only had been good, and her joining, though after age, had been immaterial. 2 Wms's Rep. 601. 608. Trin. 1731. Duke of Chandos v. Talbot.

But were it not in strictness to operate by way of assignment, yet it would be good as an agreement, especially when made

for a valuable consideration. 2 Wms. Rep. (608) Trin. 1731. Duke of Chandos v. Talbot.

(N) What

## (N) What Thing may be granted. Possibility.

Cro. E. 152.  
S. C. adjor-  
natur.

[ 1. ] If a man acknowledges a statute of 2000 l. to A. and after leases land for 21 years to another; and after leases the land to another for 90 years to commence immediately, and after the land is extended upon the statute at 53 l. per ann. during this extent the lessee for 90 years may grant over his interest of 90 years, though the extent be till damages and costs levied, which may be after the 90 years ended. For this extent is but as a lease, and by a reasonable construction it will end before the 90 years. Mich. 31 and 32 Eliz. B. R. dubitatur, between Cadec, plaintiff against Oliver and Evans. ]

Cro. J. 509.  
S. C. contra.  
1 Roll. 916.  
pl. 1. S. C.

[ 2. If a man, possessed of a lease for years devises the benefit of it to A. his feme for six years, and that if .f. his son comes home, he shall have the residue of the term, and if he does not come home within 6 years, then W. shall have it till .f. does come home. W. cannot devise this possibility which he has within the six years; for it is not any interest before the six years past. Mich. 16 Ja. B. R. adjudged between Shreeves and Wrotam. ]

[ 76 ]

† And if no sufficient distress can be found upon the premises or any rescous pound-breach or replevin shall happen to be made that then, &c.  
Cro. J. 510.  
S. C.

\* Fol. 49.

[ 3. If a man grants a rent-charge in fee by indenture, and covenants to levy a fine of the land out of which it issues, to the use of the indenture, that is to say, that if the rent be arrear at any day of payment, &c. and † then distrain upon the land, or the distress be replevied, then it shall be lawful for him to enter into the land, and retain it till satisfaction of the arrearages; and after he levies a fine accordingly, and after the grantee grants over the rent to another in fee; the assignee shall have benefit of this penalty, so that he shall enter into the land and retain it by this fine and covenant; for though this was but a possibility, yet it was annexed to the rent, (as a penalty upon an annuity or rent) and the rent upon which it was annexed is well transferred. Ergo. Mich. 16 Ja. B. R. between Haverhill and Hare over-ruled \* per Curiam and not suffered to be argued; for they say it was clear. Hill. 9 Car. B. R. this was agreed per Curiam in the case of the Earl of Kent and Steward. ]

Cro. C.  
358. S. C.

[ 4. If A. seised in fee of the manors of D. and S. levies a fine to B. of both manors in fee upon a purchase made by B. of the manor of D. and the manor of S. intended for a security for the purchase of the manor of D. and the use of the manor of D. is limited to B. and his heirs, and of the manor of S. to the use of A. and his heirs till eviction made of the manor of D. by A. S. the wife of A. and after such eviction to the use of B. his heirs and assigns till they shall be satisfied with the profits of the land for the damages received by the eviction, and then B. enfeoffs C. of the manor of D. and after A. S. enters into it and evicts C. In this case no use shall arise to C. in the manor of S. Because it was a contingent use, which ought to arise to B. his heirs and assigns in point of limitation, which is not assignable over before it happens. Hill. 9 Car. B. R. between



between the Earl of Kent and Steward adjudged per Curiam upon a demurrer. Intratur. Hill. 8 Car. Rot. 335.]

5. Grant of the *reversion of the tenant in tail made by the donor* is good. Br. Grants, pl. 100. cites 12 E. 4. 2. But if two have land to them, and to

*the heirs of one of them, he who has the fee can't grant his reversion, for it is not a reversion; but by feoffment made by him, the fee shall pass. Ibid.——— And if a man makes a feoffment in fee upon condition, he can't grant his condition over, neither can he grant, that when the condition is broken, it shall remain to a stranger. Ibid.*

## (N. 2) Good. In respect of the Estate of the Grantor.

1. **L**AND is given to A. for life, remainder to B. for life, remainder to the right heirs of the said A. there A. may give or forfeit the fee simple, though it be not vested in him during the mesne remainder; quod nota. Br. Done, &c. pl. 55. cites 24 E. 3. 70. and P. 5 E. 4. fo. 2.

2. Affise of common in 120 acres of moore and heath against J. S. with all manner of beasts at all times of the year, and he shewed a deed by which A. granted the common to G. and M. his feme, and the heirs of G. which G. had issue B. and died, and B. granted to him the common, and shewed the one deed, and the other. And the defendant said, that the land put in view is only 60 acres, and of which A. was not seised unless of five acres at the time of the grant, and that B. had nothing in the common at the time, &c. and the plaintiff was forced to answer to the one plea and the other; the assise said that A. was seised of 60 acres, and that B. was seised of all the pasture after the death of G. at the will of M. the feme of G. and granted to the plaintiff by which he was seised, and now M. is dead, and prayed their discretion, and the plaintiff prayed judgment; per Finch. in assise of novel disseisin if an ouster be not confessed, they ought of necessity to inquire of the seisin and disseisin, and 'tis found that B. had nothing, &c. and therefore the plaintiff was not seised, for the grant to him was void. Per Wich. B. had it in reversion at the time of the grant, and therefore his grant was good. And after, by reason of the opinion of the court, the plaintiff was nonsuited. Br. Assise, pl. 346. cites 37 Ass. 14.

[ 77 ]

## (O) What shall be a good Limitation of a Chattle, and the Extent of it.

[ 1. ] If a man seised of an advowson in fee grants the next avoidance to B. and his assigns, *durante vita ipsius B. ita quod liceat dicto B. & A. & gnatis suis durante vita ipsius B. to present at any time when it becomes void.* This is a good limitation of this grant, so that if B. dies before the church becomes void, the grant is determined; for this appears to be the intent of the parties, and all one as if he had granted it, if it falls during his life, and

Cro. C. 505. S. C.



and such limitation may be made upon grant of such *chattle, which is derived out of a real thing, and carries an interest of a real thing.* Tr. 14 Ja. B. R. between *Hide and Man*, adjudged upon a special verdict in a writ of error upon a judgment in B. in a quare impedit, and this was so adjudged in B. per Curiam and the court said that *this differed from a personal thing, as a horse, which cannot be granted during the life of the grantee.* Intratur Tr. 12 Car. Rot. 360. B. and in B. R. P. 14 Car. Rot. 467. But note, that Barkley and Jones said, that peradventure there would be a diversity, if a man possessed of a next avoidance grants it to another with such limitation, if he so long live. But it seems that it is all one, being once derived out of a franktenement. ]

(P) What shall be said to pass by the Grant.  
Grant limited in Law. [*By Words explaining the Intent.*]

Hob. 304. [ 1. ] If the king grants to a prior that he shall have all the possessions of an abbot in time of vacation *ad sustentationem prioris & monachorum*; advowsons will not pass by this grant, because they cannot be for their sustenance. 39 E. 3. 21. b. ]

[ 2. If a man leases eight several tenements in D. by several leases, and after by deed recites seven of the said leases, and grants the reversion of them to another with all his lands, houses and edifices in D. not having any other lands, houses or edifices in D. except the said eight tenements; the reversion of this 8th tenement, which was a will, shall pass by this grant, though all the other leases were recited, and not this; for the other words have not any other colour of satisfaction without it. Mich. 15 Ja. B. R. adjudged upon a special verdict between Hagget and Giles. ]

Cro E. 476.  
658. S. C.  
—See (T)  
pl. 8. S. C.

\*Fol. 50.

—A. has a  
house and  
land in  
Oxon, and a

house in Berks. A. conveys all his lands and house in Berks to J. S. and also *all his lands in Oxon.* Adjudged that his house in Oxon shall pass also though not so expressly mentioned as his house in Berks. Cited by Noy. Hill. 3 Car. B. R. Palm. 497. as Ever's case. —als. Heydon's —als. Ever v. Heydon.

†[ 78 ]

[ 4. If a man by indenture leases the site of a manor in Middlesex, and 20 acres of meadow, 10 acres of pasture, six acres of wood parcel of the said manor, *cum omnibus proficuis ac commoditatibus eidem manerio pertinentibus, habendum & occupandum manerium predictum* for years, and in the indenture is a covenant of the part of the lessee, that he will find the steward of the lessor meat and

and drink and horse meat at the time when he shall come to the manor house to keep courts there for the lessee and his successors. This is a lease only of the demesns, and not of the intire manor. For the intent appears by the covenant. Pasch. 40 El. B. dubitatur between Ayre and Joiner. ]

[ 5. If a man is seised in fee of a parcel of land called *Parkebill*, containing in itself 60 acres, and divides it into three parts, and leases one part of it to *A.* for years, and after, during the term, leases to *B.* by such words, scilicet, *two parcels of Parkhill containing in itself 60 acres of land*, for years, though all the three parts do not exceed 60 acres, yet only two parts shall pass by this grant; for the intent of the grant appears to be such, and so the lessee shall not have any writ of covenant for the other third part. P. 6 Ja. B. per Curiam between Loyd and Petley. ]

[ 6. If a man grants a messuage, called *Falstolfe Place*, prout *undique includitur aquis*. By these words the soile of the mores, in which the water is, shall pass. P. 9 Car. B. R. per Curiam resolved upon a trial at bar between Stint and Morgan. ]

[ 7. If a man seised of a manor, whereof certain wood, called *D. S. and V.* and other lands are parcel, bargains and sells *omnia illa boscos, subboscos, maeremia — tunc stantia, crescentia & existentia in & super toto illo manerio prædicto videlicet in & super copieia sua sive bosco vocato D. & in & super bosco suo vocato S. & in & super bosco suo vocato V.* In this case, this word *videlicet* does not restrain the general grant of all the woods upon all the manor, but shall serve only for explanation, and not restriction. Hobert's Reports 229. between Stukely and Butler. ]

Mo. 880.  
S. C. Hob.  
168. S. C.

[ 8. If a man grants his manor of *D.* in the county of *M.* if the manor extends into this county and another, yet no more shall pass than is in *M.* 9 E. 4. My Reports. 14 Ja. ]

Br. Feoff-  
ment de  
terres. pl.  
55. cites 7

H. 4. 27. — pl. 59. cites 9 E. 4. 6. 17. S. P. But makes a quære, if it had been *cum pertinentiis*. — So if it extends into 4 villis, viz. *A. B. C. and D.* and he gives his manor in *A. B. and C.* that which lies in *D.* does not pass. Br. Done, pl. 26. cites 5 E. 4. 103. — Br. Grants, pl. 88. cites S. C. — S. P. Br. Grants. pl. 25. cites 7 H. 4. 41. — Contra if he grants the manor of *D.* with the appurtenances. Ibid.

[ 9. But if a man grants his manor of *D.* in the county of *M.* and all other his land in England, parcel of the said manor; all the manor shall pass, though parcel be in another county. My Reports. 14 Ja. per Curiam. ]

[ 10. If the King seised of the rectory of *King's Wood*, in the county of *Wilts*, and also of the tithes of *Heselden Grange*, as of a portion of tithes in the county of *Gloucester*, appertaining to the said rectory, and he grants his rectory of *King's Wood* in the county of *Wilts*, and all his tithes appertaining to the said rectory; the said portion of tithes of the said Grange shall not pass by those general words; for the words shall have the same limitation, by construction in law, as the first words have, that is to say, all his tithes appertaining to the said rectory in *Wilts*. Mich. 17 Ja. B. R. per Curiam upon evid. at bar, between Poole, and Cox. ]

[ 79 ]

[ 11. If a man grants all his land, which he had by descent from his

his father, in D. that which he had of the part of his mother will not pass. 31 Aff. 7. admitted by issue.]

Fo. 51.

[ 12. If a man seised of the manor of Gargret, and of 8 yard-lands in C. gives the moiety of the said manor, and also 8 yard-lands, and also all other lands and tenements in C. To have and to hold the said moiety, and all the premisses, &c. upon condition to enter into the aforesaid moiety, and all the premisses, &c. By those words, only a moiety of the manor shall pass, and not all the manor. Because in the premisses, habendum and condition, a moiety is named, and so the intent is apparent, that only this shall pass. Dubitatur. Mich. 5 Ja. B. R. between a Moile and Evans. Mich. 8 Ja. B. this cited to be adjudged in B. and B. R. ]

[ 13. If a man leases for years all his lands which he has in D. [adding] all which he has by grant of J. S. The land in D. shall pass, though he has them by other title. M. 7 Ja. B. per 2 Justices, between Savin and Brown. ]

[ 14. If a man has land in D. and S. which his father had by descent and purchase, and grants omnia terras & tenementa in D. & S. & modo in tenura J. S. &c. vel aliquorum aliorum, & que pater meus perquisivit de J. D. & aliis; the land in D. and S. in the tenure of certain men, which his father had by descent, and not by purchase does not pass. For all is but one sentence which limits the grant, and there being other land also to satisfy the grant. M. 11. Ja. B. adjudged between Kingston Clay v. Barnaby. ]

Cro. E. 368.  
Hall v.  
Combes.  
S. C. 2.  
Rep. 33.  
Dodding-  
ton's case.  
S. C. S. C.  
cited Hob.  
171.

[ 15. If a man seised of the priory of Wells, and diverse lands, &c. pertaining to it, grants to another omnia terras & hereditamenta of the said priory, which lie in the city of Wells, and within the liberty and suburbs of the same city, though the prior was seised of mills, under one roof, and a certain rivulet run between the said mills, yet if one of the mills be within the city of Wells, and the other out of the city and liberties, both shall not pass, but only that which is within the city. H. 37 El. B. R. adjudged in the grant of the king, (the which, as it seems, is all one with the grant of a common person.) ]

Yelv. 82.  
S. C. by  
name of  
Pratt v.  
Moon.—  
6 Rep. 39.  
S. C. by  
name of  
Sir H.  
Finch's  
case.—Hob.  
175. S. C.  
cited.

[ 16. If a man grants 20 l. rent charge to another issuing out of the manors of E. C. P. and F. and the messuages, lands, tenements, and hereditaments of the grantor, situate, lying, and being in the parishes of E. W. and C. in the county of Kent, or elsewhere in the said county, to the said manors, or any of them any how belonging or pertaining. This grant shall not charge any land, but the manors, and not any which is not parcel, or belonging to the manors; for the sentence of the houses, &c. is not general, videlicet, all houses, but indefinite, and so no general including, and the word (or) without (or elsewhere) cannot make a perfect sentence, (without the words antecedent) M. 3 Ja. B. R. adjudged between Mone and Crosse. ]

[ 17. If the king grants to the Ld. Wentworth, the manor of Stepney, and also all our marshes of Stepney in Stepney, and all lands and tenements &c. in Stepney, and elsewhere to the said manor belonging. In this case, Pepper's marsh in Stepney shall pass, though it is not

not parcel of the manor, and the words [*and elsewhere,*] refer only to the manor, and the express general mention before, of all his lands in Stepney, shall not be confounded by this subsequent clause. Mich. 3 Ja. B. R. cited per Coke to be adjudged.]

[ 18. If the king has the manor of S. and N. in S. and both late parcel of the abbey of St. Albans, and he grants the manor of S. and all his lands in S. aforesaid (this was at large called Stanbridge) and all his other lands in S. or elsewhere, to the said manor late belonging. In this case both manors shall pass, and the *elsewhere* is a several and distinct clause by itself. 22 El. Robotham's case in the Court of Wards adjudged, cited per Coke. M. 3 Ja. B. R. ]

[ 19. If a man leases to B. Black Acre for 20 years, to commence at Lady-Day next ensuing, and after Easter ensuing, he recites, that whereas he had leased to B. Blackacre for 20 years, to commence at Easter last past, he grants the reversion of it, &c. Though here he mistakes the commencement of the lease, yet for the precedent certainties, that is to say, of the lessee, land, and number of years, it is a good grant. M. 14 Ja. B. adjudged, Casten and Withies. ]

Hob. 128.

Fo. 52.

[ 20. If a man has lands in the vill of M. called A. and B. and he leases all those lands in M. called A. and N. or by what name or title soever they be called; the land called B. does not pass; for this word (*those*) restrains it precisely to the name. P. 11 Ja. B. per curiam upon evidence at the bar, between Sir Edward Belling and Sir John Shirley. ]

[ 21. If a man leases his land by certain name, as Blackacre, in the parish of Mary Loades, in the city of Gloucester, his land which lies in Mary Loades shall pass, though it be not in the city of Gloucester. Because there a certainty before expressed. P. 15 Ja. B. R. per Curiam upon evidence. Robinson v. Butler. ]

[ 22. If the lord licences his copyholder for life to lease Blackacre in the tenure of J. S. for 5 years, whereas Blackacre is not in the tenure of J. S. but in the tenure of the copyholder himself; yet this is a good licence for the copyholder to lease Blackacre, inasmuch as there is a particular certainty by name before. Mich. 15 Ja. B. R. adjudged upon a special verdict, between Wallison and Bambridge. ]

[ 23. If a man grants a rent to B. out of all that manor of D. in the parish of S. and out of the land in M. where nothing of the manor or land lies in S. or M. and though this be granted out of (*all that*) which is a relative, yet it is a good grant out of the manor, in case of a common person. Hill. 8 Car. B. R. adjudged, per Curiam upon a special verdict, Ledbater and Mantell. ]

[ 24. If a man lease to another the meadows in D. and S. containing 10 acres, and in truth the meadows in D. and S. contain 20 acres, yet all the 20 acres shall pass. D. 6 and 7 E. 6. 80. 56. ]

[ 25. If a man lease 47 acres of meadow near F. whereas 15 lie in D. and 20 in E. and 15 in F. and in truth all lie in E. whether all pass, dubitatur. D. 6 and 7 E. 6. 80. 57. ]

Cro. C.  
546. S. C.—  
Jo. 435.  
S. C. by  
name of  
the vicar's  
choral of  
Litchfield  
v. Ayres.  
—Mar. 31.

[ 81 ]

\* Fol. 93.

\* Orig.  
(Liel)

[ 26. If a man seised of a rectory appropriate of the parish of D. grants to B. divers particular lands, being glebe, and the tithes of divers particular lands, with these general words, with all and singular profits, commodities and advantages, tithes personal and predial, whatsoever they be or shall fortune to be, belonging or appertaining in any wise to the said A. as parson appropriate of the said parish, as the tithes of pig, goose, lamb, wool, milk, calf, fish, swans, woods, and all other tithes whatsoever; and also all the tithes of the said glebe, (before granted) with all and singular the appurtenances, all which lately were in the occupation of one Margaret Peytoe, widow, deceased, and all other their rights, interest, title, commodities and profits in and to the same, which to the said A. doth belong, as parson, &c. though it does not appear, that Margaret Peytoe had the possession of any of the tithes appertaining to the rectory; (for it was not found by the jury that she had,) yet all the tithes shall pass which appertain to the rectory; for the words (all which last were, &c.) are words of suggestion or affirmation, and not of restriction or limitation; because the sentence is perfect before, and this commences in a new sentence, and not part of the first general sentence. Tr. 15 Car. B. R. \* between Swift and Aiers, adjudged per totam curiam upon a special verdict. Intratur. Trin. 12 Car. Rot. 426. ]

[ 27. And so it was held in the same case per totam curiam that if it had been found, that Margaret Peytoe had the occupation of any particular tithes, but not of all appertaining to the rectory, yet all had been passed by the said grant for the reason aforesaid. ]

[ 28. If A. \* the grandfather be seised of lands and tenements, called Heathers, and of other tenements called Bakers, and of other tenements called Wixes, all being in B. within the manor of C. and by his last will devises to G. his wife all his tenement and backside, containing by estimation 2 acres, called Wixes in B. for her life, and dies, and after B. his son and heir covenants by indenture to stand seised of those messuages, lands and tenements in C. commonly called or known by the name, and names of Weeks, alias Wicks, alias Weekes, his Heathers and Bakers, or by any of those name or names, or by any other name or names whatsoever, which were the inheritance of the said A. who is dead, and which were by him assured, granted, or conveyed, to or for the use of the said G. or were given or bequeathed to the said G. by the last will of the said A. and which now are in the tenure or occupation of the said B. to the use of himself for life, and after to the use of E. his wife, &c. In this case, there not being any tenement called Wicks, his Heathers, or Wicks, his Bakers, but one tenement called Heathers, and another called Bakers, and the said tenement called Wicks devised to G. as is aforesaid, nothing shall pass by this covenant, but only the tenement devised to G. For it was not the intent to pass several things, but only one thing, which had such several names, with alias dict. And when the words are with a relation, all those which were devised by G. no more shall pass than those; for this limits the general words. Trin. 13 Car. at Serjeant's inn, resolved per



per the 3 Chief Justices, scilicet, Brampton, Finch, and Dampport, upon reference to them out of the court of wards. This concerns Mr. Hanberry of the county of Southampton.]

[ 29. If a man seised of a messuage and farm, called *Rooke's farm*, in D. and of other lands in D. not parcel of the said farm, demises all to J. S. for life, and after, by other deed makes a demise by these words, he demises all that his farm, messuages, lands and tenements, sometimes called *Rooke's farm*, or by what other name or names soever the same be called, now or late in the tenure or occupation of J. S. or of his assignees or assigns, and all buildings, gardens, orchards, meadows, pastures, lands arable, woods, and underwoods, ways, waters, and commons, and other the appurtenances thereunto belonging universally, in as large and ample manner as the said J. S. holdeth, or at any time hath holden the same, habend<sup>r</sup> for 21 years, &c. In this case, lands not parcel of the farm shall pass, as well as the farm; for though there be a particular (scilicet *Rooke's farm*) mentioned, yet there are also general words of lands and tenements joined together with the particular farm, and therefore the words, *or by what name or names the same be called*, will refer as well to the general words, scilicet lands and tenements, as to the particular farm; for the word (*same*) refers to all before mentioned, and all are bound and circumscribed by the subsequent words, [*now or heretofore in the tenure of J. S.*] so that what land was in the tenure of J. S. was intended to pass, be it part of the farm or not. Mich. 24 Car. B. R. between *Vaughan* and *Longville*, adjudged upon a special verdict per curiam. Intratur. Trin. 23 Car. Rot. 1629. Another cause of the judgment was, because it is not found, that the farm was called *Rooke's farm*, but only, that it was once in the tenure of one *Rookes*; which may\* be true, and yet not called by the name of *Rooke's farm*; and then there not being any farm called *Rooke's farm*; the general words are only of effect and material in the grant. ]

[ 82 ]  
\* Fo. 54.

[ 30. If there be in the county of Somerset the vill of Street, and the vill of Walton within the parish of Street, and a man seised of land in the vill of Street, and of other land in the vill of Walton, all within the parish of Street. And he bargains and sells all his land in Street, and covenants to levy a fine, and levies it of lands in Street, and no mention is made in the indenture, nor in the fine of Walton; the lands in Walton shall not pass, because when Street is named generally, it is intended a vill, as well in grants as writs and pleadings. Trin. 4 Ja. B. R. adjudged between *Stoke* and *Pope*. ]

Mo. 250.—  
Sid. 10.

[ 31. So if he lease all his land in Street; the land within the vill of Street only shall pass, and not the land in the parish, because by *Street generally*, is intended a vill. Contra H. 39. El. B. R. ]

[ 32. If there be the parish of Rode, and also the vills of Rode, and *Herkwell* in the same parish, and the king is seised of the manor of Hide, and also of the tithes of the parish of Rode, and grants the manor of Hide in the parish of Rode, and also all his tithes in Rode, late belonging to the monastery of St James, (which is true)

Mo. 710.  
S. C.—2  
And. 124.  
S. C. by  
name of  
Sir G. Farmer's case.

In this case the tithes in Harkwell shall not pass, but only those which are in the vill of Rode; for *Rode*, mentioned in this clause, shall not be intended the parish before mentioned, but a vill. P. 41 El. B. R. adjudged in writ of error, between Whites and Harmor. ]

Cm. E.  
462 S. C.

[ 33. If the king grants to another *all waifs*, within his manor of *D.* he shall have all waifs which shall be in the lands of the franktenants in fee, as well as of the others; for all is parcel of the manor, and no prejudice is by it to the tenants. P. 38 El. B. R. in Higham and Beast's case. ]

Cro. E.  
462. S. C.

[ 34. But otherwise it is of a grant of a *free warren*; for the king cannot by his grant so charge the free tenants. P. 38 El. B. R. ]

Cro. E.  
462. S. C.

[ 35. If a *vicar* be endowed of the third part of all the tithes, coming and growing within the manor of *D.* in such parish, the vicar, by force of this, shall have the third part of the tithes of the frank-tenants, as well as of the copyhold tenants; for both make the manor, and no prejudice is to the tenants by it. P. 38 El. B. R. adjudged between Higham and Beast. ]

36. If a man grants to another a *common infra metas & bundas* of the vill of *D.* and part of the vill is several, and part waste land and common he shall have common in the common land, but not in the several. Br. Grants, pl. 125. cites 14 Aff. p. 22.

37. If a man grants common, *ubicunque averia sua ierint*, and after he manure 100 acres of land, and then becomes poor, so that he has no cattle, yet the grantee shall have common in the same 100 acres. But if a man grants to me common *quandocunque averia sua ierint*; and after he has no cattle, there the grantee shall not have common, per Marten which was agreed; and per Babbing: If a man grants common throughout his manor, the grantee shall not have common in the land sown, nor in his garden, and if it be *pro averiis suis* in *D.* yet he cannot common but only with cattle commonable, quod nota. And if a man grant common *ubicunque averia sua ierint*, and after he puts his cattle in his garden, the grantee shall have common in the same garden. Br. Grants, pl. 5. cites 9 H. 6.

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38. If lord and tenant be, and the lord grants his seignior for life unto a stranger, and the tenant attorns and dies without heir, and the grantee enters for escheat, he shall not have a greater estate in the tenancy than he had in the seignior; because the tenancy cometh in lieu of the seignior. Perk. 8. 96. cites 5 E. 4. 3.

A second  
grant of  
proxima ad-  
vocatio is  
void. D.  
35. pl. 29.  
in Marg.—Mo. 90.

39. During the voidance of a church, the patron grants *proximam nominationem, &c. cum prima & proxim. vacaverit*, the grantee shall not have this presentation, but the next. D. 26. pl. 165. Hill. 28 H. 8.

• Woods  
and under-  
woods com-  
prehend

40. Lessor bargained and sold to the lessee *all woods and underwoods in and upon the premisses*, and that it should be lawful for lessee to cut and carry away the same at all times during the term, per

3 Just.



3. Just. contra Dyer; lessee can cut but once, and per two against Dyer + *hedge-rows sparsim* do not pass, &c. See 3 Le. 547. — 3 Le. 30. Anon.

great timber trees and other wood.

10. 169. Hill. 3 Car. B. R. in case of HAYWARD v. FULCHER. Perk. S. 116. — *Thornes and hedgegroves do not pass by the name of woods in a gift, nor in an exception upon a lease.* Br. Done, &c. pl. 14. cites 14 H. 8. 2. per Pollard J.

41. A. demises 15 houses in B. to C. and names the 15 several tenants A. B. C. &c. A. enfeoffs D. of all those 15 houses in B. which A. demised to C. now in the occupation of, &c. and one of the occupiers names was omitted in the recital, yet the messuage passes. Mich. 32 Eliz. 3 Le. 235. Trapp's case.

42. Bargain and sale of woods &c. during life of the grantor, under a yearly rent, is no lease, and passes but one cut. See And. 7. Mo. 15. 3 Le. 7.

43. Lands given for the discharge of poor inhabitants of a parish of fifteenths and taxes, with a proviso that the rents should not be to the discharge of gentlemen's lands of the parish, but of poor men's only, the defendant being but a yeoman (though he had purchased some of the gentleman's lands, and sought to have benefit of the gift) was yet not allowed. Toth. 185. cites 43 Eliz. Buggs v. Stumpner.

44. King Henry the 8th granted *omnes decimas nostras granorum, &c. in Bury Sancti Edmondi, ac omnes alias decimas quas cunque infra Bury predict. quas elemosinaris monasterii predicti colligere solebat*, adjudged, that the relation ought to be expounded to the *ac omnes alias*, and not to the whole sentence. Trin. 2 Jac. Mo. 754. Baker v. Bacon.

Cro. J. 48. S. C. accordingly; so that the first grant is not restrained by the *quas*

*elemosinarius, &c.* — King H. 8. granted to J. S. the manor of B. and all his lands in B. and elsewhere in the county of Bucks *dicto manerio spectant*. The words *dicto manerio spectant*, extend but to land in the county of Bucks, and do not restrain the words, and all his lands in B. which are distinct by themselves. Cro. J. 50. Dr. Atkins v. Longvill,

45. A. seised of the manor of S. and of other lands in fee in S. and of a term of years in other lands in S. gives, grants, bargains, sells, enfeoffs and confirms to B. and his heirs the manor by special name, and the other fee simple lands by special name, and by general words *all other my lands and tenements whatsoever in S.* The court was at first divided; but afterwards it was by all adjudged, that the term passes not, by reason the habendum was to B. and his heirs, so that the intent was apparent, that nothing should pass but what the heir might take. Mo. 832. Edwards v. Denton,

Godb. 183. S. C. says, that A. covenanted in the indenture, that he was seised of the premises in fee (which was left out in the verdict. and that

the court was divided. Trin. 10 Jac. and so leaves the case a quere.)

46. Demise, grant, and to farm let, all his woods and trees; adjudged, that no property passes in the trees by these words, though there were words *with liberty to fell and sell*; for those words make no grant of property. Trin. 10 Jac. B. R. Mo. 831. Billingley v. Hercy.

2 Buls. 5. S. C. but the words there are, with liberty to fell and cut down,

and there is no mention of the word sell,

47. A. demised a garden plot to B. for 30 years, during which lease he leases it to C. for years, the first lease expires, C. erects

3 houses on part but other part remains as garden plot, during this lease, he leases to D. by name of *all that piece of ground or garden-plot late in the tenure of B. and now in possession of C.* resolved, that the houses shall pass. Mich. 20 Jac. B. R. Palm. 319. Burton v. Brown.

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48. A. was a copyholder for life of one of the king's manors, paying 15 s. rent per annum, the king granted to W. R. inter al. *omnia messuagia, terras, tenementa, redditus, reversiones, servitia & hereditamenta sua in manerio predicto, viz. totum illud annualem redditum quindecim solidorum & alia servitia exeuntia de terris A.* (and so diverse other rents of other copyholders) *ac totum illud messuagium & sex virgatas terras in manerio predicto de D. in tenura J. D. habendum, &c. omnia predicta messuagia, terras, tenementa, redditus, reversiones servitia & hereditamenta in D. predicta.* to the said W. R. and his heirs, per tot. cur. the land of the copyholder is not conveyed by this patent; for here is *no land granted*, but the rents and services of A. which is intended freehold, and there being no such, the grant is merely void. Mich. 1 Car. Cro. C. 21. Castle v. Hobbs.

49. Licence to hunt and kill deer does not give the deer. Lat. 270. Mich. 2 Car. in case of Sacheverel v. Dale.

50. If one that has several fishing, grant *liberam piscariam*, the grantee has free-fishing with the grantor; but if he grants *piscariam suam* without saying more, the intire piscary passes. 2 Sid. 8. Mich. 1657. B. R. Alderman of London v. Hafling.

51. *Custodiam parci & arborum vento prostratarum*; the trees do not pass; but had it been *custodiam parci & arbores vento prostratas*, grantee might take wind-falls. Hard. 307. Mich. 14 Car. 2. Scacc. in case of Walter (Sir William) v. Travers. Arg. Het. 15.

52. Grant of lands and *mines*, and there are mines open; the mines open only pass. 2 Lev. 185. Hill. 28 & 29 Car. 2. B. R. Asty v. Ballard.

### (P. 2) \* Soil passes. By what Words.

1. **NOTE**, that it was said, that if a man grants to another *to dig turves* in D. in 100 acres of land there, and to carry away at will, by this the soil passes, so that if he be ousted he shall have assise of the soil, which is not law; for the grantee may bring assise of common of turves and recover, and not bring the assise of the soil; quod nota. Br. Feoffment de terre, pl. 21. † cites 5 Aff. 9.

It shall not pass the land, because but part of the profit is given; for trees, mines, &c. shall not pass. Co. Litt. 4. b.

Per Coke  
Ch. J. Roll.  
R. 321.  
cites 45.  
E. 3.

2. A man seised of lands in fee, by his deed grants to another and his heirs *the profits of those lands*, and makes livery *secundum formam chartæ*, the whole land itself does pass, for what is the land but the profits thereof; for thereby vesture, herbage, trees,

trees, mines, and all whatsoever, parcell of that land, does pass. Co. Litt. 4. b.

3. The soil will pass by the words of *baillorie of salt*, or of *omnes boscos suos*, or of *omnes boscos suos crescentes*, or of *20 acras alneti*, *omnia prata sua*, *omnes brueras suas*, *omnes juncarias mariscos suos*, *ruscarias*, *stagnum*, *gurgis*, *minera*, or *fedina plumbi*, fould course. Co. Litt. 4. b. 5. a. 5. b. 6.

4. But by the words *vestura*, or *herbagium terræ*, the lands will not pass. Co. Litt. 4. b. 5. a. 5. b. 6. *Vestura terræ, or herbagium*

*terræ*, granted by deed to another and his heirs, and livery of seisin made secundum formam chartæ, will not pass the land itself; but corn, grass, underwood, sweepage, &c. 'twill pass, and the grantee shall have an action, *quare clausum fregit*. Co. Litt. 4. b.——If a man grants *vesturam terræ* for term of life, 'tis a grant of the land for term of life; for the vesture is the profit of the freehold, and to have the profit of the freehold, and the freehold is all one. Kelw. 118. pl. 60.——One may have the *vesture* and another the soil, per Clerk, and by the Lord Ch. Baron, he that has *vesturam terræ*, cannot dig the land; and if many have a *meadow together*, viz. so b: divided among them every year by lots, how much each should have in this, or that place, and so to change every year according to the lots, they have not a freehold, but only *vesturam terræ*. Trin. 30 Eliz. Ow. 37. Anon.

He that hath *herbage* may inclose but he that hath *reasonable herbage*, cannot. Arg. Godb. 417. cites Kelw. 159.

Though the owner of a park may dispark it, yet he that has only the herbage of it, cannot. Arg. Godb. 419. cites D. 71.

5. There is a difference between *vestura* and *prima vestura*; [ 85 ] for by *vestura* perchance the soil passes; but by *prima vestura* no soil passes. But per tot. Cur. if the grant be *de prima vestura usque ad* a day certain, as *Lammas, Mich. &c.* there the grantee shall have the soil also for the time, and feed or mow it; but where 'tis *prima vestura* only, as soon as he has cut the grass, his interest is gone. Pasch. 19 Jac. B. R. Palm. 174. Bishop of Oxford's case. Vestura passes the soil in the grant of a common person, but *prima vestura* does not, and is but

an interest in the first cutting or taking of the grass. And all agreed, that by *prima vestura* from such a day to such a day certain, the grantee shall have the soil, and mow or feed it as he pleases. Cited by Sir Francis North. Arg. Vent. 393. as a case Pasch. 19 Jac. between Collins and Bishop of Oxford.——Properly, unless other matter be shewn to prove the contrary, the freehold is in him, that has the first tonture; for that is the most beneficial part of the year, and those, who have the after pasture, have but the profits in nature of common. Pasch. 10 Car. B. R. Cro. C. 362. Ward v. Pettifer.

6. *Separatis piscaria* will not pass the soil. Co. Litt. 4. b.—— But by Livery made secundum formam chartæ cannot enlarge the grant. *Ibid.* But by grant of *piscary*, the soil passes;

for by 40 E. 3. 45. monstraverunt lies of a *piscary*, which implies, that it contains land and demesne; for otherwise distress cannot be taken in it, as is noted; Pl. C. 154. a. Dav. 55. b.

7. If a man grant *aquam suam*, the soil shall not pass; but the *piscary* within the water passes therewith. Co. Litt. 4. b. Dav. 55. b.

8. If a man gives *his woods*, the soil passes; but if he *leases his land*, except *woods and underwoods*, the soil is not excepted, but only the trees. 14 H. 8. 2. So of a manor. B. Grants, pl. 167. cites 14 H. 8. 1.

9. A man has a *warren*, and makes a *lease of the game*, the soil does not pass. Mich. 13 Jac. Roll. R. 259. Rice v. Wiseman. Grant of a *warren* in a park does  
not pass the soil. 3 Buls. 82. Rice v. Wiseman.——Roll. R. 259. S. C.——If I have a *warren* in my land, and I demise my *warren*, excepting the soil, the soil doth not pass; per Coke 3 Buls. 82.

10. By the lease of a *weare*, the soil passes; because he cannot amend it without the soil; per Doderidge J. Roll. R. 259. cites 7 E. 3.

11. Grant of the bishop of Winchester to the corporation to build in the vacant places, and inhabit there, is but a covenant or licence, and does not pass the soil; but the soil, and consequently the houses, are the bishops, though the grant be confirmed by the dean and chapter. Mich. 3 Car. C. B. Hct. 57. Major and Com. of Winchester's case.

(P. 3) What passes by what Words. *Words of like Signification.* What Things or Interest.

1. LESSOR grants, that lessee shall have *as great commodity of the land, as lessor might have had*, yet lessee cannot dig the land for a mine of coal or stone; because the law forbids him to dig the land. Hill. 23 Eliz. C. B. Godb. 5. cites 17 E. 3.

Br. Grants,  
pl. 120.  
cites 14 H.  
8. 1, 2.—S.  
P. Hob. 304.

2. By a grant of *all trees, apple trees* will not pass; yet if it be of *all trees, cujuscunque generis*, naturæ, nominis, aut qualitatis, then they will pass. Arg. Pasch. 3 Car. B. R. in case of Whittle v. Weston.——Godb. 398. cites 14 H. 8. 2.

3. A bishop granted all his *farms and hereditaments* of W. in W. in the county of Somerset.——In W. he had a rectory, which *extended into the county of D.*——Per Cook a counsel, the word [farms] does not pass the *rectory*, unless the rectory was in lease before; but he agreed, that [hereditament] is sufficient to pass the rectory, and because the rectory extends into Devonshire, it seems, that so much, as lies in Devonshire, shall not pass by the grant. Mich. 24 Eliz. Mo. 176. Robert's case.

[ 86 ]  
Cro. E.  
905. Mich.  
44 & 45  
Eliz. B. R.  
S. C. is, that

4. A. grants to B. *medietatem manerii de C.* and 8 rood of ground in C. and *moreover all other lands and tenements in C.* per Popham, only a moiety of the manor passes. But per Gawdy, Fenner, and Yelverton, all the manor passes, and the jury found accordingly. Noy. 49. Moyle v. Ewer.

A. granted the *moiety of the manor of C. and all his lands in C.* it was urged, that that extended but to other lands, not parcel of the manor of C. and not to pass the whole manor, and if he had not any other land, those words were void, and of that opinion was Popham. Ibid. says, this was in regard the deed was old, viz. in the 3 H. 7. by which A. claimed, and on which a rent of 3s. 4d. was reserved; and the whole manor of the grantor had been enjoyed under that grant, and the original grant expressed a moiety, because the original grantee had a manor in that vill, and the prior (the first grantor) another manor, which perhaps were anciently but one manor, and divided after; and so the manor of the prior was called the moiety of the manor. For these causes, Gawdy and the other justices held, that the entire manor should pass; but they advised the jury, if the case was so, to find it specially; but the jury gave a general verdict.——  
A. seised of a manor, grants *partem manerii*, the moiety passes; per Coke, D. 91. pl. 10. Marg.—If A. grants *four parts of his manor*, it shall pass four parts of five, and not all. Arg. Hill. 1650. Sti. 250. in case of Bawley v. Lowdall.

5. A. granted *omnes boscos arbores, &c. ad tunc crescent, &c. simul cum omnibus boscis, &c. quæ ad aliquod tempus extunc imposterum forent crescent, &c.* in & super illis partibus forestæ, &c. except the land and soil of the same wood.—Resolved, that the grantee has an inheritance, as profit apprender in alieno solo, and that

that the soil remains to grantor. Pasch. 8 Jac. C. B. 8 Rep. 137. Barrington's case.

6. A. granted *all his woods growing upon all that his manor of Cleave*, viz. upon three coppices, A. B. C. The viz. does not restrain the grant because of the word (all). But if the word (all) had not been, the viz. had restrained. Hob. 276. cites Hill. 12 Jac. Stuckley v. Butler.

7. By the grant of an *house*, a house, which is *pulled half down*, will pass. Mich. 14 Jac. B. R. Roll. R. 430. Slingsby v. Barnard.

8. *One thing shall enure as another.* See Maxims.

### (P. 4) What Words give what Estate.

1. **I**N grants, a *reversion* shall be taken for a *remainder*. 4 Le. 76. Hill. 29 Eliz. C. B. In case of Lord Mountjoy v. Barker.

2. By grant of *totam terram*, which A. held in dower, the reversion shall pass. 4 Le. 77. Hill. 29 Eliz. C. B. cites 38 E. 3.

3. *Remainderman in tail grants all his estate* to W. habend' all his estate to W. *during the life of C. (tenant in tail)* remainder to the king; after the grant to W. of all his estate, he cannot limit any remainder of it to the king. 2 Rep. 51. b. Pasch. 39 Eliz. Scacc. in Sir Hugh Cholmeley's case.

### (P. 5) Grant by Recital of a Thing which is not, yet Good.

1. **D**EED of grant was set forth, by which H. the defendant had granted to the plaintiff and his heirs *twenty load of wood, of which the plaintiff had sixteen of the gift of Richard my father*, and shewed only the deed of the defendant, and not of his father who granted sixteen load, and yet good; for it is a good grant of twenty load by the plaintiff, though his father never granted sixteen. Quod nota. Br. Grants, pl. 69. cites 20 Aff. 8.

2. If the K. grants to me *the office of steward of the constable of the castle of D.* with a fee, &c. where there is *no such office*, the grant is void; per Choke. Br. Grants, pl. 94. cites 8 E. 4. 6.

3. A. became surety for B. the defendant to one C. *in 100 l. bond*, and B. gave A. a *counter-bond to save him harmless, from a bond of 200 l.* so that by the mistake, the counter-bond was void in law, yet the same was relieved. Toth. 222. cites 11 Jac. Griffin v. Sayer.

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(P. 6) Who shall take by it; One not Party to the Deed.

1. **A.** *Seised of land joins in a feoffment with B. reserving rent to them and their heirs, and the feoffee grants, that it shall be lawful for them to distrain for the rent, this is a good grant to both; because B. is party to the deed, and the clause of distress is a grant to A. and B. But if B. had been a stranger to the deed, he had taken nothing. Co. Litt. 213. a. b.*

(P. 7) To two several Persons, having several Interests. Enure How.

1. **I***N replevin the case was thus: B. held 50 acres of A. as of his manor of Swarden, by fealty, and 4 s. 7 d. rent, &c. And C. held 47 acres of A. &c. by fealty, and 3 s. 4 d. rent. A. by indenture between him the said B. and C. reciting the said several tenures, gives, grants, &c. and confirms the said rents, services, and seigniories to B. &c. and their heirs, to the use of them and their heirs, &c. And in that case it was resolved, that it is an extinguishment of the moiety of every of their tenures; and for the other moiety they held one of another. And the avowant had judgment accordingly; for there was a cross tenure between them for the one moiety, and that shall not move as a release, reddendo singula singulis, &c. Dyer 319. See and note 11 H. 7. 12. a. 39 H. 6. 2. 49 Ed. 3. 40. In the principal case there is not an equal benefit to every of them; for it was said, if the acres and rents had been equal, that then it should have been extinguished in all. Noy. 113. Goldwell v. Navenden.*

2. *And Cook put this report-case; A. lessee for life, the remainder to B. for life; the lessor gives, grants, and confirms to them and their heirs. A. shall have all the possession during his life, and afterwards B. shall have all the possession during his life, and one moiety then executed, and after the death of B. the other moiety to A. in fee. Noy. 113. Goldwell v. Navenden.*

(Q) In the Occupation. [*what is sufficient misrecital.*]

[ 1. ] **I***F a man grants all his lands called D. in the tenure, occupation, or possession of J. S. and J. S. has parcel in D. in lease, and parcel not, but he depastures it with his beasts, all shall pass by the grant; for if he has the occupation or possession, by wrong or right, it is sufficient. P. 12 Ja. B. R. agreed between Deckwray and Befs. See this, Co. Litt. 4. b. ]*

[ 2. 59



[ 2. So though the parcel, which is not in lease to J. S. be inclosed (being a wood) but the fence is cast down in several places, by which the beasts of J. S. are wont to escape usually and feed in the wood, this is a sufficient occupation to make it to pass; for the taking of the herbage is a sufficient occupation. P. 12 Ja. B. R. per Cur. between Dockray and Befis. ]

[ 3. If a man lease to B. the herbage of his wood, and after grants all his lands in the tenure, possession, or occupation of B. the wood shall pass by this grant; for the particular possession and occupation of B. is sufficient in this case. Co. Litt. 4. b. ]

[ 4. A. seised in fee of two houses in Andover, whereof the one is in the tenure of Hitchcocks, and the other in the tenure of Bincant and Note, and this, which is in \* the tenure of Bincant and Note, is the corner house, but is contiguous, adjoining to the other house, and after A. leases for years to B. the house in the tenure of Bincant and Note, and lessee covenants to rebuild it, and after A. devises to C. in fee his corner house in Andover, in the tenure of Bincant and Hitchcock, upon condition to be new built, according to the covenant, in a lease made to B. and dies. This is a good devise of the corner house, in the tenure of Bincant and Note; for the corner house is a sufficient certainty to pass it without more; and therefore though the other addition (in the tenure of Bincant and Hitchcock) be false, as to Hitchcock, yet this shall not vitiate the devise, and the clause (provided that it be rebuilt according to the covenant in the lease made to B.) shews the intent of the deviser to pass this house, and the other house, which is contiguous to it, shall not pass. Trin. 13 Car. B. R. between Blake and Gold. Adjudged per Curiam upon a special demurrer. Intratur Hill. 11 Car. Rot. 752. ]

I. A. was possessed of a term in Cruel Grange, whereof part, viz. Hobsfield, came to B. in possession, for part of the term, and to C. in reversion for the residue of the term; a rent-charge was granted out of Cruel Grange, *nuper in tenura A. & modo in tenura & occupatione C.* This did not charge Hobsfield but it charged the rest, and so there was no repugnancy; per Hobart Ch. J. Hob. 171. cites it as Ognell's case.

of his term of 30 years, and Hobbesfield to B. for 23 years part of the said term, and afterwards A. granted to B. and C. and another all his interest in the said Grange, during the whole term of 30 years; and after the reversioner granted a rent out of Cruel Grange heretofore in the tenure of A. and then in the tenure of C. and his assigns; it was held, that this rent issued out of no more of Cruel Grange, than was then in the tenure and occupation of C. and his assigns, for those words restrained the general words preceding. Underhill v. Ognell.——4 Le. 115. accordingly; though it was objected per Walmfley Serjeant, that the words in the grant of the rent (*in tenura & occupatione C.*) should be construed disjunctive, quasi *five*, and then the close called Hobbesfield was in tenura of C. though not in the occupation of him; and though the grant was *parcipendum de omnibus terris, &c. quibuscunque vocat Cruel Grange, &c. nuper, &c.* (as before) yet it did not charge Hobsfield. Ognell. v. Underhill.——4 Rep. 50. S. C. accordingly.

II. Plaintiff demanded 40 acres; the evidence was, that Henry VIII. by letters patents gave the plaintiff the manor of New-Hall, and all the lands in the tenure and occupation of J. W. and before demised to J. S. and in the parish of W. and in truth the 40 acres were in the possession of \* J. W. but never were demised to J. S.

Fo. \* 55.

Cro. C. 447. 473. S. C. by name of Blague v. Gold.——Jo. 379. S. C.

And. 178. reports it thus: viz. That A. granted part of the lands (as Bl. acre) to C. for 24 years, part

S. P. cited by Atkins, Justice. Hill. 26 & 27 Car. 2. C. B. 2 Mod. 3. in nor



case of the  
King v. Bi-  
shop of Ro-  
chester and  
Clerk.—  
Cites And.  
148. Hey-  
wood's case.  
—Le.  
120. ad-  
judged good  
against the  
Trapp's case.

nor in the parish of W. per Cur. the 40 acres did not pass; for the circumstances of the deed are not true as to the demise to J. S. or the parish, but both were false; but if the said lands had had a *special name* in the letters patents, it had been well enough. And per Anderson, if upon the particular it had appeared that the demandant had *paid his money* for the said 40 acres, perhaps, they had passed. Hill. 29 Eliz. C. B. 3 Le. 162. Heidon v. Ibgrave.

in a grant by King Edward VI. the Queen v. Lewis and Green.—3 Le. 235. Arg. Bridgm. 101, 102. cites 2 E. 4. and D. 292. b.—

[ 89 ]

The words  
of the new  
grant were,  
all the said  
messuage or  
tenement,  
with the ap-  
purtenances to

the same belonging or in any wise appertaining, by the said B. now occupied, and all other rooms with the same now occupied, and now in the tenure of the said B. between the messuage of J. S. East, and J. D. West, and so much in length. The jury found, that the two chambers were not in the tenure of B. and that the lower story was within the bounds described, but not those two rooms; adjudged, that the two rooms did not pass. Cro. E. 473. Pasch. 38 Eliz. C. B. Hunt v. Singleton.

IV. If one give *all his lands in D. in the tenure of A. and B.* and he hath lands in D. but not in their tenures, yet all the lands pass; per 2 J. Mich. 11 Jac. C. B. Godb. 236. in case of Clay v. Barnett.

'Tis to be  
observed,  
that though  
the words  
(which were  
in the tenure  
of J. S.)  
when they  
are in one  
and the  
same sen-  
tence, may  
be con-  
strued to be  
a restriction,  
yet in these  
words, viz.  
all which  
were, &c.  
the word

(all) so disjoined cannot be a restriction, but an explanation, and so it was adjudged a good grant, Ibid.—Mar. 32.—\* It should be Pl. C. 191.

V. Grant of 78 acres of glebe land, with all profits, &c. and of all tithes, prædial and personal, and of the tithes of 78 acres of glebe land, *all which were in the tenure of J. S. &c.* Some part only was in the tenure of J. S. It was held by all the justices, that the grant was good, and not restrained by the first words, and the words (which were) are only a restriction when the clause is general, and is all but one and the same sentence, and not ended, or restrained before the end of the sentence, as in the cases of 2 E. 4. 29. Pl. C. \* 391. in case of WROTHESLY v. ADAMS, and 395. in the E. of LEICESTER's case. But where the clause is not in *one entire sentence*, but distinct and disjoyned from the other, as here, there cannot be any restriction, and being in the case of a common person the addition of a false thing (viz. *false possession*,) shall never hurt the grant. Trin. 15 Car. B. R. Cro. C. 548. Swift sub chantor, &c. of Litchfield v. Eyres, &c. lessees of Peyto.

### [ (Q. 2) Misprision of Dates. ]

This lease  
was adjudg-  
ed good;  
because it  
was for 30  
years, then  
next im-

[ 5. If a man lease for years by deed, bearing date the 30th of August, and after, within the term, the lessee, reciting that this lease bears date the 6th day of August, makes a new lease to a stranger for years, to commence after the end of the first lease and indenture; though the date of the first lease be mistaken, so that there

there is not any such lease, as is recited, yet this second lease is good, and shall commence after the first lease ended. D. 2 & 3 Ma. 116. 70. adjudged. Same case in Benlowes. M. 2 Ja. Rot. 648. It seems, that by this is intended, that this shall commence in interest after the expiration of the first lease, but it seems, it commences in computation immediately.]

mediately after the demise and indenture of the first lessee fully ended and expired, and the

words were not, to have and to hold for the said years, &c. after the said demise to the first lessee fully ended, &c. so that the word *said* was omitted. Bendl. 38. pl. 71. S. C. by the name of Mount v. Hodgken. — And. 3. pl. 5. MOUNT'S case. S. C. Trial, (D. f.) pl. 6. Estate, (Z. a) pl. 8. — Sid. 461.

[ 6. If King H. 8. in 31 H. 8. had leased land to another for 21 years, and after had granted the reversion to a bishop, and the bishop, reciting all the lands contained in the letters patents of the king, and the land itself before leased by name, and reciting the letters patents of H. 8. says, that whereas H. 8. by his letters patents dated the 20 H. 8. (when the letters patents were dated 31 H. 8.) and also misrecites the date in the day of the demise of them, and grants all the lands, tenements, pastures, and meadows to the first lessee for certain years, *post expirationem hujusmodi litterarum patentium*; in as much as the date is mistaken, and the commencement is referred to the expiration of the said letters patents, and not of the term, it seems, that the lease shall commence presently, and so the first lease shall be surrendered by acceptance of the second lease. Dubitatur. H. 38 Eliz. B. R. between Halfwell and Ayleworth. ]

Sid. 461.

[ 90 ]

[ (Q. 3) Misrecital of the Estate of Grantor. ]

[ 7. Baron and feme, seised of a reversion in fee in right of the feme, recite, that the feme had title of dower in the said land, and after grant all their estate in the said third part of the land, and after covenant to pass further estate of the premises, and then levy a fine. In this case, though the recital be that she has title of dower, where she has not any, yet this is not any parcel of the grant, and therefore shall not limit the grant, but a third part of the reversion, whereof she is seised, shall pass. M. 17 Ja. B. adjudged between the Earl of Clanrickard. ]

Hob. 273. E. of Clanrickard v. Lord Lisle.

8. If a man leases to baron and feme for their lives, and after he grants the reversion of the land, which the feme held for term of her life, to a stranger, the grant is not good; for he had no such reversion. So where a man leases to two men for life, and after grants the reversion of one, this is not good; per Cur. Br. Grants, pl. 137. cites 13 E. 3. and Fitzh. tit. Grant, 63.

S. C. cited Trin. 22 Jac. C. B. Winch. 96. and cites Br. Grant. 65.

9. A. grants to B. all his house, and two yard lands in C. in the possession of D. two acres were not in the possession of D. but all the rest were. Per two J. against two, the acres passed; & afterwards absente Popham, judgment was, that they did pass. Pasch. 31 Eliz. C. B. Cro. E. 299. Bartlet v. Wright.

(Q. 4)

(Q. 4.) Who shall take by Words not certain; in respect of the Consideration.

1. **I** F a deed be made in this form, viz. *Noverint universi per presentes nos de communi assensu, &c. dedisse, &c. W. H. be- redibus suis unum toftum quo jacet, &c. habendum, &c. reddend. nobis & successoribus nostris xii d. et pro hac concessione predict. W. H. renunciavit totam communiam cum diversis averiis nostris, &c.* these words in the deed (*renunciavit totam communiam suam*) shall have relation to the abbot and covent, in consideration of the premises in the deed; tamen quære. Perk. S. 179. cites 9 H. 6. 35.

2. If a man by his obligation acknowledges himself to be indebted to the obligee in 20 quarters of corn, to be delivered unto the obligee at such a place, &c. and to perform the same, the obligor acknowledges himself to be bound in 100 s. and doth not say to whom he doth acknowledge himself to be bound, in this case it shall be taken, that he is bound to the obligee, in consideration of the premises of the obligation. Perk. S. 180.

(R) In what Cases a Grant shall be void for Uncertainty of the Thing.

•D. 91. pl. 10.—Mo. 382. S. C.—Cro. J. 262. —Or for so much as they are

**[ 1. ]** F a man seised of a manor grants to another *all his trees growing upon the manor which may be conveniently spared*, this is void for the uncertainty; for it cannot be reduced to any certainty. Trin. 15 Jac. B. between Stukeley and Butler, per totam curiam \* 1 Ma. 91. 10 Da. 1. Tan. 36. ]

reasonably † worth, it is void. 2 And. 142. cites D. 91.—Arg. 2 Roll R. 356. cites S. C. and adds, that if he had said, according to the opinion, or by appointment of J. S. it had been good.—D. 91. pl. 11. acc.—But if a man covenants or grants that J. S. may take such trees as may conveniently be spared without prejudice, &c. it was held by Hobart, that this being but a covenant or grant executory, J. S. may take trees by force thereof, and justify by specially averring that they may be spared, and put himself upon the jury. But in the case of a bargain and sale, it must take effect and change the property presently and at once, or inchoative, depending upon somewhat that shall reduce it to its full effect, and which when done shall make the grant good ab initio. Hob. 174. Stukely v. Butler.

†[91] 2. If a man grants to me *common*, and does not say in what place, the grant is void, per Paston, which none denied. Br. Grants, pl. 5. cites 9 H. 6.

3. If lord and tenant be of three acres of land by fealty, and 12 d. and the lord grants the services of a third acre unto a stranger, it is a void grant, notwithstanding that it be by fine. Perk. S. 67. cites 7 E. 4. 25.

Br. Patents, pl. 21. cites S. C.

4. If a man grants corody, or estovers to another, without shewing what in certain, the grant is void for the uncertainty, per Yelverton. Br. Grants, pl. 52. cites 9 E. 4. 11.

5. A man cannot give a deer in his park, but the gift is void; for they are feræ naturæ; nevertheless if it be a deer known, as white

white deer, or black deer, *where there is no other but this one*, or only one hart among them, and he gives this, it is a good gift, per Brian Ch. J. quære if there be a diversity, it seems not; for *he is fera natura*, notwithstanding he is known by his colour or the like. Br. Done, &c. pl. 34. cites 18 E. 4. 14.

6. If an abbot makes a grant by such words, viz. A. D. abbot of such a place grants *quandam annuam pensionem* ad J. D. ad rogatum J. de Exon illam pensionem, *quam idem J. de Exon habuit*, pro termino vitæ suæ in festo natalis Domini & pasch. *percipend. quousque sibi de competente beneficio fuerit provisum*, &c. these words, &c. (*quo usque sibi*) shall have relation unto the grantee. Perk. S. 178.

7. A \* gift to A. or B. is void for the uncertainty. Godb. 93. <sup>So of a grant or gift. Br.</sup> in case of Leeds v. Crompton.

Grants, pl. 172. cites 11 H. 7. 13. — 4 Le. 58. cites S. C. — 2 And. 103. — So to † one of the children of J. S. he having four. 2 And. 103. cites 7 E. 4. 39. — † Br. Done, &c. pl. 31. cites 11 E. 4. 2. S. P. — But a gift *omnibus filiis* J. S. without other name is good. Br. Done, &c. pl. 17. cites 37 H. 6. 30. — But grant to two et *heredibus* is void. 1 Rep. 85. a. — Perk. S. 181.

8. If a man levies a *fine of 15 acres of his manor of D.* it is a good fine; and yet it is not certain, which acres pass. Pasch. 7 Eliz. Arg. Mo. 82. in case of Bullock v. Burdet. <sup>So a fine of 20 acres, where the conusee had 100 acres, is good, and the conusee shall choose. Mo. 102. in Calthrop's case.</sup>

9. So if a man seised of 40 acres makes a *feoffment of 20 acres* to the use of himself and his heirs, and of the other 20 to the use of his son and his wife in tail for a jointure, this is good. Arg. Mo. 82. Pasch. 7. Eliz. in case of Bullock v. Burdet. <sup>But a feoffment of 20 acres *versus orientem* is void for the uncertainty. Arg. Litt. R. 217. Mich. 4 Car. cites D. 281. b. Bullock's case.</sup>

10. So covenant to stand seised of 20 acres, in consideration of marriage to be had with his daughter, &c. for her jointure, is good, notwithstanding the statute of inrollments. Arg. to which Walsh J. agreed. Pasch. 7 Eliz. Mo. 82.

11. But if A. seised of land of 500 l. per annum, covenants to *assure lands of 100 l. per annum* for jointure, and makes feoffment of all his lands to the use of the indentures, it is void for uncertainty. D. 280. b. 17. Marg. cites Kelway. 84. b. &c. So if A. covenant to stand seised of 100 l. per annum of the land ut sup.

12. A man seised of 100 acres makes \* *feoffment of so much, as is worth 10 l. per annum*, it is void for the uncertainty of land, and the value. Mich. 4 Car. Arg. Litt. R. 217. cites D. 281. Bullock's case. — † But says, it is otherwise in *limitation of uses*. <sup>It is void even in a covenant to stand seised. Agreed Litt. R. 307. Anon.</sup> Ibid. — And so by *devise*. Ibid.

cites it so adjudged in case of Thomas v. Rice. — D. 280. b. Marg. — \* 3 Justices said no more shall pass than the place itself where the livery was made, and if assignment of 10 l. land be made at a time after, yet it will not amend the case; but it seems by Coke and Doderidge J. that if the *assignment be made before the livery* it is good but otherwise not. Roll. R. 187. Pasch. 18 Jac. B. R. Woodhouse v. Futter.

† [ 92 ]

13. If the king grants the *moiety of a yard land, in a great square*, without certainty of the part, or name, or how bounded, or any certain description, it is void; but if a common person <sup>If the king has 100 acres in D. and makes</sup>

he grants  
20 acres of  
the land in  
D. without  
any describ-  
ing them  
by the rent  
or occupa-  
tion, or  
name, &c.  
the grant is  
void, and  
in the case  
of the king

makes such grant, it is good enough, and the grantee may make his *election*, where, &c. and by such choice executed, the thing shall be reduced to a certainty, and if such grant be by common person to a *corporation*, the corporation shall not make their *election by attorney*, but after they were determined what part to take, they should make a special warrant of attorney reciting the grant to them, and in which part of the said waste their grant should take effect, east, west, &c. or by buttals, &c. according to which direction the attorney is to enter. Trin. 27 Eliz. Le. 30. Sir Walter Hungerford's case.

the patentee shall not have his election as he shall in the case of a common person. But in the king's case if the 20 acres are described either by *abuttals*, or by *name certain*, in the particular it is good demonstration, which 20 acres shall pass. 12 Rep. 86. Stockdale's case.

14. Grant of *all the wool, which shall grow upon the sheep, which he shall buy hereafter*, is not good but void. Hob. 132.

15. A *copyhold* was granted to A. and his son; if he has but one son it is good; but if he has several sons, and does not demonstrate which of his sons shall have it, the grant is void for the uncertainty. Mich. 12 Jac. Cro. J. 374. Winkmore's case—cited there in case of Cob. v. Betterton.

16. *Fine* was levied to uses contained in an indenture, in which was contained, that the conusees should be seised of *so much land as should be worth 30l. per annum* to the use of the wife, whom he intended to marry, *to be assigned and set out in several by J. S.* And adjudged that in as much as no assignment ever was made, this was void as to the feme; but otherwise if an *assignment*, or valuation had been made. D. 280. Marg. pl. 17. cites Pasch. 3 Car. C. B. Thomas v. Morgan.—And that she cannot enter, and be tenant in common with the others, to whose use the residue of the land was limited; but otherwise it had been, if they had made valuation of the land. Ibid.

17. One possessed of a *lease* for 2000 years grants the land to A. and his wife, *without mentioning any term*, to the use of B. for life, and the heirs of his body, and in default of issue to the use of B. for 1800 years, the first limitation is void for uncertainty. Trin. 1712. 2 Vern. 684. Kirsley v. Duck.

## (R. 2) Who shall take by the Words.

1. FATHER has issue *bastard and mulier* both named *John*, and he gives to his son *called John*; the bastard shall take; but if to his son *John*, the mulier shall have it. Hill. 29 Eliz. Mo. 230. in Fanshaw's case.

\* *Primogenito proli*, &c. but at that time (of the lease) B. and M. had no issue,

2. In an ejectione firmæ, upon issue joined, the case in a special verdict was, that a lease by indenture was made by A. to B. and M. *his wife & \*primogenito, habendum to them, & diutius eorum viventi successive* for term of their lives, and then they had issue a daughter: the question was, if the daughter had any estate; and three justices held that she had no estate, because she was not

in



in being at the time of the lease made; and a *person*, that is *not in esse*, cannot take any thing by livery, for livery ought \* to carry a present estate, where the estate is not limited by way of remainder, 18 Ed. 3. 3. 17 Ed. 3. 29 and 30. adjudged; but it was said at the bar, that if the estate had been conveyed by way of use, it is otherwise; and the said justices held clearly, that the word (successive) would not alter the case; and judgment was given for the plaintiff accordingly. Mich. 29 Eliz. Ow. 40, 41. Stephens v. Layton.

but after they had issue a daughter. Cro. E. 121. Stevens v. Laughton.—Ow. 152. accordingly. S. C. by name of Stephens's case.

3. A. tenant for life, remainder to B. in tail, B. had issue C.—B. afterwards marries M. and levies a fine according to a covenant on his said *second marriage*, by which M. was to have a settlement of 150*l.* per annum, and if he should have heirs male, then those *heirs male* should have another 150*l.* per annum out of the lands during the life of M. and after her decease, the *heirs males of his body and of M.* should have 300*l.* per annum; though the limitation of 150*l.* per annum was defective in law, because Francis, who was son of the second marriage, was not named in the limitation (that being to the heirs male; whereas he was not heir male, B. having C. by a former venter) yet the court thought, that by the true meaning of the marriage agreement the plaintiff, Francis, is a person well described to take the rent and to be relieved, and the rent to be paid to the plaintiff during the life of M. N. Ch. R. 121. 1666. Seymour Boreman and Yate, cited in case of Darcy v. Darcy.

4. Money is given in trust for the *children of J. S.* It belongs only to the children which he had when the money was given. 2 Chan. Rep. 69. 24 Car. 2. Warren v. Johnson.

5. By a marriage settlement lands were limited upon trust to raise 2000*l.* after the death of the husband and wife for *younger children*, and if more than one, then to be equally divided among them, but if but one, then to such *younger child*, and after the 2000*l.* raised, then the lands to be to the husband and his heirs; they had issue a son and a daughter; the son died without issue, so as the daughter became both heir and younger child, but no inheritance descended on her by reason of incumbrances by her father. It was admitted on all sides, that if the son had died and left children, then the daughter should have been accounted a younger child; because the inheritance had then gone from her; that upon which it was urged, that if she had title when younger child, and when the inheritance would have gone from her, why should she not have a title when she is \* *eldest* and *has no inheritance*? The Court as to this point seemed to incline that the daughter had a good title, and if so, that the 2000*l.* would be an incumbrance prior to the other incumbrances, and so made no decree but directed the parties to go to law; the bill being by the daughter and her husband to compel the defendant to perform an agreement for a purchase made by him of the estate, which he pretended the plaintiffs had no right in. N. Ch. Rep. 185. Mich. 1691. Sands v. Fleetwood.

\* A. was tenant for life remainder to his first, &c. son in tail male, remainder to B. his brother in tail male, remainder A. in fee with power charge 2000 portion for younger children, sons or daughter, who should be living at his death. A. died leaving issue two daughters only, and one of whom was born after his death. A. by will charged the premises with 2000*l.* to his daughter Mary; but if the child whom should prove a daughter, then the 2000*l.* to be divided between them equally; it was objected that the eldest could not claim, because she was eldest,

sons only, and one of whom was born after his death. A. by will charged the premises with 2000*l.* to his daughter Mary; but if the child whom should prove a daughter, then the 2000*l.* to be divided between them equally; it was objected that the eldest could not claim, because she was

eldest, and the other could not, because not living at A's death. But per Cur. the eldest daughter, though first born, has often been ruled to be a younger child, where there is a son, *Every one but the heir is a younger child in equity*, and the provision, which such daughter will have, is but as a younger child's in regard the son goes away with the land as heir. So here *the estate by entailment goes all to the remainder-man who is hæres factus*, and neither of the two daughters is heir; wherefore the elder having no more than the younger, is (as to this provision) a younger child; per Ld. C. Harcourt. Wms's Rep. 244, 245. Hill. 1713. Beale v. Beale.

And as to the words (*who should be living at his death*) his lordship held that this posthumous child may well be looked upon in equity to be *living*, at her father's death, *in ventre sa mère*. Ibid. 246.

[ 94 ]

6. Lands are settled on marriage to A. the husband for life, and as to part thereof to M. his wife for her jointure, remainder to trustees *in trust, that if there are both sons and daughters, then the trustees to raise out of the lands not settled in jointure 4000 l. for younger children's portions*, remainder to his first, &c. son in tail. A power was reserved to A. to allot the 4000 l. among the younger children, in what proportions he pleased. A. had two sons B. and C. and several other children, and appointed to C. his second son 2600 l. Six years after this appointment B. dies, so that now C. became the eldest son, and so intitled to the whole estate after A's death, whereupon A. appointed the 2600 l. to a daughter. Lord Wright agreed the rule, that of voluntary deeds and appointments, the first is to take place, but that this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person; that C. was a person capable to take at the time of the appointment made, but that was *sub modo* and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir, so that he had a defeasible capacity in him; and decreed the 2600 l. to the daughter, and added, that though the appointment to C. had been made in consideration of marriage, it would have been the same thing. 2 Vern. 528. Hill. 1705. Chadwick and Ux. v. Doleman.

(R. 3) *Misrecital of the Person of whom the Lands, &c. were purchased, &c.*

This case is there stated in this manner, but no resolution.

S. C. cited per Hobart. Hob. 171.

who said that in grants of particulars the sufficiently ascertained, a mistake there will be frustrated though

the fact.

1. **T**WO having rent assign it to five, who grant it to A. and he reciting by deed, that *whereas five had assigned to two, &c.* (which was just vice versa.) Mich. 1 Mar. D. 93. pl. 28. cites Hill. 30 Eliz. Lewin v. Moody.

2. A purchased a house of J. S. in D. and had no other house there, and enfeoffed B. of it, by name of the *messuage late of W. S.* (which was false) with a letter of attorney to make livery, as if he himself were personally present, which was done accordingly; and held a good feoffment, notwithstanding the *false demonstration of J. S. for W. S.* for had the christian name been omitted, and a space left for it, it had been good, and so the name and surname of either are idle and not necessary, but the words *messuagium cum pertin.* in D. is sufficient in this case. D. 376. b. pl. 25. Cotton's case. —



3. If one recites, that he has 10 l. rent of the grant of J. S. whereas it was of the grant of J. D. and then grants the same, it is good. Mich. 29 and 30 Eliz. Ow. 42. per Anderson in the case of Lewen v. Monday.

Ow. 153. S. C. Cro. E. 127. S. C. by name of Moody v. Lewen,

which was, the *desforceants* in a *fine* were recited as plaintiffs, & vice versa.—But if the recital be of a grant to J. S. instead of W. S. or made by Queen Mary, where it was made by Queen Elizabeth, 'tis void; per Archer J. Mich. 18 Car. 2. C. B. Cart. 149—in case of Foot v. Berkley.

4. If a man gives all his lands in D. which he has by descent from his son, there all his lands whatsoever shall pass; per 2 J. Godb. 236. Mich. 11 Jac. In case of Clay v. Barnet.

5. A feoffment was of 8 acres, which he bought of J. S. 'Twas held upon the evidence, that though the 8 acres were bought of J. D. and not of J. S. yet they pass well enough by this feoffment; for 'twas \* *certain enough before those later words added*; as if he had given a name certain to the acres, as White Acre, &c. Clayt. 14. Bradford's case.

So of a release; per Archer J. Cart. 150. —\* D. 376. b. pl. 25. S. P. Windham's case.

—And. 60. S. C.—225. S. C. cited.—2 Rep. 32. Dodington's case.—4 Rep. 34. Boon's case.—In the D. of Northumberland's al. Doughty's case. Le. 21. the *falsity preceded the truth*, which made it void. per Manwood, Ch. B.—3 Rep. 10 S. C.—Where the *truth precedes the falsity*, 'tis good. 3 Le. 235. Trapp's case.—Cart. 154. per Tirrel J. in case of Foot v. Barkley, cites Doughty's case, and Hob. 171. 175. Litt. R. 23. D. 87. pl. 101.—Goldsb. 187, 188. pl. 132. per Fenner J. in case of Sharpless v. Hankinson.—Per Hobart Ch. J. If any part of the description be false, all the grant shall be void, and denies Doughty's case, and says, the contrary was adjudged in Dodington's case. Hob. 171. in case of Stukeley v. Butler.

## (R. 4) Misrecital of a Former Grant.

[ 95 ]

1. IF a man hath a rent charge of two shillings, issuing out of Black Acre, and hath no more rent, and he reciting by his deed, that he hath a rent charge of two shillings issuing out of Black Acre and White Acre, grants the same rent unto a stranger, this is a good grant to charge Black Acre with attornment of the tenant. Perk. S. 72.

And if a man hath two shillings rent charge issuing out of Black Acre and White

Acre, and reciting by his deed, whereas he hath two shillings rent charge issuing out of White Acre, grants the same rent unto a stranger, this is a good grant with attornment, &c. For the whole rent is issuing out of every acre, and out of every parcel thereof. Perk. S. 72.

2. If I recite that the original grant was made to me by indenture tripartite between A. of the first part, B. of the second part, and myself of the third part, whereas 'twas between me of the first part, &c. This shall not avoid the grant. 3 Le. 136. in case of Lewen v. Moody.

3. Grantee of a rent charge recites a *fine*, and mistakes the plaintiff for the desforceant, and also recites, that the fine was levied of a manor and diverse lands, &c. whereas it was of the manor solely; and then grants the said rent, granted to him, to J. S. and his heirs, and whereas he recited the grant was made to him, it was made to him and his heirs, and that the said rent was granted *inter alia*, whereas there was no other grant; this grant was adjudged good; per Anderson. M. 30 & 31 Eliz. Ow. 153. Lewin v. Monday.

This misrecital is but matter of surplusage. 3 Le. 136. S. C.—cited per Bridgman Ch. J. Cart. 158.—'Tis good because

there is sufficient certainty, and that 'twas the intent of the parties to grant it. Cro. J. 127. Moody v. Lewen.

4. A. seised in fee makes a *lease habend' a festo purific.* and afterwards reciting the lease, as granted a *festo annunc.* grants the reversion to B. This was held a good grant of the reversion. Hill. 12 Jac. Hob. 128. Withes v. Cason.

Ibid. 152.  
per Brown,  
this point  
was agreed  
in Cro. C.  
502. Loyd

5. Misrecital of the commencement of a former lease, \* *habend'* after the demise expired, 'tis good. But if it be + after the term recited is expired, 'tis void; per Archer J. Mich. 18 Car. 2. C. B. Cart. 150.

v. Gregory.—If the recital makes no alteration in the commencement, or end of the term, that is not a material misrecital. Cart 157.—\* D. 116.—Bend. 35.—And. 3. Saintleger's case.—† 8 Rep. 154. Altham's case.

6. *Mistake of a scrivener* in reciting a grant of more than was granted was relieved. Hill. 3 Geo. 2. in Canc. Gibb. 118. Hunburn v. Bence.

### (R. 5) Misrecital of the *Estate in the Land.*

1. **I**F husband and wife held one acre of land jointly of J. S. for their lives, and J. S. grants the reversion of the acre of land, which the husband alone holds of him for life, and he doth not hold any part alone of him, this grant is void. Perk. S. 67. cites 31 E. 3. Gr. 93.

2. The mistake of a name in a conveyance, (being *heir-male*) was aided, and the lands decreed to pass according to the intent of the party. Toth. 228. cites Mich. 16 Jac. Goodfellow v. Morris.

3. If a man take upon him to recite a term, and misrecite the same, and sells the same term, if he sell the interest in the same, 'tis good; per Brown J. Mich. 18 Car. 2. C. B. Cart. 151. in case of Foot v. Berkley. cites 4 Rep. 74. in Palmer's case. Cro. El. 584. S. C.

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4. A. settles land to the use of himself for life, remainder to B. and the heirs male of his body, remainder in tail to C. &c. with power of revocation as to B's remainder only; A. reciting the settlement to be to B. and his heirs males, omitting (*of his body*) revokes, and limits new uses to B. and his heirs males; but the date of the first deed is recited right, and so are the parties; resolved that this is a good revocation, and a good appointment of a new estate tail, by his directing the said estate in the said deed named, to be to the use of B. and his heirs males, now the said estate was an estate tail. Trin. 1 Jac. 2. C. B. 3 Lev. 213. Gilmore v. Harris.

### (R. 6) Misrecital of the *Date.*

1. **I**F the sheriff sells a term upon an extent, and puts a date to it, viz. recites a date and mistakes it, the sale is not good; for there is no such lease. Arg. Godb. 433. cites D. 111.

2. As.

2. A. seised of land in fee made a feoffment dated the 10th of September to B.—B. by another deed, reciting that A. had made him a *feoffment dated the 11th of September*, gave authority to C. to receive *livery* for him. 'Tis no good feoffment. per Brown J. Mich. 18 Car. 2. C. B. Cart. 151. cites Cro. El. 603. Marriot v. Smith.

For the attorney was to receive the livery secundum formam chartæ, and by varying

in the date, there is no such deed, and so no authority to receive it. Cro. E. 603. Marriot v. Smith.——And though in this case, *livery was made by the feoffor himself to the attorney*, yet 'tis not good to the attorney any more than 'tis good to the feoffee; for there was no intent to enfeoff the attorney, but the feoffee, and so is utterly void. Ibid.——The difference is between an authority and a conveyance. Arg. Het. 25. cites Marriot's case. S. C.

3. 'Twas insisted upon the Case of SMITH AND TOUCHET Hill. 22 & 23 Car. 2. in Scacc. where before Hale Ch. Baron, upon a special verdict, the case in an ejectment was, D. B. reciting an order of chancery dated December 15, 12 Car. 2. and an indenture of demise 23d of November following made to him by the mayor and burgeses of Reading of a mansion house, meadow, and other parcels of lands, particularly mentioned in the parish of D. he grants the said mansion house, meadow, and other lands in the said demise mentioned, and all his estate, term and interest, in and by the said indenture to him granted, whereas in truth, there was no such lease to him by the mayor and burgeses, and so no term, estate, or interest granted to him; for the date was mistaken; yet insomuch that he had a term for years in the premises, though not by the grant recited, and he grants the mansion house and lands, it was resolved, that the estate and interest in the lands, passed by the grant of the house and lands themselves. Trin. 6 W. & M. B. R. Skin. 543. 544. Jennan v. Orchard.

### (R. 7) Misrecital of the Thing granted.

1. IF I grant and confirm to you 20 shillings of rent for life out of my land, which rent you have of the grant of my father; though you have nothing of the grant of my father, yet this is a good grant now, and you may have assise. Br. Grants, pl. 73. cites 26 Aff. 38. per Skipwith.

2. If a man be patron of the church of St. Peter and Paul in D. and grants the next presentation of the church of St. Peter, or contrary, if it be of the church of St. Peter only, and he grant the advowson of St. Peter and Paul, this is not good in the one case nor the other, and the same law of such grants of charge by parson, patron and ordinary, extra talem ecclesiæ, &c. this is void; for all is one and the same name, and if it fail in the name, all is void. Agreed. Arg. Br. Grants, pl. 12. cites 35 H. 6. 5.

[ 97 ]

3. If a man grants all his land in D. which he has of the gift and feoffment of J. S. there nothing shall pass, but that which he has of the gift of J. S. But if he grants all his lands in D. called N. which was J. S.'s there his land called N. shall pass, though it never was J. S.'s by reason of the special name called N. contrary of general words, as in the first case; note the diversity. Br. Grants. pl. 92. cites 2 E. 4. 27.

4. A. has lands in D. and grants his *messuage in D. and all the lands thereto belonging*, where in fact there is *no such messuage*, no land shall pass. Arg. 2 And. 165.

5. Misrecital of the *rent* is no misrecital of the *lease*; so if the recital had been *without impeachment of waste*, and there is no such clause; or the rent reserved, recited to be *payable at two days*, where in truth 'twas payable but at one; or in such a *place*, where in truth 'twas at another; or that the former lease was *under such and such a covenant*, and there is no such covenant in it; per Tirrel J. Mich. 18 Car. 2 C. B. Cart. 152. in case of Foot v. Berkley.

6. *Præsentia corporis tollit errorem nominis & veritas nominis tollit errorem demonstrationis*. Bac. Elem. 86.

### (R. 8) Misrecital of the *Quantity*.

Ow. 153.  
S. C.

1. **A** Fine was levied of a manor; afterwards in a conveyance the recital was, that it was levied of a manor, and diverse other lands, yet adjudged good; per Anderson. Mich. 29 and 30 Eliz. Ow. 41, 42. Lewin v. Mooday.

Arg. S. C.  
cited Roll.  
R. 422—  
Yelv. 166.

Anon. S.—  
But if a  
lease be

2. *Ten acres of land, five plus five minus*, ought to be intended of a reasonable quantity, more or less, by a quarter of an acre or two, or 3 at most; but if it is 3 acres less than 10, the lessee must be content with it; but can never be carried to extend to 30. Owen 133. Day v. Fin.

made by these words, *and also the meadows in S. and D. containing ten acres*, where in truth they contain 20 acres. It seems lessee shall have the whole. Pasch. 28 Eliz. Savil. 114. in case of Thetford v. Thetford.

3. If A. grants to B. out of the manor 10*l.* per annum, and recites but 5*l.* the recital shall not diminish the grant; so if I grant 10*l.* and recite 20*l.* this shall not enlarge it. Brownl. 32. Anon.

### (R. 9) Where *Parcel of the Land* is omitted.

1. **A**. Seised of a manor with advowson appendant *mortgaged* the same, *omitting the advowson*. Afterwards he grants the advowson to B. in trust for himself for life, remainder to Emmanuel College, &c. for ever. A. paid off the mortgage, and sold the manor to B. but the advowson was not mentioned in the deed of sale, but was *mentioned in the fine*. Yet decreed that the grant to the college was good, and the putting advowson into the fine was on purpose to convey it to B. during the life of A. 1 Car. Chan. Rep. 18. Emmanuell Coll. v. Evans.

[ 98 ]

2. A. being tenant of the manor of D. was employed by B. to purchase the same for him, which A. agreed to do; but contrary to the said agreement, he purchased the same in his own name; A. was afterwards persuaded to let B. into the purchase, which  
was

was done by deed mutually executed between them; but in that deed there were several omissions of many things comprised in the purchase deeds, and thereupon B. exhibited his bill for relief against the said omissions, and accordingly it was decreed. 4 Car. 1 N. Ch. R. 7. Nelson v. Nelson.

3. In ejectment evidence was given, that A. sealed an indenture of lease of Black Acre, Green Acre, and White Acre, and by letter of attorney, reciting that whereas he had made an indenture purporting a demise of Black Acre and White Acre, (omitting Green Acre) as by the same more at large appears, &c. gave power to deliver it as his deed upon the land, and also by word of mouth commanded the attorney to do the same thing. Roll inclined, that the letter of attorney was insufficient in respect of the omission; but Bacon contra clearly; because there is a description sufficient to shew it to be the same lease. All. 53. Pasch. 24 Car. B. R. Bamfield v. Brown.

4. An omission was of 4 parcels of land in a church lease, by the carelessness of the chapter clerk in the ingrossing the deeds, and which were allowed for by the lessee in the contract, and though the same, by the like mistake of the clerk, were implicitly granted to another lessee as the residue of the lands, yet 'twas decreed, that the omission be relieved, and the plaintiff enjoy the parcels. Mich. 26 Car. 2. Fin. R. 172. Gardian v. Fox, and the Dean and Chapter of Windsor.

5. Omission of a parcel of land, by the carelessness of the scrivener, in a voluntary conveyance not supplied in equity. Hill. 1681. Vern. R. 33. Lee v. Henly. S. P. accordingly; but in this case, it

being proved by many circumstances, and the acknowledgment of the husband, that he intended and ~~ought~~ he had settled the unmentioned parcel, and had so declared, the Lord Chancellor decreed it to the plaintiff, but not to supply the value according to the covenant, (which was a point in that case) but to establish what the husband intended to settle, and what he thought he had settled, as before. Mich. 33 Car. 2. 2 Chan. cases 68. Downes v. Moreton.

## (R. 10) Omission of Names of Persons.

1. IF J. S. grants an annuity by deed, and in the deed is the S. P. Br. surname, viz. S. but not his name of baptism; this grant is not Estoppel, pl. 98. cites 9 E. 4. 29. good. Perk. 38. cites 3 H. 6. 26.

Per Needham. So if the surname is omitted.——Where a thing is granted to one by such a name, as that he cannot be intended to be any other person, it is good without a christian name expressed. Pasch. 8 Jac. Buls. 21. in the case of Ewers v. Strickland.——S. P. as omnibus filius J. S. or primogenito filio J. S. or uxori de J. S. &c. Hill. 11 Jac. 11 Rep. 21. in Dr. Ayrey's case.

2. Two obligors; one's name was omitted in the bond, but both signed and executed. He, whose name was omitted, knowing nothing of the omission, was applied to to give fresh security, which he agreed to; but after, upon discovery of the omission, refused, the other being run away; this is a proper matter to be relieved in equity. 3 Ch. R. 99. Crosby v. Middleton. Per Cowper C. his hand and seal is sufficient evidence, and the omission is a sufficient

accident for equity to relieve against. Ibid. 101.——Ch. Prec. 309. Hill. 1710. S. C.——But where a blank was left for the christian name in the bond, and the surname was inserted, and

after obligor subscribed both christian and surname, it was adjudged sufficient. Cro. J. 261. Dobson v. Keyes.

\* (R. 11) Omission of *Words* of Grant, or Limitation.

4 Le. 8. S. C. —184. Ibid. S. C.

1. **T**WAS doubted if chancery might help a purchaser for a valuable consideration, where there wants the word (*heirs*) in the deed of purchase. Mich. 30 Eliz. C. B. Godb. 142. in Halton's case.

But covenant to stand (omitting *seised*) to the

2. The words *shall stand and be seised*, were omitted in a deed of settlement, yet relieved. 1650. Chan. Rep. 162. Thin v. Thin.

*use, &c.* was adjudged an incurable fault in all the courts in Westminster. They went into chancery, but were forced to have it relieved by act of parliament. Cart. 150. and 169.—Such case was relieved in chancery. Mich. 33 Car. 2. 2 Chan. cases 71. Coventry v. Thinn.

3. A. seised in fee by indenture, *in consideration of marriage with M. the lessor of the plaintiff, did covenant, grant, and agree, to and with W. R. and W. S. their heirs, &c. in manner following (that is to say) all that messuage, &c. to the use, &c. of A. during his life, and after to M. for her life, &c.* Plaintiff had judgment by the opinion of the whole Court, and their chief reason was, because the *intent of the parties was to make a present settlement*, and therefore they would supply the deed with these words, (*to be*) or (*shall be*) and then the covenant will run thus; the covenantor covenants, grants, and agrees to and with the trustees, &c. all that messuage, &c. to be, or shall be, to the use, &c. and judgment was given accordingly. Trin. 9 W. 3. Lutw. 792. Sleight v. Metham.

(R. 12) Omissions in Deeds, &c. leaving the Meaning imperfect. In what Cases supplied or understood.

1. **T**HE chancery gives help for perfecting of things well meant, and *upon good consideration*: as if in a feoffment of lands for money, the word (*heirs*) be omitted in the deed, Audley Chancellor said, he would supply it. Cary's Rep. 23. cites 9 H. 8.

2. So at law, where in an indenture between A. of the one part, and B. and C. of the other part, reciting the surrender of a former grant of annuity, the words, *hath granted &c. to the said B. and C.* followed immediately, *without saying who had granted*, yet it was held well; for being made between A. of the one part, and B. and C. of the other part, it must be intended the grant of A. Hill. 1 & 2 W. & M. C. B. 2 Vent. 141. Tretheway v. Elsdon.

3. If a demise of lands wants sufficient words to carry that which was



was meant to pass, it shall not be holpen in equity. Toth. 153. cites 1591. Kent v. Kent.

4. A. leased lands to B. the defendant, intending that all woods growing thereupon should be excepted, saving for necessary boots; but by mistake the clerk inserted (*hereafter excepted*) where there was *no exception after mentioned*; and thereupon the defendant cutting down woods, an injunction was granted. Toth. 228. cites 37 Eliz. Bleverhasset v. Fuller.

5. *Forbearance for a quarter* shall be understood a quarter of a year, according to common parlance. Arg. Hard. 5. cites Pasch. 9 Jac. the executors of Hangar's case———And Cro. E. 387. Pasch. 37 Eliz. B. R. May v. Alvarez.

(R. 13) *Mistake of the Place where.*

[ 100 ]

1. A. Seised in fee of 5 messuages, &c. by deed indented and inrolled bargained and sold *all his tenements, &c. in the parish of St. A. in the occupation and tenure of J. N.* It was found by special verdict, that the messuages lay in another parish, but were in the occupation of J. N. It was resolved that nothing passed; for though the last certainty was true, yet because the first was false, the bargain and sale was utterly void; but otherwise it had been if there had been true certainty in the first place. 3 Rep. 9. b. Trin. 26 Eliz. in the Exchequer. Dowtie's case.

S. C. cited by Hobart, Ch. J. who said, that he held it plainly contrary; for the several circumstances and descriptions circum-

scribe and ascertain the grant. And it is a good rule, *incivile est nisi tota sententia perspicua de aliqua parte judicare.* Hob. 171. H. 12 Jac. in the case of Stukeley v. Butler.———And therefore the judgment in DODDINGTON's case. Co. lib. 2. 32, 33. is full in the point. H. 8. was seised of the hospital of Wells, whereof certain lands in D. out of the circuit of Wells, which were in the tenure of A. were part, and he granted unto B. all his lands in the tenure of A. situate in Wells, to the said hospital belonging. And it was adjudged, that though the first part of the description, as it was placed in the patent, [in the tenure of A.] were true, yet the latter part (being false) marred all, even if it were the grant of a common person; and indeed, in one sentence it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam & modum* to the sentence. Ibid.

2. Lease of two acres in D. and S. If the land lies in either of them, it is sufficient, and it is not necessary to lie in both. Clayton 123. Anon.

3. A lease was of 47 acres of meadow near the ditch, whereof 15 lie in D. and 20 in E. and 12 in F. where in truth all lie in F. Quere, whether all the 47 acres shall pass? Hill. 6 & 7 Ed. 6. D. 80. b. pl. 57. Lord Willoughby v. Forster.

The parties agreed, and Lord Willoughby gave a good sum of money, but there were other matters in dispute. Ibid.

4. A. bargained and sold a house in the parish of St. Botolph without Bishopsgate, in the tenure of J. S. by the name of his house in the parish of St. Botolph without Aldgate, in the tenure of J. S. It will be very difficult to make this good; because the thing aliened has no name, but the name of the parish which is mistaken. Trin. 12 Eliz. D. 292. pl. 72. cited as Campian's case.

In this case Manwood thought contrary to Dyer, that the house would pass well.

enough, notwithstanding the mistake of the parish; for that there is sufficient certainty in the beginning. Ibid. Marg. cites 15 Eliz.

5. The



5. The king granted the *commandry of S. in the county of R.* If no part is in *R.* yet it shall pass; but if part is in *R.* and part in another county, no more shall pass than what is in *R.* Arg. Mich. 30 & 31 Eliz. Cro. E. 114. says it was so adjudged in the Exchequer.

6. A. bargains and sells his *manor of G. in the county of O.* where he had no such manor, but he had in the county of *C.* It will not pass, but otherwise if *livery* had been made. Trin. 48 Eliz. B. R. D. 292. b. pl. 72. Marg. cites 3 Jac. Skipwith v. Ellis.

7. If I purchase land *by a name*, and allege it to be in a *wrong parish*, or *shire*, it is good notwithstanding the mistake; per Cur. Brownl. 42. Mich. 10 Jac.

So if A. gives *Black Acre and White Acre* in the county of *Kent*, if *White Acre* is in *Essex*, yet this is good

8. A. has a moiety of lands in *Kent*, and a moiety of lands in *Essex*, and he grants *all his moieties in Kent*, the moiety in *Essex* shall pass as well as that in *Kent*; for there is a certain demonstration of the thing \* to be granted, and in a grant you shall never refer one certainty upon another, and the plural cannot be satisfied with the singular; per Coke Ch. J. 2 Buls. 181. Hill. 11 Jac. in case of *Mirril v. Nichols*.

clearly for *White Acre* also; for that relation of words is always to be taken according to the matter to which they are applied; per Haughton Just. 2 Buls. 177. Hill. 11 Jac. in case of *Merrill v. Nichols*.

\*[101]

(R. 14) Good in respect of the *Reservation*; Reserving *Part of the Estate* granted.

So where a man grants an advowson to another, reserving the presentation for life, this is a void reservation; quod nota, per Prisot & non negatur. Br. Grants, pl. 60. cites 38 H. 6. 34.

1. IF a man grant an *advowson*, of which he is seised in fee reserving the *advowson for life*, this is void: for he cannot reserve a less estate than he had before. Br. Grants, pl. 60. cites 38 H. 6. 34.

2 And. 64. S.C.— Poph. 47. S.C.— Mo. 687. S.C.—

2. A man cannot grant an estate to another, *reserving any particular estate to himself* and his wife. Hill. 35 Eliz. B. R. Mo. 688. Callard v. Callard.

Cro. E. 344. S. C.— Though a deed operates by way of use, or otherwise, yet no particular estate can be reserved to him who departs with the estate; per Twisden J. and not denied by any; and for this reason it was held in the principal case, that a deed made by the mother to her eldest son was void, because there was a clause in it, *she the said Margaret Forster enjoying it during her life*. Trin. 14 Car. 2. B. R. Sid. 82. Forster v. Forster. — And he held, that if the case of *CALLARD* and *CALLARD* had been by deed, yet no use would have arisen; because it was *reserving an estate to me and my wife*, which could not be, and so all the operation of the deed was hindered and obstructed by it. Trin. 14 Car. 2. B. R. Sid. 82. cites 38 H. 6. 34.

(R. 15) Grant of *one Thing by Words proper for other Things*; what Things and Interest pass.

1. IF a man leases land, rendering 20 l. per annum, and grants *the reversion*, and the tenant attorns, the *rent passes*; per Finch. and not denied. Br. Grants, pl. 16. cites 41 E. 3. 16.

2. If

2. If a man *grants a parsonage*, or leases it; by this word the *glebe* (land) passes well, and yet the parsonage may consist only in tithes and offerings; per tot cur. Br. Grants, pl. 86. cites 8 H. 7. 2.

3. If land be known by the name of the house, in such case the reversion of the same land may pass by the name of the house, &c. Perk. S. 116.

Lands will pass by the name of an house, if

they have been usually enjoyed and occupied with the house, so that by it they gain a reputation to be appurtenant; per Haughton J. Trin. 21 Jac. B. R. 2 Roll. R. 347. in case of Loftus v. Baker.

4. And if six acres are known by the name of a manor, then the reversion of them shall pass by the \* name of the manor, &c. The same law is e converso in these two last cases mutatis mutandis, &c. Perk. S. 116.

\* S. P. without naming reversion. 6 Rep. 56. Tr. 4 Jac. in Ld. Chandos's case.

5. By grant of all manner of *estovers*, the grantee shall have [ 102 ] *housebote, plowbote, and haybote*, &c. Perk. S. 116.

6. A lease of *messuagium suum in D. cum omnibus terris eidem messuagio pertinent' habend' sibi reddend'*, &c. the land passes. D. 130. b. 69. Pasch. 2 & 3 Ph. & Ma. in case of Hill v. Graunge.

7. By a grant of *centum librat' terræ*, or *solidat' terræ*, &c. land of that value passes. Co. Litt. 5. b.

8. *Messuagium sive tenementum*, if it will pass a garden? See Mo. 24. Dal. 29. pl. 5. The justices divided.

Dyer Ch. J. held that the garden

nor land did not pass by this grant, for by this word (*messuagium*) nothing passes, but the *house*, and *the circuit of the house*; a garden is a thing distinct; for in a *præcipe quod reddat*, the writ shall say, *de uno messuagio & uno gardino*, which proves them to be several: *quod alii justiciarii concesserunt*; and by this word (*tenementum*) as it is put here, no land passes, because this is only the name of the house; for the deed is *sive tenementum*: but if it was *& tenementum*, then it would be otherwise.—Brown was of a contrary opinion; but Weston said, that it passed by the name of the messuage, with *averment*, that they have been occupied together. Mo. 24. pl. 82.—A garden may be said to be a parcel of a house, and by such words may pass in a conveyance. 2 Saund. 401.

9. Advowson appendant to a manor shall not pass without *inrolment of the bargain and sale*, yet there were words that might pass it by grant; for this was *against their intent*: otherwise if a man makes a lease for life, or years, of a manor and grants the inheritance of the *advowson* by the same deed; per Coke Ch. J. Arg. 2 Brownl. 201, cites it as Andrew's case, alias Lord Cromwell's case.

Bargain and sale without inrolment, notwithstanding the attornment of the tenant for life,

are not apt words to make a grant of a reversion. Godb. 7. pl. 9. per Dyer Ch. J. cites it to have been so adjudged in C. B.

10. *Advowson* of a vicarage passed by the name of *all hereditaments lying in D.* where the vicarage was; for it has some essence in the vill and church of the vicaridge, in as much as the view in a writ of right of advowson shall be given in the church, &c. though it lies not in livery, nor is visible or palpable; per Cur. D. 323. b. pl. 30. Pasch. 15 Eliz. Anon.

Hob. 304. —Cro. C. 74. Turner v. Palmer. —Co. Litt. 332. —Bridgm. 95.

Wood will pass by the name of land, if there be no other land whereby the words may be supplied otherwise. woods pass.

11. A. seized of a *manor*, to which diverse *woods* are belonging, by deed grants the manor, and the woods to it belonging; but the deed was not inrolled, nor any livery made, nor estate executed; it was said, that in this case the wood does not pass, and the wood, when it is felled, is but a *chattel*, which was not belonging to the manor. Pasch. 25 Eliz. Savil. 63. Whiskard v. Futter.—Cro. E. 416. cites it as the case of Blunt v. Andrews.

Pasch. 12 Jac. B. R. Godb. 256. Dockwray v. Beale.—By lease of a manor the woods pass. 5 Rep. 11. b.

12. Surrender of a *messe* containing 12 acres of land; it was objected that the 12 acres could not pass by the name of a *messe*, but the court gave no regard to it, but gave judgment on another point. Cro. E. 29. Clamp v. Clamp.

13. If a common person grant an acre, called the two acres, one acre only passes. Mich. 40 & 41 Eliz. B. R. Cro. E. 633. Per Popham in case of Brownlow v. Farr.

14. Common in gross will not pass by the words lands, tenements, past. & pastur. yet it is a feeding and pasturage. Hob. 304. cites 20 Ass. 9.

15. Appropriation, or the advowson of it, will not pass by the name of advowson, yet *advowson* will be contained under the name of a tenement. Hob. 304. in case of London v. Collegiate Church of Southwell.

16. There is a difference between a conveyance *en pais*, and by matter of record: for where a man had a row of houses in Egham, called *Egham rents*, and makes feoffment of all his rents in Egham, the houses pass. Arg. cites Perk. fol. 116. and says it was so held in C. B. 2 Roll. R. 69. Hill. 16 Jac. B. R. in case of Trefwallen v. Penhules.

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17. Where a thing of one nature is known by the name of a thing of another nature, it will pass by the name of the other thing by whose name it is known, as 14 H. 8. 1. by name of *wood pasture* shall pass. Arg. Mich. 20 Jac. B. R. 2 Roll. R. 266. in case of Burton v. Brown & Ward.

18. Portion of tithes will not pass tithes belonging to a rectory. Arg. Pasch. 1651. Sti. 270. in case of Cremer v. Burnet.

(S) By what Words [Grants] may be made. In what Cases, by Words proper for other Thing, it shall enure as a Grant. Feoffment

[ 1. ] If feoffment be made of a manor in lease for years, and livery made without ousting of the lessee, by which it becomes a void feoffment, yet if lessee attorns it shall pass as a grant of the reversion. 11 H. 4. 71. admitted. ]

[ 2. If lessee for years be, the reversion for life, the reversion in fee, and he in reversion in fee makes feoffment and livery to lessee for years, admitting that this is void as a feoffment, as is there held, yet this shall not enure as a grant of the reversion and attornment, because

because he intended to pass it by way of feoffment. M. 40 and 41 El. B. R. per Curiam between Knotsford and Edes. ]

[ 3. If lessee for life be, the remainder for life, the reversion in fee to the lessee, and the lessee makes a deed of feoffment to another, with a letter of attorney in it to make livery, and after no livery is made, yet the reversion in fee shall pass by grant with the attornment of him in remainder. Pasch. 13 Ja. B. R. per Curiam between Sir Thomas Lucy and Sir Francis Englefield. ]

[ 4. If A. seised of two acres leases one for years, and after makes charter of feoffment of both to B. and makes livery in the acre in possession in the name of both; in this case, only this acre in which the livery is made shall pass; yet if the lessee attorns, the reversion of the other acre shall pass. Co. Litt. 49. ]

[ 5. If a parson appropriate makes a deed of feoffment of the parsonage and after no livery is made, by which it does not pass as a feoffment; this shall not pass the tithes by way of grant, because all is one entire thing. Between Bozoun and Futter, per Curiam cites Mich. 8 Ja. B. ]

Savil 82.  
S. C. —  
See grant  
construction S. C.

[ 6. If a man by indenture demises to J. S. the manor of D. and bargains and sells to him all the woods and trees, &c. upon the said manor to be felled and carried at his will, habendum the said manor for life. This is an absolute sale of the wood and trees; for the intent appears by the words, and the several distinct clauses in the premises, and the leaving of it out of the habendum. Tr. 10 Ja. B. per Curiam between Rawles and Mason. ]

2 Brownl.  
193. S. C.

[ 7. If A. seised of land leases it for years, and covenants and grants to and with the lessee, his executors and assigns, that it shall be lawful for him to take and to carry away to his own use such grain as shall be growing upon the land at the end of the term; though the word covenant be joined with the word grant, and though the words are not by way of gift of the grain, but that it shall be lawful to him to take to his own use, yet it shall be a grant, and transfer the property of the grain, which shall grow there at the end of the term; for the intent and common use of such words amounts to as much as the clause without impeachment of waste [and] transfers a property in the trees. Hobart's Reports 179. adjudged between Grantham and Hawley. ]

(M) sup.  
pl. 1. S. C.  
—Hob.  
132. S. C.

8. Words of reservation or perception enure many times by way of grant. Arg. Godb. 449. cites 10 E. 3. 500. 10 Aff. 40. 8 H. 4. 19. Colinbrooke's case.—41 E. 3. 15. 13 E. 12. Feasts and Fasts 108.

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9. If a deed be made to a man by these words, *dedi concessi & confirmavi*, the grantee may use it to his most benefit, viz. by way of feoffment, or by way of grant, or by way of confirmation, as will be most to his advantage. Br. Grants, pl. 117. cites 14 H. 4. 38.

10. Land cannot pass by deed [made] of a house, nor as parcel; for it is not parcel of a house. But gift of an acre by the name of *carue* is good; and the same of a gift of a *carue* by the name of *manor*. Br. Grants, pl. 7. cites 27 H. 6. 2.

11. Lessor made a deed of feoffment to lessee for years, and in the end was a special letter of attorney to make livery to the lessee for

A. was tenant in tail of a manor,

reversion to his right heirs. A. by deed gives and grants the manor and the reversion, and includes within the deed a letter of attorney to make livery, but no livery was made. The reversion does not pass; for his intent appeared, that should pass by livery and seisin, and not by grant. Trin. 10 Jac. C. B. 2 Brownl. 201. cited per Coke Ch. J. as H. 15 Eliz. Ld. Cromwell's case.

for years, and his heirs. *Lessee for years* has election to take the same by way of *confirmation or feoffment*, and the law suspends the grant and expects, till he has declared his pleasure; and when he has made his *election* to take it by livery, it shall be a feoffment ab initio, and by the delivery of the deed, in the mean time, nihil operatur. Trin. 25 Eliz. C. B. Godb. 139. Leonard v. Stephens.

12. If devisee enters into the term devised to him without the executors assent, by which he is a wrongful seisor and a disseisor, and after he grants his right and interest to the executor; though the devisee has no term in him, but only a right to the term, suspended in the land, and to be revived by the entry of the executor, yet it was adjudged to be a good grant, and that it shall enure, first, as the agreement of the executor by the acceptance of the grant, that the devisee had the term in him as a legacy; and secondly, the deed shall have operation by way of grant to pass the estate of the devisee to the executor, and so no wrong. Trin. 27 Eliz. Ow. 56. Carter v. Low alias Lawes.

13. Surrender to grantee of a reversion shall first enure as attornment, and after as surrender, cited to have been so adjudged. Trin. 27 Eliz. Ow. 56. Carter v. Low al. Lawes.

14. In a lease was a covenant to take fireboot, &c. by the lessee; but it had not the word grant added to it; it was objected, therefore that this was not sufficient to justify the lessee's taking it, but that he may have action if he was denied it. But the court seemed to incline that it was well enough, being by the same deed of lease; if it had been well pleaded. Mich. 6 Jac. B. R. Cro. J. 291. Purfrey v. Gryme.

\* A grant cannot amount to a licence.

Arg. Hard. 48. in case of JONES v. CLARK, cites 2

Rep. Buckley's case.—and 11 Rep. 48.

15. The Bishop of Winchester granted to a mayor, &c. that they might build in the vacant places of the same city, and inhabit there, and the dean and chapter confirmed the grant; per Hutton J. The soil is still the Bishop's, and consequently so are the houses, quia quicquid plantatur solo, cedit solo; and the grant enures but as a covenant or \* licence, and not otherwise. Het. 57. Mayor and Commonalty of Winchester's case.

16. A conveyance shall not enure to a contrary end, than it was designed for. Arg. Hard. 48. cites 6 Rep. Sir M. FINCH's case, and Co. Litt. 301, 302. But held, that a lease, though not good, amounted to a good appointment. Hard. 49. Jones v. Clerk.

17. If it does not appear by the fabrick of a deed; that lands are to pass thereby by way of feoffment, yet the lands may pass by way of use, if there be a sufficient consideration expressed in the deed to raise an use; Sic dictum fuit. Pasch. 1655. B. R. Sti. 445. Anon.

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18. A. articles that a man in consideration of 20 s. and 6 d. per Ann. rent shall have a way for himself, his heirs, &c. over such

such a close. This is a good grant of the way, and not a covenant for enjoyment. HOLMS v. SELLER, 3 Lev. 305. Trin. 3 W. & M. C. B.

(S. 2) *Enure as a Release in what Cases.*

1. IF there be lord and tenant of three acres of land, one white acre and two other acres, and the lord grants unto the tenant by deed, that he will not distrain in white acre for his rent and services, this grant shall not enure to such intent as to determine the seigniority in any part, but shall enure by way of covenant, so that if the lord distrain in white acre for his services, the tenant shall have an action of covenant. Perk. S. 69.

2. So, if a man holds an acre of land of J. S. by fealty and suit, as of his manor of Dale, and J. S. is also seised of another manor called T. and J. S. grants unto the tenant, that he shall do his suit at his manor of T. this grant shall not determine the suit at the manor of Dale. Perk. S. 70. cites 2 E. 2. Action for Lesta.

And if J. S. in the same case had granted unto his tenant that he shall give unto

him 12 d. yearly for his suit; this grant shall not determine nor alter the tenure. Perk. S. 70.

3. In a replevin the case was thus; B. held 50 acres of A. as of his manor of Swarden by fealty, and 4 s. 7 d. rent, &c. And C. held 47 acres of A. &c. by fealty and 3 s. 4 d. rent; A. by indenture between him and the said B. and C. reciting the said several tenures, gives, grants and confirms the said rents, services and seigniories to B. and C. and their heirs, to the use of them and their heirs, &c. And in that case it was resolved, that it is an extinguishment of a moiety of every of their tenures. And for the other moiety they hold one of another, and the avowant had judgment accordingly, for there was a cross tenure between them for the one moiety, and that shall not move as a release, reddendo singula singulis, &c. Dyer 319. See & note 11 H. 7. 12. a. 39 H. 6. 2. 49 E. 3. 40. In the principal case there is not an equal benefit to every of them; for it was said, that if the acres and rents had been equal, that then it should have been extinguished in all. Noy. 113. Goldwell v. Navenden.

4. And Cook put this report case. A. lessee for life, the remainder to B. for life. The lessor gives, grants and confirms to them and their heirs. A. shall have all the possession during his life, and afterwards B. shall have all the possession during his life, and one moiety then executed, and after the death of B. the other moiety to A. in fee. Noy. 113. Goldwell v. Navenden.

(S. 3) *Enure. Where a Covenant shall enure as a Grant.*

1. A. By articles agreed with B. his heirs and assigns, that it should be lawful for him, his heirs, &c. at all times to have and use a way by and through a close of A. in consideration whereof



whereof B. covenanted to pay 20 s. down, and 6 d. a year to A. his heirs and assigns, and to repair the gate between the closes. Adjudged per Pollexfen and Rokesby only in court, that this was a good grant of the way, and not a covenant only for the enjoyment. Trin. 3 W. & M. C. B. 3 Lev. 305. Holmes v. Seller.

[ 106 ] (S. 4) Pass. Where one Thing shall pass by the Name of another, as *Perquisite*.

1. **T**RESPASS for taking of hawks, the defendant pleaded not guilty, and was found guilty, but the plaintiff before the trespass sold all the trees in the wood to N. by indenture, with free egress and regress, &c. and by the indenture it was agreed that N. should not cut the trees before Michaelmas, within which time the defendant took the hawks, and entered by the common way, to the damage, &c. and the court took advice quære legem. It seems to me that the vendee has no property in the trees till they are cut, and then he shall have them as chattles, but they are parcel of the franktenement as long as they grow, and then the vendor shall have action of trespass. Br. Trespals, pl. 247. cites 27 Aff. 29.

2. If a man seised of a manor, unto which an advowson is appendant in fee, leases the same manor unto a stranger for years, or for the life of another man, and the church becomes void during the term, and the years expire, or he for whose life it was, dies before the six months pass, and before the lessee hath presented; yet the lessee shall have the presentment, because he is to have the same as a perquisite, by reason of the manor. Perk. S. 97. cites 4 H. 7. 11.

**(T)** What shall pass by Grant of all Lands and Tenements. [or by either of those Words, or by other Words.]

Common  
all pass  
by the  
words, all lands and tenements. Br. Grants, pl. 87. cites 11 H. 6. 22.

[ 1. **B**Y those words a common in gross shall not pass. 20 Aff. 9 Curia. Contra 11 H. 6. 22. b. ]

In an assise  
of common  
of pasture

[ 2. By grant of all his lands and tenements \* pascuis a common shall not pass. 20 Aff. 9 Curia ]

for six oxen, the plaintiff shewed for title that the defendant had granted common of pasture to W. N. for six oxen in N. in fee, and that W. N. granted to him the plaintiff omnia tenementa pascua & pasturas suas in the same vill, and because it was not expressed in the assignment, therefore the justices intended that it could not pass by the words [tenementa pascua et pasturas] quære inde; for the plaintiff was nonsuited, by reason of the opinion, &c. Br. Grants, pl. 70. cites 20. Aff. 9.

By grant of all his lands and tenements in D. common shall pass; for the writ of dower shall be return de libero tenemento in N. and she shall make her demand of common, therefore common is a tenement; per Newton and Candish. Br. Grants, pl. 143. cites 11 H. 6. 22. ——— S. P. Br. Grants, pl. 87. cites 9 H. 7. 25. ———\* So it is in the original, and seems misprinted.

[ 3. By such words a reversion shall pass. 11 H. 6. 22. b. ]

Mo. 36. pl. 13. [ 4. By grant of a tenement a reversion shall pass. 37 H. 6. 5. ]

[ 5. By



[ 5. By such words a way shall not pass, unless it be *appendant* to any of the lands. 11 H. 6. 22. b. ]

[ 6. If a man grants to another all his lands and tenements in D. a *rent-charge* which he has there shall pass. Trin. 38 El. B. R. said per Popham to be so adjudged. ]

2 And. 2. 4.  
Br. Grants,  
pl. 402.  
cites 14 E.

4. 4.

2 And.

123. S. C.

Mo. 359.

S. C. 4

Rep. 87. b.

Cro. E.

476. S. C.

—ad-

judged con-

tra. 2 And.

123. and

the differ-

ence is

between a

grant and

a will.

Sup. (P)

pl. 3. S.

C.—If

he had de-

352. S. C.

\*[107]

By grant of

lands and

tenements an

advowson

shall pass,

&c. Perk.

9 H. 7. 25.

[ 7. If a man grants to another all his lands in D. *houses* will pass; because the house is built upon the land, and *cedit solo*. Trin. 38 El. B. R. agreed between Ewer and Haydon. ]

[ 8. If a man is *seised of a house in L. in the county of Oxford, and of certain houses and land in the county of Hertford*, and leases the houses in Hertford, rendering rent, and after makes his will in this manner, *I devise all that my house in L. in Oxford to J. E. and his \* heirs, and also all those my lands, pastures and meadows in W. in Hertford to him and his heirs for ever*; by this devise the reversion of the houses in Hertford shall pass by the word [lands] though he has made mention of a house before in another county, and makes particular difference between land, pasture and meadow. Trin. 38 El. B. R. 47. between Ewer and Haydon, adjudged. See before contra. ]

*vised all his lands and had not spoke of his house*, the house had passed. Godb.

[ 9. If an *abbot be patron, and parson*, and there is a *vicar endowed*, and he grants *all manors fees and advowsons*; the *advowson of the parsonages* does not pass by it; but it remains in the abbot as patron and parson. 44 Ass. 37 adjudged. ]

S. 116.—S. P. Br. Grants, pl. 87. cites 9 H. 7. 25.

[ 10. But the *advowson of the vicaridge* shall pass to the grantee by the said words. 44 Ass. 37. adjudged. ]

[ 11. And the *tithes of the parsonage* shall pass by the said grant. 44 Ass. 37. adjudged. ]

[ 12. A *common in grass* shall not pass by grant of *all his pastures*. 26 Ass. 9. ]

[ 13. If a man *leases a manor for term of 3 crops with all the demesnes and profits whatsoever*, this is a lease for years of the manor. 33 E. 3. Accompt. 130. ]

Per Haughton J. Roll. R. 319. cites 23 E. 3. F.

Account 130. and 3 Buls. 103. Haughton J. cites 33 E. 3.

14. If a man has a *reversion in fee in 10s. rent, issuing out of land in D. and has also the reversion in fee of an acre of land in the same town*, and he grants *all his land and tenements in D. unto a stranger*, by this grant the reversions shall pass. Perk. S. 114. cites 34 H. 6. 6. 16 E. 3. gr. 55. 38 E. 3. 36.

S. P. and so of a devise. Br. Grants, pl. 10. S. C.

—But if the grantor had

an annuity in the same town, it shall not pass by such grant, &c. Perk. S. 141.

15. If a man has *land in lease for years*, and is *seised of other lands in fee*, and makes a *feoffment of them both, and livery only in the fee simple land*, the lands for years shall not pass, Br. Grants, pl. 87. cites 9 H. 7. 25.

\* S. P. per Brook. Br. Grants, pl. 87. cites 9 H. 7. 25. For those words shall be intended freehold at the least—Br. N. C. pl. 301. S. P.—But if he grants *omnes firmas suas*, a lease for years shall pass; for of this an ejectment lies, and by this he shall recover the term, and therefore it is a good word of grant. Br. Grants, pl. 155. cites 7 E. 6. Br. N. C. 96. pl. 438. cites S. C. and † 37 H. 8.—Br. Done, &c. pl. 41. cites † S. C.—S. C. cited Arg. 1 Buls. 100.

By name of house or tenement, 100 acres of land may pass, though they lye at a great distance from the house, or in another vill, or parish. Pasch. 1658. B. R. 2 Sid. 76. Murrell v. Lord Brook.

16. In Br. Abr. Tit. Grants, pl. 155. 'tis said; that if a man grant *omnia terras & tenementa sua* in D. a lease for years shall not pass; but in BRACEBRIDGE AND COOK's case in the Com. 424. that case in Br. is denied; and 'tis there resolved that a grant of all his lands and tenements shall make the interest for years to pass. Skin. 539, 540. Trin. 6 W. & M.

17. A grant was per nomen *messuagii five tenementi*; per 2 justices, the garden does not pass, but if it had been *et tenementi*, it would be otherwise; 1 Just. held the contrary, and one held that it passed by the name of the messuage, with an averment that they have been occupied together. Pasch. 3 Eliz. Mo. 24. pl. 82. Anon.

[ 108 ] 18. In 1 Leon. 98, 99. 'tis held by Popham, that if a man be tenant by elegit, or statute, of lands in D. and, not having other lands there, grants all his lands in D. The interest, which he has as tenant by elegit or statute, shall pass by the word [land.] Trin. 6 W. & M. B. R. Skin. 539. Jerman v. Orchard.

19. *Redditus est tenementum.* D. 206. pl. 8.

### (U) What shall pass by general Words.

[ 1. BY grant *de omnibus averiis suis*, deer shall not pass. 18 E. 4. 14. b. ]

Cro. E. 161. Perkins v. Hynde.—11 Rep. 13. b. Mo. 47. contra.

[ 2. If a parson by indenture leases his glebe with all profits and commodities to the same belonging, habendum for 95 years rendering so much rent for all exactions and demands whatsoever to the said rectory for the close aforesaid belonging, yet this shall not pass the tithes of the land; for the lessee shall not have the land discharged of tithes, but shall pay them to the parson; because it is due to the parson of common right, and so shall not pass by general words. M. 31 and 32 El. B. R. per Curiam agreed between Portnis and Hynde. ]

3. If an advowson be appropriated to an abbot, and a vicar is endowed, and the abbot afterwards grants the church and advowson, this passes only the advowson of the parsonage, but not the advowson of the vicarage. Br. Judgment, pl. 138. cites 16 E. 3. per Pulton and others and Fitzh. tit. Grant, pl. 56. 17 E. 3. ibid. but adds a quære.

4. If a man gave land before the statute of *quia emptores terrarum*, and after time of memory to one to hold by fealty and 3d. *pro omnibus serviciis, exactionibus & demandis*, this shall excuse a fine for an alienation, heriot custom, and such like, which were due before, and be

be a good bar in an avowry; per Cur. and per Strange it shall excuse a relief; contra Skrene; because 'tis incident, quære. Br. Barre, pl. 18. cites 14 H. 6. 2.

5. If a man gives all his *maniments*, all charters, releases, and other evidences pass; and if a man gives all his *deeds*, thereby all charters, releases, and letters of attorney pass. Br. Grants, pl. 13. cites 35 H. 6. 37. per Wang.

6. If a man grants unto me *common of pasture for 10 kine in his lands in such a town*; yet I shall not have common but in his *land commonable* in the same town, and yet the grant is general in his lands in the same town; but the reason is because he does not grant but only common of pasture, and for cattle certain and commonable; so as the grant shall not extend but unto *pasture lands*. Perk. S. 108.

But if common of pasture be granted unto me for all manner of cattle, I shall not have common for hogs,

&c. Also if common of pasture be granted unto me for my cattle, I shall not common but with *cattle commonable*; for a grant shall have a reasonable construction, &c. Perk. S. 108.

7. A predecessor of a bishop made a lease to B. of his *manor-house*, and the *scite thereof*, and of certain *particular closes and demesnes by particular names (and of all other his lands and demesnes)* and the question was, whether an ancient *park and copyhold land* should pass? but it was held per Cur. that neither of them passed by those latter general words; for that neither the park, nor yet the copyhold could be intended to be demesnes, and that in such cases a grant shall not be construed by any violent construction, but according to the intention of law. Hill. 1 Buls. 100 Arg. cites 18 Eliz. 2. Lord North v. Bishop of Ely.

8. A. granted *omnes arbores suas*, fruit trees do not pass. Hard. 309.

9. A. by conveyance executed in his life-time settled all his lands in the counties of B. C. and D. (mentioning them all particularly) to the use of *himself for life, remainder to his issue*, if he should happen to have any, in tail, and then appointed the lands in D. to his nephew H. and the lands in B. and C. to his nephew L. In the enumeration of the particulars of the lands in B. and C. in this after part of the deed, limiting them to L. a *farm or manor* of about 60 l. per annum was omitted; but after the limitation of the land to his nephew H. there were added these general words; *and all other my manors, lands, and tenements, whereof no use is already limited, the same shall be unto the use of my nephew H. &c.* A. died without issue; by which means H. and L. were his heirs at law. The question was, who should have the *omitted farm*; whether H. by virtue of the *general words*, or L. by reason of the words, *whereof no use has been already limited*? For the use of this very farm was limited to A. and his issue, though not enumerated in the limitation to L. besides the scrivener, that drew the settlement, swore, that A.'s intention and instructions were to settle it on L. and the not doing it was purely an omission of the clerk; and therefore it was prayed to supply that defect, especially as it was the case of an heir at law; but the Lord Chancellor, upon the whole matter, did not think fit to decree it for one or other of

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them, but left the land in question, to descend equally between the 2 nephews. Hill. 1681. Vern. 37. Lee v. Sir Robert Henley & al.

And therefore they construed it, that nothing should pass but what the heir should take; but if the word *executors* had been in there 'tis plain from that case that the words [all

his lands and tenements] had conveyed the term. Trin. 6 W. & M. B. R. Skin. 539. cited in case of Jerman and Orchard.

10. One *seised of the manor of Catesmarsh in fee, and of other lands in fee in Catesmarsh, and also of a term for years in Catesmarsh, conveys the manor by special name, and the other fee simple lands by special name; and then came these general words, and all other his lands and tenements whatsoever in Catesmarsh; and the question was, whether the lease for years passed; and upon this the Court was divided; Croke and Williams J. were of opinion, that the term did not pass; Yelverton J. and Fleming Ch. J. held it did pass. In that case it was adjudged afterwards, that by those words the term did not pass; for there the *habendum was to the grantee and his heirs*. Skin. 539. 6 W. & M. B. R. cited in case of JERMAN v. ORCHARD, as the case of EDWARDS and DENTON, reported by Serjeant Moor, p. 832.*

## (W) Pass. What will pass by the word (Bona) only.

Personal actions are as well in-

cluded within this word (goods) in an *act of Parliament*, as goods in possession. 12 Rep. 2. Pasch. 4 Jac. in the Exchequer Chamber, Ford & Sheldon's case.

Br. Grant, pl. 148. S. C.

1. **BONA** include all chattels, as well real as personal. Co. Litt. 118. b.

2. If two men have goods in common, and have other goods severally, and give to me omnia bona sua; it passes all their goods, which they have in common, and all their goods which they have severally; per Newton Ch. J. quod nullus negavit. Br. Done, &c. pl. 12. cites 19 H. 6. 4.

Br. Done, &c. pl. 43. cites S. C.—A term for years will pass by a

devise of all his goods, but not by a grant of all his goods. Cro. E. 386. Portman v. Willis.—a term is taken in 7 H. 4. 6. b. to be within the word (goods) and an executor may have action on the statute of goods carried away in vita testatoris, per Warburton J. 2 Brownl. 131. in case of Petto v. Checy.

In the spiritual court, where legacies are demandable, bona & catalla are taken for all one, and see the *stat. of Marl.* giving an action to the successor, *ad repetenda bona prædecessoris*; yet an *ejct. custod.* has been maintained thereupon; so also upon the statute *de bonis asportatis*, &c. the same has been resolved\*; and where administration is granted, it is only omnium bonorum without speaking of chattels, yet has the administrator interest in leases, as well as moveables. So the statute *de prærog. regis* mentioning only forfeiture *de catallis* is extended to moveables. So in the writ of assise, *de catallis quæ in eo capta fuerint*, and in the writ of execution on a statute, there is only the word catalla, and not bona; most of which statutes and writs were considered in PORTMAN's case; but appear not to have been considered in the case in E. 6. time when the contrary was held, and in the case reported Kelw. 35. a. 13 H. 7. it seems that bona & catalla were taken as *synonymi*. Wentw. Off. Executors 253. 254.

\* [110]

4. By

4. By grant of all goods, *apparel* will not pass. Arg. Godb. 398. cites 3 Rep. 81.

5. The question in chancery was, whether *plate* passed by the name of goods; and it was decreed to be goods. Toth. 133. cites Mich. 15 Car. Turner v. Williams.

6. The father in consideration of marriage of A. his son with B. and of a considerable portion, covenanted to settle and assign to A. such lands, and leave to him *all such goods, as he should be possessed of at the time of his death*. The father leaves a legacy of 30*l.* to a daughter, and other specifick legacies by his will, and makes A. executor; A. took no notice of the will, nor proved it. Decreed A. to account for what came to his hands after the father's death, and which is not *included in the articles*, and if he has sufficient assets unadministred (and beyond what is included in the articles) at the time of the bill exhibited, then to pay the 30*l.* with damages, since the bill brought, and to deliver the specifick legacies, and pay her full costs, which she shall swear to be at. Fin. R. 125. Mich. 26 Car. 2. Mablety v. Baker.

7. *Money* will pass by the name of bona, though it may not be demanded by such name. 2 Show. 133. Anon.—And money is goods, within the statute of 1 R. 3. 3. for seizing felons goods. Raym. 414. Osborn v. Wandell.

## (X) What shall pass by Grant of all Goods and Chattels, [*or Goods or Chattels.*]

[ 1. ] If A. B. grants omnia bona sua, the *trees growing* shall not pass. 18 E. 4. 16.]

[ 2. *Otherwise if the trees were cut* at the time of the grant. 18 E. 4. 16.]

[ 3. If a man grants all his goods and chattels, an *obligation* in which J. S. is bound to him, shall pass by this, that is to say, *the parchment*, though the debt be a *chose en action*, which cannot pass. D. 26 H. 8. 5. 3. per Fitz. ]

The Court was of opinion, that by a gift of all his goods

and chattels a bond would pass. 4 Mod. 157. Cook v. Bosinger.—D. 5. b.—8 Rep. 33. Caly's case, contra.—that is the paper and wax will pass. Arg. Litt. R. 87. cites D. 5.—By the word (bona) all chattels real and personal pass, and in a grant by the King, these words carry a chose en action. per Walters Ch. B. Litt. R. 87.—Coke Ch. J. seemed contra. Roll. R. 7. in case of Cullam v. Sherman.—Goldsb. 114. pl. 7. S. P. but no resolution. Adams v. Oglethorp.—By a gift of goods and chattels, *charters* do not pass. Br. Charters de terre. pl. 70. cites 22 E. 4. 12.—2 Inst. 152.—D. 5. b. Marg. cites Kelfet v. Nicholson.—In as much as the debt included and written on it is the principal, the words of the grant ought to comprehend the name of the principal. But if I grant all my goods and chattels *in such a box* to J. S. and *in this box are bonds*, there the bonds pass, by reason of the *special reference* by the grant expressed, quod Curia concessit. Yelv. 68. Channel v. Robotham.

[ 4. If a man grants omnia bona & catalla, *charters* do not pass. 8 Rep. 33. 22 E. 4. 12. ]

Perk S.

115. Br.

Done, &c. pl. 47. cites Done in Fitz. 6.—*A deed of entail* does not pass by gift of all goods and chattels; for it is inheritance, as the land is, and of the nature of the land, and shall go to the heir. Br. Charters de terre, &c. pl. 53. cites 4 H. 7. 10.—Br. Grants pl. 84. cites S. C. per Fairfax and Hufey.

[ 5. So, by such grant a chest sealed with charters does not pass. 22. ]

[ \* 6. If a man grants *bona sua* (and does not say *omnia*) yet all goods shall pass by it. 21 E. 4. 47. ]

These words will pass a term for years.

[ 7. If a man grants *omnia bona & catalla sua* a term for years in right of his wife shall pass. 9 H. 6. 52. b. ]

2 Buls. 226. Stone v. Grubham. — 2 Brownl. 131. Peto v. Chety. — An interest termini will pass by grant of *omnia bona & catalla in custodia sua*. Cro. J. 60. Saffin v. Adams. — Mo. 352. Portman v. Willis. If there are no other circumstances to guide the intent otherwise. — A lease for years to A. to begin after the expiration of a lease made to B. will pass by such grant, though the words were *omnia tunc bona & catalla sua*. 3 Le. 152. Cades v. Oliver.

Pl. C. 418, 419. Bracebridge's case. — Noy. 106. Dalby v. Spooner,

[ 8. If a man grants *omnia bona & catalla sua*, the goods which he has as executor, shall pass as well as his proper goods. P. 1 Ja. B. 1. between Sheldon and Billey adjudged; the which intratur. P. 44 El. Rot. 125. 20 H. 7. Kell. 64. b. per Frowick. ]

accordingly cites 10 E. 4. 1. 19 H. 6. 4. — 4 Le. 22 contra. 3 Buls. 8. contra. Br. Done, &c. pl. 47. contra, that the goods of the testator do not pass; yet he shall have trespass, that *bona & catalla sua cepit*, of his own possession, cites 10 E. 4. 1. — Br. Grants, pl. 96. cites S. C. according, per Danby and Moyle.

[ 9. If an administratrix takes baron, and the baron grants *omnia bona & catalla sua*, and it is expressed in the deed, that he gives a horse in the name of seisin of the goods, which horse is parcel of the goods of the intestate, as is found in a special verdict, it seems the goods of the intestate shall pass by this grant. Dubitatur, Trin. 8 Car. B. R. between Rowse and Barkley, upon special verdict. Intratur Trin. 7 Car. Rot. 497, or 498. See 21 H. 7. 29. b. of an arbitrament. ]

[ 10. By a grant of all his chattels, a term in extent, upon a statute merchant shall pass; for it is but a chattel. 11 H. 6. 7. b. ]

\* S. C. cited Arg. 4 Le. 109.

11. The abbot and covent of D. granted a rent-charge by D. for four years, with clause of distress, and the grantee granted over the same rent, which was granted to him to W. N. by these words, *omnia bona & catalla sua tam viva quam mortua*, and it was held, that the said rent which was a chattel, might pass by these words, with attornment of the tenant, well enough, quod nota. Br. Grants, pl. 62. cites \* 39 H. 6. 35.

12. If a man bails goods, and the bailee gives *omnia bona & catalla sua*, the goods bailed do not pass. Br. Done, &c. pl. 47. cites 10 E. 4. 1.

Dal. 82. pl. 26. —

D. 261. b. pl. 27.

Marg. cites 3 Jac. B. R.

Fitzwilliams's case.

13. Per Dyer, if a man has a lease for years of a house, and grants all his goods and chattels being in the same house; as well the lease of the house as the goods within it, pass by such grant. Pasch. 14 Eliz. 3 Le. 19.

14. Lessee for years of the pawnage of the park of H. grants all his goods and chattels moveable and immoveable within the said park. It was held by Weston and Dyer justices, that the lease of the pawnage passeth by these words, 3 Le. 19. pl. 46. Pasch. 14 Eliz. Anon.

15. Bona



15. Bona & catalla do not extend to *rights* or *choses en action*; for such things only, which are commonly understood, shall pass by such words; by grant of goods, chattels real will not pass; for when men speak of *goods*, householdstuff, money and such personal things only are understood. So a man cannot be said to have a chattel, but where he is possessed of it. So that by grant of bona & catalla by the king, a presentation to a church of a person outlawed will not pass; for this interest is but a *jus presentandi*; per Anderson; but per Periam J. this interest is a chattel; *adjournatur*. Le. 202. The Queen v. Archbishop of Canterbury, Fane and Hudson.

16. By the grant of omnia bona & catalla *dogs* do not pass. [ 112 ]  
Arg. Ow. 94.

*Hawks nor*  
bonds will not pass by those words. Br. Done, &c. pl. 39. cites 22 H. 8. 4. per Elliot. Quod non negatur. — *Apes*, &c. which are *feræ naturæ*, and are made tame for pleasure, shall not pass per Elyot. Br. Grants, pl. 142. cites 12 H. 8. 4.

17. Devise of all his *moveable goods* and chattels extends not to debts, which are *jura*, as *bonds*. Jo. 225. Sparkes v. Benne. *Debts and rights do not pass by those words.* Sid. 142. Jo. 225.

18. *Fish* cannot be called bona & catalla, unless they are in *trunks*, though they are in a close pond; but he may call them *pisces suos*. 6 Mod. 183. The Queen v. Steer.

(X. 2) Where a Grant is ineffectual to pass the Estate &c. intended, it shall pass another Estate.

1. A Termor, supposing himself to be seised of a freehold, grants the land to J. S. for life, but no livery was made. The term passes. For 10 Eliz. D. 227. is, that a termor devised the land to one for his life, and the term passed. So here. But Popham said, if there had been in the deed a *letter of attorney to make livery*, it would perhaps have been otherwise; for then the grantor's intent would have appeared to have passed a freehold, and not the term only. Mich. 39 & 40 Eliz. B. R. Cro. E. 585. Buckler v. Hardy.

(X. 3) Uncertain. How much shall pass.

1. IF a man grants to another a *common infra metas & bundas* of the vill of D. and part of the vill is *several*, and part *wast land and common*, he shall have common in the common land, but not in the several. Br. Grants, pl. 125. cites 14 Aff. p. 22.

2. A. was seised of land in D. and by deed shewn in evidence gave and granted eighteen acres of land, parcel of the tenements *joint cum common of pasture*, in all his land, *habendum & tenendum to him and his heirs*, &c. by which the plaintiff made title to common of pasture in gross in D. and made plaint to common in 200

acres of lands, with all manner of beasts, and 'twas *not expressed in the deed, in what vill the common shall be taken, nor in what tenement, nor with what number of beasts*; it shall be intended, that he shall have common in all the other lands of the grantor in the same vill where the other land was given, and with beasts without number; quod mirum, that he may grant it over; and the plaintiff recovered by award, quod nota. Br. Grants, pl. 78. cites 36 Aff. 3.

3. A. grants a rent of 5 l. to B. out of certain land, *for his life, and after the death of C. 10 l. to B. for his life*. C. dies; B. shall have 15 l. during his life; for A. ought to have added an exception after the death of C. Jenk. 272. pl. 90.

4. If a man *binds himself to give another six cows and horses*, it must be *six of each*, and it shall be taken severally, as strongest against the grantor; per Curiam. Mich. 12 W. 3. 12 Mod. 421. In case of Hammond v. Ouden.

[ 113 ]

5. It was agreed by marriage articles, that in consideration of a provision for the wife made by the intended husband, she *should have no claim out of his real or personal estate, provided that this should not extend to all or any of the household goods or utensils, or household stuff, &c. of the said husband at the time of death*, all which she was to receive and enjoy. Ld. Ch. King said, that where the meaning is uncertain, the safest way is to follow the letter; and that as both words and letter extend to all household goods, and the intention not appearing otherwise, and it being in favour of a wife, he would take the meaning as large as the words, and so decreed her, not only the goods in the house in London, in which he dwelt, but also a very great number of beds, sheets, and other furniture in proportion for a great number of seamen, invalids, in an hospital at Gosport, used by the government. But on appeal, this decree was reversed in the House of Lords. 2 Wms's Rep. 302. Mich. 1725. and Feb. 1726. Pratt v. Jackson.

(X. 4) Pass. What Estate or Thing *not* contained in the Premises.

1. A. Granted to B. *divers loads of estovers* out of his wood of D. to be burnt in his house of S. and that B. and his heirs may take the estovers out of the said wood, at certain times of the year, and adjudged, that this is an estate only for life of the grantee, because the word heir is not in the grant, though 'tis in the sequel of the deed. D. 253. pl. 100. Marg. cites it as held per Anderson Ch. J. Ld. Paget's case.

(Y) What

(Y) What Thing shall pass by the Grant of other  
Parcels.

[ 1. ] IF a man seised in fee of a manor leases parcel of the demesnes for life, and after grants the manor to another in fee, to whom the lessee and the tenants of the manor attorn, the reversion of the land so leased for life shall pass; for it is parcel of the manor. Mich. 15 Ja. B. R. between *Boxe and Palmer*. Per *Houghton*. 26 Ass. 55. adjudged. ]

The reversion of the tenements in lease was in the owner of the manor, otherwise he could not have the rents and services; so that it must be either a reversion in gross, divided from the manor, or else part of the manor: that it should be a reversion in gross, divided from the manor, has no colour of reason; for when a man is seised of a manor and demesnes in possession, and makes a lease for life, and parts with the possession of what he so leases, in lieu of the possession he has the reversion and services, which are annexed to the manor and part of it, and the reversion and services naturally follow the right and nature of the land. Pig. of Recov. 44, 45.

[ 2. So it seems by common recovery of the manor the reversion of the lease so leased shall pass. For it may be so demanded by a precipe of the manor. Mich. 15 Ja. B. R. between *Boxe and Palmer*; upon evidence this was a doubt, of which the Court would not give any opinion. ]

It seems contra. For it is said in Co. Litt. 325. a. that in case of gift in tail, or for life, of a manor, excepting any part, there ought to be several writs of precipe. Because the franktenement is several.

[ 3. If a bishop leases parcel of the demesnes of a manor for life not warrantable by the statute of 1 Eliz. of bishops, and after leases the manor to another for life, the said parcel so before leased for life will pass with attornment of the first lessee; for the said lease does not make any discontinuance, but the reversion of it continues parcel of the manor. P. 1 Car. B. R. between *Walter and Jackson* per Curiam, adjudged in writ of error upon such judgment in bank, and then was said by Justice *Barkley*, that it was so resolved in bank in this case. ]

[ 4. If tenant in tail of a manor leases parcel of the demesnes for life, not warrantable by the 32 H. 8. and after leases for life or conveys the manor in fee to another, and lessee attorns, yet the reversion shall not pass by this grant of the manor, because by the lease for life of the said parcel, this was a discontinuance of this parcel, and so the reversion no parcel of the manor. P. 11 Car. B. R. between *Walter and Jackson*, per Justice *Barkley*, in a writ of error upon a judgment in bank, and then said by *Barkley*, that it was so agreed in B. in this case. ]

[ 5. If a man leases land for life, excepting the trees there growing, and after he grants the reversion to another, the trees shall pass as well as the land; for the trees are annexed to the reversion. Adjudged, 11 Rep. 50. b. *Liford's case*. ]

But trees in boxes are no part of the feebold, and do not pass by a grant of it. Pasch. 3 Anne B. R. 6 Mod. 170. *Olivier v. Vernon*.

[ 6. So if he had granted the reversion by name of his tenements, the trees shall pass. Adjudged 11 Rep. 50. b. *Liforde's case*. ]

Br. Com-  
prise, &c.  
pl. 26. cites  
S. C. and  
makes a  
Quære. Be-

cause it may be parcel of the possessions or revenues of a priory, but not of the priory itself, as it seems; tamen quære.

7. 'Twas agreed by all the justices that an *annuity* may be parcel of a priory; for this is a thing perpetual; contrary of a manor, or of an acre of land, and therefore it cannot be parcel of them. Note a diversity. Br. Comprise, pl. 23. cites 22 E. 4. 44.

8. It was admitted that a *hundred* may be parcel of a manor. Br. Court Baron, pl. 15. cites 27 H. 6. 2.

9. 'Tis said that *land* cannot be parcel of an office, nor an office parcel of land, but land may be appendant to an office, and an office may be appendant to land. Br. Comprise, pl. 17. cites 1 H. 7. 28, 29.

Br. Com-  
prise, pl.  
18. cites

S. C.—A

castle may  
be parcel of  
a signiory.

Quod nota.

Br. Comprise, pl. 35.

10. In trespass, recovery was pleaded of a castle, of which an acre of land was parcel, and it was agreed, that an *acre* may be parcel of a castle, and per Brian, this is proved by the tenure by castle guard; for if the land escheats, it shall be parcel of the castle, and land may be parcel of a vill. Br. Precipe, pl. 23. cites 5 H. 7. 9.

11. If a man gives the *land and body of an heir in ward, and all things which he hath by reason of the custody*, the *advowson* shall pass. Br. Done, &c. pl. 49. cites 5 H. 7. 36.

• S. P. Br.  
Court  
Baron, pl.  
8. cites 8

H. 7. 3. S. C. by the best opinion; and that by grant of the hundred the leet passes—S. P. per Fineux, Read, Fisher, Davers, Townsend and Brian. But contra per Kehle, Wood and Vavisor. Br. Patents, pl. 56. cites S. C.—Br. Leet, pl. 22, cites S. C.—*Waife and Stray* is no parcel of a leet, nor incident to it, but may be appendant to it. Br. Incidents, pl. 16. cites 3 E. 2. Fitzh. tit. Bre. 783.—S. P. Br. Leet, pl. 23. cites 8 H. 7. per Vavisor.

13. The *patronage of a chapel* and such like may be parcel of an honour or earldom. Quod nota, per Curiam. Br. Comprise, &c. pl. 38. cites 10 H. 7. 18, 19.

[115]

14. If a man seised of a *manor* enfeoffs a stranger of the manor, without saying any thing of services, and without saying [cum pertinentiis], by such feoffment the *services of the tenants*, which held of the manor, shall pass with the attornment of the tenants, for in such cases the services are parcel of the manor, &c. Perk. S. 116. cites Brief, 581. Feoffment 53.

• 2 Sand.  
401. Smith  
v. Martin.  
—Land  
may be  
Parcel of a  
house. Br.

15. \* *Garden* and *curtelage* are parcel of an *house*, per two justices, and per Sanders a *dovehouse*, *mill*, and *shops* may be parcel of the messuage. Pl. C. 171. Hill v. Grange.—M. 23 H. 8. Br. Feoffments 171.

16. If a *house* or tenement, built upon a *marsh*, be leased with the *appurtenances*, the marsh passeth not by law, yet relieved in equity against the heir. Toth. 225. cites 36 Eliz. Ellis v. Beswick.

17. One

17. One moiety cannot be parcel of another moiety; for every moiety is entire; per Anderson Ch. J. Mich. 29 & 30 Eliz. C. B. Le. 77. Zouch v. Bampffield.

(Z) In what Cases one Thing shall pass by Grant of another. *Incidents.*

[ 1. **T**HE grant of a thing passes *things included, without which the thing granted cannot be had.* In time of E. 1. Fitzh. Grants, 41. Hobart's Reports. Case 295. Agreed per Curiam between Lord Darcy and Askwith. ]

*Things which are incident to another thing, may pass by the*

*grant of the principal, without mentioning of the incident. As a court of piepowders is incident to a fair, and shall pass by a grant of the fair; Per Vavilour. Br. Grants, pl. 86. cites 8 H. 7. 2.——Hob. 234.*

[ 2. If a man holds of another as of his honour of his castle by castle-guard, if the lord grants over the castle, the service passes as incident. 17 E. 3. 65. Grantor shall not have it after. ]

*If a man holds of his lord by homage,*

*fealty, rent and castle-guard, and the lord grants over the services, and the tenant attorns; the grantee shall not have the castle-guard, because he hath not the castle. Br. Grants, pl. 162. cites 31 E. 1. and 19 E. 2. and Fitzh. Ass. 441.——But per Bere. and Spigurnel, he shall have the money, because it is a contribution: Br. Assise, pl. 458. cites S. C. But Brooke makes a quere of it, and thinks it is lost.*

[ 3. But if a man holds of another as of his honour of his castle by other services than castle-guard, and the lord grants over the castle, yet the services remain in the grantor annexed to the honour. 17 E. 3. 65. ]

[ 4. If a parson be patron of the vicarage of the same parsonage, and leases the parsonage to another, the patronage of the vicarage shall pass as incident to it; for the patronage of the vicarage belongs of common right to the parsonage. 17 E. 3. 51. ]

[ 5. If there be lord and tenant by fealty and rent, and the lord grants the rent, the fealty shall pass as incident to it; and so shall pass as rent service; for he grants the rent in the same manner as he himself had it. 26 Ass. 38. Winton's Assise. ]

*Br. Grants, pl. 2.——Incidents, pl. 1. cites 27 H. 8. 22. per Fitz-*

*herbert and Mountague, but per Moyle contra. M. 39 H. 6. Fol. 24, 25.——pl. 24. cites 29 Ass. 20.——But in the same case, if the lord grant the rent (serving to himself the fealty) the grantee shall have the rent as a rent seck, and the fealty doth not pass, &c. Perk. S. 113.*

*If in such case the lord releases to the tenant his right in the land, except (præter) the rent, there the rent and fealty remain; for it is incident to the rent service. Br. Incidents, pl. 25. cites 12 E. 4. 11.——Ibid. pl. 32.*

[ 6. If there be lord and tenant by homage, fealty, escuage and rent, and the rent is granted over, the seigniorie shall not pass with it; because the homage or escuage are not incident to the rent service, and the fealty cannot pass without them, and therefore it shall be rent-seck. 26 Ass. 38. per Wilby ]

[ 116 ]  
*If there be lord and tenant by homage and fealty, and*

*the lord grants the homage unto a stranger, and the tenant attorne; by this grant the fealty shall pass as incident to the homage, &c. Perk. S. 112.——If a man grants the homage; rent and services of his tenant, by this escuage passes well, though it is not mentioned in the fine. Br. Grants, pl. 136. cites 20 E. 3. and Fitz, per quæ servicia 11.——Br. Grants, pl. 86. cites 8 H. 7. 2. per Vavil.*

[ 7. So,

Br. Grants, pl. 2.—  
But where he holds by fealty, scutage and rent, and grants the rent, now it is rent-seck; for the fealty remains with the homage as incident to it. Br. Incidents, pl. 10. cites 26 Aff. 66.

[ 7. So, if there be lord and tenant by homage, fealty and rent, and the lord grants the rent to another, the fealty shall not pass for the cause aforesaid, but the rent shall pass as a rent-seck. 26. Aff. 38. Dubitatur. ]

Donor in tail grants the rent and services of the tenant in tail to a stranger in fee, the

[ 8. If a man leases for years or life, or gives in tail rendering rent, and after grants over the rent, the fealty shall not pass, because it is incident to the reversion which does not pass, and therefore the rent shall pass as a rent-seck 26 Aff. 38. in Fine. Contra 26 Aff. 66. adjudged against the opinion of the major part, and error brought. ]

tenant in tail attornes, nothing shall pass but a rent-seck, for the services are incident to the reversion, and cannot pass without the reversion, nor be severed from the reversion; for the reversion of them was not good but in respect of the reversion, by several, Wilby e contra. Br. Grants, pl. 140. cites 26 Aff. 66.—Br. Incidents, pl. 33. cites S. C.

Fol. 60. [ 9. If the king has a corody as incident to the patronage of a priory, and grants over the patronage, the corody shall pass with the patronage, because it is incident to the patronage. 26 Aff. 53 ]

Roll. R. 259. Rice v. Wiseman.

[ 10. If a man has a warren in his own land, and he leases the game, the soile shall not pass by it. M. 13 Ja. B. R. adjudged between Rice and Wiseman. ]

[ 11. If a man has a park in his soile, and he leases the park, the soile shall pass; for he cannot have a park in the soile of another man. Mich. 13 Ja. B. R. ]

[ 12. If a man has a warren and a park, in his own soile and he leases the warren, the soile shall not pass. M. 13 Ja. B. R. ]

[ 13. If a man has a warren in his own soile, and he leases the warren, the soile shall not pass by it; for a man may have a warren in the soile of another man. M. 13 Ja. B. R. Dubitatur. ]

S. P. But in that case if the grantor of the reversion in his grant

[ 14. If a man leases for life or years, or gives in tail rendering rent, and after grants over the reversion, the rent shall pass upon attornment as incident to the reversion, though no mention be of the rent. 26 Aff. 38. ]

saves unto himself the rent, the rent shall not pass. Perk. S. 113.

Hob. 234.—Unless he cannot otherwise take the fish as

[ 15. If I grant to another my fish in my water, he may fish with nets, but he can not cut the banks, and so make it dry to take the fish. Hobart's Reports 265. For it is not directly necessary nor usual ]

with nets, &c. Arg. Godb. 53. pl. 65.—For a grant shall always have a reasonable construction. Perk. S. 110.—So if I grant all the fish in my pond, the grantee may fish with nets. Godb. 538. Arg. cites 2 R. 2. Grants.

Hob. 234.—11 Rep 52.

[ 16. If a man grants or reserves wood, it implies a liberty to take and carry it away. Hobart's Reports 265. ]

—If a man has a wood, and he grant all the oaks growing in his wood to a stranger, the grantee may cut down the oaks, and come upon the land of the grantor with carts to carry them, for otherwise he cannot conveniently have them, &c. Perk. S. 110. cites 6 E. 1. Gr. 41.—S. P. Arg. Godb. 53. pl. 65. cites Mich. 28 & 29 Eliz. in case of Dike v. Dunstan.

\*[117]

[ 17. If



[ 17. If I have a *close* inclosed with my own land on every part, and I alien this close to another, he shall have a way to this close over my land as incident to the grant. For otherwise he cannot have any benefit by the grant. Mich. 3 Ja. B. R. per Yelverton. Tr. 5 Ja. B. R. between Clark and Rugge; and feoffor shall assign the way, where he may best spare it. ]

and is not obliged to use the same way as I do. Noy. 123. Oldfield's case.—If a way of necessity be claimed, it is a good plea to say, the party has another way. But fecus, where a way is claimed by grant or prescription. 6 Mod. 4. Mich. 2 Annæ, B. R.

Cro. J. 170. S. C.—The grantee shall have a convenient way over my lands,

[ 18. So if the close aliened be not totally inclosed with my land, but partly with the land of strangers; for he cannot go over the land of strangers. Mich. 3 Ja. B. R. Quære. ]

19 Where a man holds of another of his manor, by suit to his mill, and the lord grants the mill and suit, yet the heir of the lord shall have the suit if he makes a new mill; for the tenure is to the manor of the grantor or to his person, and not to the mill; which suit remains with the other services; per Harle. Quære. Br. Affise, pl. 458..cites 31 E. 1. and 19 E. 2.

20. Where a man has a warren in his land, and demises the land for years, without expressing the warren, the lessor shall not have it, during the years, for he hath not reserved it; and the lessee shall not have it, for it is not granted to him, by the best opinion; but per Prisot, if the warren be appendant to the manor or land, it shall well pass by the demise of it; but if it be in gross, it shall be in suspense during the term. Br. Grants, pl. 144. cites 32 H. 6. 24.

A. has warren in his land, and leases the land to B. rendering rent. The warren does not pass. Tr.

21 Eliz. D. 30. b. pl. 209. in Marg.—There is a difference between a warren used with a manor *time out of mind*, and a warren *appendant*. In the first case, it shall not pass by a grant of the manor, cum pertinentiis; for it is not parcel; in the other case, it shall pass; but not without the words, cum pertinentiis. Dy. 30. b. pl. 209. Marg. cites 8 H. 7. 4.

21. Where I grant to a man to dig my land to lay conduit pipes, if the pipes decay, he cannot dig my land to mend them, if it be not so granted. The same law, if I prescribe to have such conduit, &c. I cannot amend it, if I do not prescribe to do it, toties quoties, per Choke; quod fuit negatum in both cases; for per Curiam, it is incident to such grant to enter and amend. Br. Nuisance, pl. 14. cites 9 E. 4. 35.

22. Waif and stray do not pass by grant of a leet; for they are not incident; contra if they are appendant, and the grant is, cum pertinentiis. Br. Patents, pl. 56. cites 8 H. 7. 1. per Vavisor.

23. A leet is not incident to a hundred; for one liberty cannot be incident to another liberty; but a leet may be appendant to a hundred. Br. Incidents, pl. 18. cites 12 H. 7. 16.

Br. Court Baron pl. 9. cites S. C.

24. If one leases a rectory, the lessee shall have tithes and offerings, as incident. Br. Lease, pl. 15. cites 15 H. 7. 8. per totam Curiam.

The tithes pass by such lease, though

without deed; for the church, the church-yard and the tithes, are the rectory; and all pass by parcel, by the word rectory; and the parson shall have trespass of the trees cut in the church-yard and carried away, and for breaking of the church. Br. Lease, pl. 20. cites 21 H. 7. 21. and there is a quære, whether the parsonage house, glebe and oblations do not pass in the demise by the name of rectory.—Br. Trespass, pl. 210. cites S. C.

25. Grant

25. *Grant of a forest* passes all the game. D. 169. b. Mich. 1 & 2 Eliz.

26. A. has a manor, in which is a park and fish-ponds. A. demised the manor, *excepting deer and fish*, and after grants the reversion; grantee shall have deer and fish, as appendants. 11 Rep. 50. b.

See Wast,  
(M) pl. 16.

[ 118 ]

27. A mine is open at the time of the lease; the lessee cannot take *timber to use* about the mine, though former lessees have taken it; for the wrong of one lessee cannot warrant the wrong of another. Hob. 235.

But if A.  
licence B. to  
hunt in his  
park, and  
to kill a  
deer, yet

28. *Warrant for a buck* in a park impowers the servant of him, that is to have the buck, to go into the park for him, and to assist the park-keeper in killing him, and to bring him away. Hard. 347. Arg.

B. cannot carry away the deer; for it is not incident to the thing granted; per Haughton J. Godb. 359. Trin. 21 Jac. B. R.

29. Where a *franchise* is granted for the benefit of a body politick the body politick has a power incidently to *regulate* that franchise for the publick benefit. Trin. 11 W. 3. B. R. 1 Salk. 142. City of London v. Vanacre.

30 If the king grant a tract of land in the plantations abroad to a man, with a *legislative power*, which grantee passes over to another; the legislative power shall not pass as a privilege annexed to the land, but that remains with the person of grantor; per Holt Ch. J. 12 Mod. 399. Pasch. 12 W. 3. B. R. In a case between Basse and Bellamount.

## (Z. 2) Pass as Incidents, what, to personal Things granted.

1. **I** F a man bargains for 20 barrels of ale or cups of wine when he comes to his house, there the grantee shall have the ale and the wine, but not the barrels, nor the cups; Per Fitzh. clearly. Br. Contract, pl. 4. cites 27 H. 8. 27.

## (A. a) What Thing shall pass by Grant of other Thing. Appendants.

Goldsb. 42.  
pl. 20.—  
And with-  
out saying  
any thing  
of the ad-  
vowson.  
Perk. S.

[1. **I** F a man seised of a manor, to which an advowson is appendant, aliens the manor \* without saying *cum pertinentiis*; yet the advowson shall pass; for this is parcel of the manor. Perkins S. 116. 5 H. 7. 37. b. Stamford's Prerogative, 42. 10 Rep. Whistler 64. agreed. 38 H. 6. 34. Contra Doctor and Student 35. 8 H. 7. 4. b. ]

116. S. P.—So the king, before the statute of prerogative, granted a manor to J. N. without expressing the advowson, and without saying, *cum pertinentiis*, and yet adjudged that the advowson passed, because it was appendant to the manor; but now by the statute of prerogative, advowson, dower, fees of knights, do not pass, unless expressly mentioned. Br. Patents, pl. 6. cites 43 E. 3. 22.—Br. Grants, pl. 19. cites S. C.—Br. Incidents, pl. 4. cites S. C.—See Ibid. pl. 35. contra.

• *Br. Grant*, pl. 86. says, that things, which are appendant, regardant or appurtenant, shall not pass by grant of the principal without these words, *cum pertin.* as common, advowson, way, waif, &c. cites 8 H. 7. 2. per Vavifour. — *Br. Grants*, pl. 43. cites 22 H. 6. 33. per Moyle. — \* S. P. per Vavifour and Davers; but contra per Brian and Towns. *Ibid.* pl. 85. cites 35 H. 8.

[ 2. If two coparceners be of a tenement, to which an advowson is appendant, and the one dies, his heir in ward, and the guardian grants over the land without any mention of the advowson, reserving the ward of the body to himself, the advowson shall not pass to the grantee. 32 E. 1. 89. adjudged. ]

[ 3. If at this day a grant *de novo* be made of common of pasture for beasts levant and couchant upon his manor of D. or common of estovers or turbary in fee, to be burnt or spent within his manor, these are commons appurtenant; and will pass by grant of the manor. Co. Litt. 121. b. ]

Cro. C. 482. Sacheverell v. Porter.

[ 4. If A. seised of 100 acres of land, to which a common for beasts levant and couchant upon the land is appurtenant by grant within time of memory, grants 10 of those acres only without saying *cum pertinentiis*; yet a proportionable common for beasts levant and couchant upon those 10 acres shall pass, in as much as it is appurtenant to the said acres, and the common is to be apportioned. Mich. 13 Car. B. R. \* between Sacheverell and Porter, adjudged per Curiam upon a special verdict, and special pleading. Intratur. Tr. 11 Car. Rot. 324. ]

Cro. C. 482. 2 Sid. 87.

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\* Fol. 61.

[ 5. If there be a common appurtenant to a copyhold tenement, and the lord makes feoffment of the tenement with all profits, commodities and common to it appertaining, yet the feoffee shall not have any common; for it was appurtenant to the copyhold, and not to the freehold. Mich. 10 Ja. B. R. ]

See Common extinguished.

[ 6. So if he lease the copyhold tenement for years, with such words as before, yet the lessee shall not have common for the cause aforesaid. M. 10 Ja. B. R. adjudged. ]

[ 7. If the king grants the manor of D. to J. S. in fee and *tot tales & hujusmodi libertates*, as such abbot lately had in the same manor, and the abbot had *bona & catalla felonum*, by which this is a good grant of this liberty to J. S. and after J. S. made feoffment without deed of the said manor, *cum pertinentiis* to J. D. This shall not pass the said liberty to J. D. it being done without deed. Mich. 37 El. B. R. in Owen Vaughan's case, which is the abbot of Strata Marcella's case, and reported. Co. 9. ]

8. A forest was appendant to the honour of P. and the king granted the honour *cum pertin.* and by this the forest passes; per Curiam. Br. Incidents, pl. 11. cites 26 Aff. pl. 60.

Br. Patents, pl. 35. cites S. C. — S. C.

cited 10 Rep. 64. b. in Whistler's case.

9. But where the king had granted the bailiwick of the forest before to J. D. in fee, rendering rent, this bailiwick does not pass; for it is severed by the grant of it, and therefore it is not appendant. Br. Incidents, pl. 11. cites 26 Aff. pl. 60.

S. P. For it was in gross before, and cannot pass, but by express

words. Quod nota. Br. Patents, pl. 35. cites S. C.

10. A *leet* may be appendant to a *vill*, and pass by the name of a *vill*, *cum pertinentiis*, in a grant of the king. Br. Incidents, pl. 29. cites 18 H. 6. 11.

11. *Fire-boote*, *house-boote*, and *hey-boote*, are appurtenant to a *termor*, or tenant for life, though the lease be by *parol*, without deed, and without expressing any grant of them; per *Ascue*, & *totam Curiam*. And the same law, per *Markham*, of *plough-boote*, but contra per *Ascue*. And as to *fold-boote*, the Justices were of diverse opinions. Br. Incidents, pl. 6. cites 21 H. 6. 27.

12. If I lease an acre of land to which an *advowson* is appendant for life, reserving the *advowson*, and after grant the reversion of the acre with the appurtenances, the *advowson* shall not pass; because it is not now appendant. But if I grant the *advowson* for life, reserving the acre, yet the reversion of the *advowson* remains appendant to the acre, and by grant of the *advowson* with the appurtenances, the *advowson* in reversion shall pass; per *Prisot*. Br. Grants, pl. 60. cites 38 H. 6. 34.

Br. Grants,  
pl. 129.  
cites S. C.  
— Br.  
Comprise,  
pl. 17. cites  
S. C. But  
land cannot  
be parcel of

13. Land may be appendant to an office; and an office may be appendant to a manor or land; and by grant of the office in the one case, the land shall pass without livery; and by livery of the land in the other case, the office shall pass: as the office of Warden of the Fleet has land appendant, &c. Br. Incidents, pl. 13. cites 1 H. 7. 28.

be parcel of an office, nor an office parcel of land.

14. *Waif and stray* are not parcel of a *leet*, nor incident to it, but may be appendant to it. Br. Comprise, &c. pl. 20. cites 8 H. 7. 1.

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15. *Tithes and offerings* are incidents to a *parsonage*, and by lease of the *parsonage* by *parol*, without deed, they pass, though not expressly named. Br. Incidents, pl. 7. cites 15 H. 7. 8.

16. If there be a *park* of antiquity, and office of *parkship* usually granted, with certain profits appendant to it, as *windfalls*, &c. those things shall go with the office by prescription; and be enjoyed by the keeper. D. 71. b. pl. 47. Trin. 6 E. 6.

17. *Feoffment* of a manor, &c. and livery made; though the tenants do not attorn, yet an *advowson* passes, as appendant to the demesnes. D. 70. b. pl. 41. Marg. 32 Eliz. C. B.

18. If a man has land, and a way to it, and he leases the land, the way passes, though not expressed in the deed; and the difference is between a grant of land with *common* or *estovers* to be burnt; there if he lets the land, the common of *estovers* will not pass without a deed and express words; because they are *profits appender in another's soil*, and are *not of necessity*; but the land cannot be used without a way, so that it must go with it of necessity. And unity of possession does not extinguish it. Cro. J. 189. Mich. 5 Jac. Beaudly v. Brook.

If three co-  
parceners  
have a

19. By grant of a manor that has a *leet*, the *leet* shall pass without express mention, or words equipollent. 13 Rep. 64. b.

manor, to which a *leet* is appurtenant, and the king purchases two parts of the manor, with the appurtenances, the *leet* is not extinct, but remains appendant to the third part of the manor. \* And. 26. pl. 58. Anon. — But the reporter adds, quære, the intent; for at least the K. holds the

the leet with the third coparcener, but not the whole leet by the alienation of the two sisters. — \* Benl. 20. pl. 30. S. C. — D. 30. b. pl. 209. Marg. S. C. — If it *has used to pass* by grant of the manor, cum pertinentiis, &c. time out of mind, it is appendant. Br. Incidents, pl. 2. cites 33 H. 6. 4. — The same law of an *hundred*. Ibid. — Brook says, it seems that a *hundred* may be appendant to a manor. Br. Court Baron, pl. 15.

20. A *millstone* taken out to be picked shall pass by a demise or conveyance of the mill. 11 Rep. 50. b. Mich. 12 Jac. in Liford's case.

21. By the statute 27 H. 8. all tithes and churches were given to the king, and it was resolved by Hobart, Winch, and Hutton, that *church* contains all fruits and profits appendant to it. Mich. 18 Jac. 1 Jo. 2. Wright v. Gerard.

22. A man, *seised in fee of an hundred, and of lands within the hundred*, grants the hundred. It was held by Lord King, that this passed only the franchise; and not the lands within the hundred or franchise; and the rather, in regard that the hundred, and those other lands, came to the grantor's family by different purchases. 2 Wms's Rep. 400. Mich. 1726. Bays v. Bird.

## (A. a. 2) Pass. What will pass by the Words Cum Pertinentiis.

1. *A. And two others were seised in fee of the manor of D. to which a hundred was appendant; and the two released to A. and his heirs all their right in the hundred, and after they three give the manor, cum pertinentiis, to baron and feme, and to the heirs of the baron; per Littleton and Waingf. the third part of the hundred passes by these words, cum pertinentiis; for this remains appendant to the manor as before, and the other two parts are severed, and made in gross by the release; and yet they were jointenants after the release of the whole manor, and survivorship may take place; but the jointenancy of the hundred is determined by the release. Br. Jointenants, pl. 2 cites 33 H. 6. 4, 5.*

2. The king grants *warren* within my manor; if I infeoff the king of the manor without pertinentiis, I shall have the warren. D. 30. b. pl. 209. Hill. 28 H. 8.

manor time out of mind, and appendant; in the first case it does not pass by grant cum pertinentiis; for it is no parcel; in the second it passes, but not without cum D. 30. b. pl. 209. marg. cites 8 H. 7. 4.

3. If a man makes feoffment of a *mesuage cum pertinentiis*, nothing passes by these words (cum pertinentiis) but the garden, curtilage, and close adjoining to the mesuage, and upon which the mesuage is built, and no other land, though other land hath been occupied with the mesuage; notwithstanding, in the time of H. 8. it was used to add these words, ac omnia terras Ten. & hereditamenta eidem mes. pertinen. aut cum eodem occupata locata aut dimiss. existen. And so the land used with the mesuage shall pass. Br. Feoffment de terre, pl. 53. cites 32 H. 8. 23 H. 8.

occupied therewith for the same rent, and by the same words; the lord Chancellor Bromley, by advice of the judges, ordered those lands should now pass also; yet in law they do not pass, as some Justices hold. Cary's Rep. 24, 25. — Surrender of a house cum pertinentiis will pass land: per Harvey J. Het. 2.

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*Warren* used to a of a manor pertinentiis.

Ibid. pl. 54. S. P. cites 27 H. 6. 2. — A *mesuage* was demised (cum pertinentiis) only, but for that sundry lands had been

Hughes's  
Abr. 1026.  
pl. 8. cites  
S. C. and  
says, it was  
the opinion  
of the  
court;  
And Nelf.  
Abr. 909.  
pl. 4. (B)  
cites D.  
158. S. C.  
as adjudged,  
that by the  
grant of

the house, the grantee shall have the other as a thing implied in the grant; but I do not find it so adjudged there, but left only as a quære.

4. *A. and six others were seised in fee, to the use of G. and his heirs, of a house and 70 acres of land, &c. in H. called now, and time out of mind, by the name of W. and so seised they all by indenture demised the mesuage aforesaid with the appurtenances called W. within the parish of H. aforesaid, to J. S. for life. Upon a special verdict it was moved in arrest of judgment, whether this demise by G. the cesty que use, and his feoffees be sufficient? And whether it will extend to the 70 acres in demand by the name of the mesuage with the appurtenances called W. it not being expressly found that the said 70 acres were appurtenant to the said mesuage, &c. D. 158. pl. 31. Hill. 4 & 5 P. & M. Drew v. Marrow.*

5. *A. seised of a barn, in which the tithes of certain lands have used to be put, let the same by these words, demise, and to farm let the barn with all tithes belonging to the same; it was held, that the tithes did not pass; but tithes which had usually been demised with the barn, passed by such words; as by the demise of a house cum pertinentiis, all the lands pass which have been used to be demised with the said house; for the demising usually of the tithes with the barn makes the tithes to be belonging to the barn, and not the innings them in it. 4 Le. 183. Mich. 20 Eliz. C. B. Anon.*

6. *Situm rectoriæ cum decimis eidem pertinent. habend' situm prædict. cum suis pertinentiis for 20 years; the tithes pass for 20 years. Le. 281. Pasch. 28 Eliz. in the Exchequer. Cary's case.*

B. P. and  
A. may  
come into  
B's soil to  
mend it, but  
it ought to  
be in con-  
venient  
time, and  
this without  
special pre-  
scription or  
special  
grant. Per  
Cur. Mo.  
682.  
Brown v.  
Nicholas.

7. *If lessee for years of a house and land erect a conduit on the land, and after the term the lessor occupies them together for a time, and then sells the house, with the appurtenances, to A. and the land to B.—A. shall have the conduit, and the pipes, and liberty to amend them; but per Popham, if lessee erects a conduit, and after the lessor, during the lease, sells the house to A. and land to B. and after the lease determines; B. may hinder A. from using the conduit, and may break it; because it was not erected by one that had a permanent estate or inheritance, nor made one by the occupation and use of them together by him that had the inheritance; so it is if a disseisor of a house and land erects such conduit, and the disseisee re-enters, not taking consuance of any such erection, nor using it, but presently after sells the house to A. and the land to B.—B. may hinder A. from using the conduit. Cro. J. 121. Trin. 4 Jac. B. R. Nicholas v. Chamberlain.*

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8. *Habend' tenementum cum omnibus eorum pertinentiis, &c. lands appurtenant passed by the name tenement. Cro. J. 175. Trin. 5 Jac. B. R. Ward v. Walthew.*

9. *Common is not created by the words cum pertinentiis. Yelv. 189. Mich. 8 Jac. B. R. Massam v. Hunter.*

If a portion  
of tithes  
have been

10. *Tithes cannot pass as appurtenances to a grange, because they are of several natures, except, as Winch J. said, the grange*



is the glebe; for if it is, then the rectory may pass by this name. long time  
Winch. 72. Pasch. 22 Jac. C. B. Bone v. Bishop of Norwich. used with a  
shall pass now by grant of the chapel, and all tithes thereunto belonging, though otherwise the  
name Portion of tythes is necessary in grants. Clayt. 15. Anon. chapel, it

11. A. seised of a mesuage, and *two acres of land four miles distant*, and which were *occupied 7 years with the mesuage*, \* *devised* by his will, the mesuage, cum pertinentiis seu aliquo modo spectantibus, to his wife, during her widowhood, and after to his son C. and his heirs for ever, &c. Resolved, that the two acres do not pass. Litt. R. 9. Hill. 2 Car. C. B. Keen v. Allen. For lands don't pass by those words, but only such things which properly may be pertaining. Cro. Car. 57. Kene v. Allen.——But had it been *cum terris pertinentibus*, it had been otherwise. Ibid.——A *messe containing 12 acres of land*, was granted by copy upon a surrender, and was objected to as not good; but the court gave no regard to it. Cro. E. 29. Trin. 26 Eliz. B. R. Clamp v. Clamp.——\* Resolved, that the lands did pass by the words cum pertinentiis; for being in a will, the intent of the deviser shall be observed. Godb. 40. Harwood v. Higham.——Goldsb. 99. Butcher v. Samford. S. P.

12. *Liberties in grass*, which lie in charter, will not pass by the words *de maneriis prædictis cum pertinentiis*, without special words of *omnia privilegia & franchises*. &c. Jo. 272. 8 Car. in Itin. Windsor, in Lord Lovelace's case.

13. *Turbary* granted to a house passes by the grant of the house cum pertinentiis. 3 Lev. 165. Trin. 36 Car. 2. C. B. Solme v. Bullock.

(G. a) Deeds of Grant. How Deeds of Grant shall be *expounded*, where *one Part* is *contrary* to the other.

[ 1. ] F a copyholder in fee according to the custom surrender out of court into the hands of the tenants in writing, as followeth; *Memorandum*, such a day and year A. S. the copyholder, *surrendered* the land, &c. *to the use of B. and C.* and the survivor of them, *and for default of issue of C.* of his body begotten the said land shall remain to D. *This surrender not to stand and be of force, till after the decease of A. S. the surrenderor.* If this memorandum should be good, then it would be a surrender to commence at a day to come, and then it would be void; and therefore the surrender being perfect before, by the first part of the instrument, this memorandum shall not make it void; but the memorandum shall be void. Trin. 10 Car. B. R. between *Seagood and Hone*; adjudged per Curiam upon a special verdict. Intratur Mich. 8 Car. B. R. Rot. 195. ]

(D. a) How it may be. In what Cases it may be *without Deed*, in respect of the Grantor or Grantee.

[ 1. **L**AND, or other thing, which may be granted to any natural person without deed, may be granted to a sole corporation without deed, as to a parson, bishop, and such like, and to their successors. Co. Litt. 94. b. ]

[ 2. So such thing may be granted to an abbot and convent, or prior and convent, and to their successors without deed, because the abbot only takes, and not the convent. Co. Litt. 94. b. ]

[ 3. But land, or other thing, which may pass to a natural person without deed, can not pass to a corporation aggregate without deed, as dean and chapter, mayor and commonalty, and such like. Co. Litt. 94. b. ]

4. A body politick, as a mayor and commonalty, cannot make a gift of chattels personal without deed. Perk. S. 64. cites 4 H. 7. 17.

So when a man, by virtue of an interest which he hath, grants an

office for life, it must of necessity be by deed; but if he doth it by virtue of an authority only, there needs no deed at all. Trin. 10 W. 3. B. R. 12 Mod. 201. Saunders and Owen.

6. Where a custom was alledged, that the lord admiral should constitute a registry for and during the term of his life, it was adjudged he might nominate without deed. 12 Mod. 202. Saunders and Owen.—Cites it as ruled Dy. 152. in Hunt's case.

7. When corporations have power by prescription to nominate a town-clerk, the constant practice is never to nominate them under the common seal, but only to elect him; yet he has an estate for life, and may maintain an assise for his office. In London indeed it is customary to grant it by deed, but in other corporations not. Trin. 10 W. 3. B. R. 12 Mod. 202. In case of Saunders and Owen.

8. Whatever is to take effect out of a power or authority, or by way of appointment, and not out of an interest, is good without deed. Trin. 10 W. 3. B. R. 2 Salk. 467. Saunders v. Owen.

Fol. 62.

(E. a) How it may be. In what Cases without Deed, and in what not. *Licence*.

\* It seems it should be 42 E. 3. 2.

[ 1. **A** Licence to chase in a chase may be without deed. \* 42 E. 32. ]

—Br. Licence, pl. 1. cites 42 E. 3. 2.—pl. 6. cites 22 H. 6. 52.—Trespass by the Dutchess of Norfolk against several, Yaxley for some pleaded not guilty, and for the others said that the plaintiff

plaintiff licensed and granted to J. D. Earl of Suffolk, to enter and hunt at his pleasure, by which the defendant, as the servant of J. D. and by his command entered and chased and took the deer & hoc, &c. Per Keble, the grant is not good without writing; and licence is not good, but to him to whom it is given; and licence to chase, is not sufficient to take the deer; and licence is only at pleasure, which cannot be granted *in*, as of a way, or to enter into my house to eat and drink, and he cannot take the deer, for he who gave the licence had no property in it. Br. Trespas, pl. 287. cites 12 H. 7. 25. — One may justify to *hunt*, or use the like liberties in the soil of the plaintiff himself, who made the licence, without any deed. Trin. 18 Jac. Cro. J. 575. in case of Monk v. Butler. — cites 5 H. 7. 42. El. 3. 2.

[ 2. A man may grant *the pasture of a close for years* without deed. Because it passes the land \* for depasturing, and not the vesture only as common for beasts. Tr. 14 Car. B. R. between Mountjoy and Terdrue. per curiam, adjudged upon demurrer, where in trespass the defendant pleaded, that A. was seised in fee, and leased the pasture of the close for years to B. who licenced him to put in his beasts, and all this pleaded without deed, and adjudged a good plea, for the reason aforesaid. Intratur. Trin. 14 Car. Rot. 1291. ]

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2 Roll. 63.  
pl. 25. —  
\* Orig. (a! Pasture.)

[ 3. But otherwise had it been, if he had granted *pasture for certain beasts.* ]

## (F. a) What Things may be granted without Deed.

[ 1. **TREES** growing may be granted without deed. 42 E. 3. 23. b. ]

[ 2. A horse or cow may. 42 E. 3. 23. b. ]

3. All chattels, real or personal, may be granted or given without deed, unless in special cases. Perk. S. 57.

## (G. a) How. In what Cases without Deed.

[ 1. **A THING** lying merely in grant cannot pass without deed. ]

[ 2. As a reversion cannot pass without deed. Contra 42 E. 3. 4. ]

A reversion in a term, is not assignable. 3 Lev. 155.

ble without deed and attornment.

[ 3. Rent service cannot be granted without deed. 43 E. 3. 1. b. 20 H. 6. 7. ]

[ 4. Rent-charge cannot be granted over without deed. D. 3 & 4 Ma. 139. 37. 12 H. 4. 17, 18 E. 3. 56. b. ]

Perk. S. 61.  
Mo. 379.  
Arg. — But  
Perk. S. 62.

upon partition a rent may be granted by one coparcener unto another without deed.

[ 5. A hundred in gross cannot pass without deed. 11 H. 4. 89. b. ]

[ 6. A Corody cannot be granted without deed. 12 H. 4. 17. ]

[ 7. An advowson cannot be granted without deed, by delivery of the seisin at the door of the church, 8 H. 6. 33, 20 H. 6. 7. b. Contra 43 E. 3. 1. b. ]

S. P. Cro. E.  
163. Mich.  
31 & 32 El.  
Crisp's

case. — Composition between parceners to present by turns is good without writing. D. 29. pl. 194.

—A man may make a grant of an *advowson* without deed, scilicet, he may come to the door of the church, and deliver *seisin* of the doer, and this is good without deed; per all the justices, but Kirton contrary. Br. Grants, pl. 18. cites 43 E. 3. 1.

[ 8. The profits of a mill cannot be granted without deed. 18 E. 3. 56. b. ]

[ 9. A manor will pass with attornment without deed. 20 H. 6. 7. ]

Vid.

(A. a. 2.)

[ 10. An *advowson appendant* will pass with the manor without deed. 20 H. 6. 7. b. ]

[ 11. A ward of the body may be granted over without deed; for it may be delivered over by the hand, as well as any other chattel; because it is an original chattel. Co. Litt. 85. Contrary admitted. 14 E. 3. Action upon the statute. 17. ]

[ 12. A vill cannot be leased for years without deed; because it is derived out of a franktenement, which lies in grant. Co. Litt. 85. ]

[ 125 ]

[ 13. If the king grants to J. S. the manor of D. and that he shall have *tot tales tantas & easdem libertates*, in the said manor as such abbot had before; and the abbot had in the said manor, *bona & catalla felonum*, &c. and after J. S. makes feoffment of the said manor to J. D. in fee, with the appurtenances, without deed, this does not pass the liberties, this feoffment being without deed. Mich. 37 El. B. R. adjudged in the report of Owen's case, which is reported in Co. 9. in the name of the abbot of Strata Marcella's case. ]

### [Tithes.]

[ 14. A parson cannot grant his tithes over to a stranger for life, or years, &c. without deed. Because it rests merely in grant. M. 4 Ja. B. R. between Hawkes and Brayfield. per Curiam. P. 13 Ja. Cro. J. 137. B. R. per Curiam. ]

—D. 117. pl. 72. — 2 Le. 29. — Tithes will not pass by grant without deed. Trin. 26 Eliz. B. R. Le. 23. Withy v. Saunders. — By way of contract a demise may be of tithes without deed, but in pleading it ought to be set forth, that there was a deed. Arg. Godb. 374. cites 10 Rep. 92. where the deed ought to be shewn, which proves that there ought to be a deed.

S. P. Godb. 374. in case of Bellamy v. Bathorp. [ 15. But a parson may lease his rectory for years by parol, without deed, by which the tithes shall pass as annexed to the rectory. ]

—A lease of the parsonage with the tithes belonging thereto is good without deed, and it seems the reason is, because of the glebe. Br. Lease, pl. 1. cites 16 H. 7. 3. and 19 H. 8. 12. — And the lessee shall have the tithes and offerings as incident, and the lease is good, though there be no parsonage-house, but only a church and church yard. Br. Lease, pl. 15. cites 15 H. 7. 8.

[ 16. A parson cannot lease his tithes to a stranger for one year only without deed; for in this case there cannot be any diversity between one year and two, it being made to a stranger, by which the tithes ought to pass by way of grant. ]

Yelv. 94. ]

S. C. — Cro.

J. 137. S. C.

\* — Orig.

[ 17. A parson may lease by parol to a parishioner, for a certain consideration, his own tithes for one year only; for the parishioner has it by way of retainer, and the tithes are always growing within

within the year, and the grant for the consideration is but a composition between him and the parson; \* † for the tithes leased. M. 4 Ja. B. R. between *Hawkes* and *Brayfield* agreed per Curiam. Mich. 8 Ja. B. doctor Langworth's case. ]

Pur que le consideration est done, but these words seem surplusage.—† Orig. Pur leas dismes.

[ 18. So a parson may lease by parol to a parishioner, for a certain consideration, his own tithes for two or more years, or for life, &c. Because it enures as a discharge by way of composition for the tithes of another year, which are not growing. M. 4 Ja. B. R. between *Hawkes* and *Brayfield* per Curiam.

Yelv. 94.

B. R. parson *Booth's* case adjudged, cited Mich. 8 Ja. B. those cases were contrary to this. \* But a grant was adjudged according to this; Trin. 21 Ja. B. R. between *Snell* and *Honcombe* consultation denied. ]

\* Orig. (Mes a grant ove ceo suit ad judge.)

[ 19. But Mich. 8 Car. B. R. between *Lake* and *Sainthill*, a prohibition [was] denied. Because, per Curiam, it is not a good grant. H. 9 Car. B. R. between *Norgate* and *Knowles*, per Curiam. Contra M. 4 Ja. B. R. between *Hawkes* and *Brayfield* adjudged. ]

[ 20. It seems, that where a parishioner has such lease of his tithes, for one or more years, or for life, without deed to him and to his assigns, that the assignee of the land after shall take advantage of it. Trin. 21 Ja. B. R. between *Snell* and *Honcombe* adjudged. Contra, 29. El. adjudged between *Nelson* and *Woodward*. ]

Cro. J. 668.

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### [Other Things.]

[ 21. A grantee of a future interest of land, as he to whom a grant is made of land for years to commence after the death of a lessee for life, his surrender or forfeiture, may assign it over without deed, during the life of the lessee for life. D. 2 & 3 Ma. 124. pl. 41. adjudged. *Throgmorton's* case. Quod vide. ]

[ 22. Same case, though the original grant could not be without deed, being made by an abbot. ]

[ 23. If A. seised in fee of *Black Acre* and *White Acre*, grants *Black Acre* to C. with common for the beasts, levant and couchant upon *White Acre*, this is not good without deed. Mich. 1650. between *Tanner* and *Hobbes*, adjudged upon demurrer. Intratur. Trin. 1650. Rot. 1199. ]

[ 24. If A. be seised in fee of land, to which a common for beasts levant and couchant upon the land is appurtenant by grant, by a deed within time of memory, and he makes feoffment of the land without deed; yet the common shall pass, it being appurtenant to the land, though it could not be created without deed. Mich. 13 Car. B. R. adjudged, per Curiam, between *Sacheverel* and *Porter*. Intratur. Trin. 11 Car. Rot. 324. ]

[ 25. If A. seised of land in fee grants the pasture of the land to B. for years, and B. licences C. to put in his beasts; this lease of the pasture is good without deed, and the licence also; for this is

2 Roll. 624 (E) pl. 2a

\* Orig. (al.  
pasture.)

+ Fol. 64.

S. P. Br.  
Grants, pl.  
168.

Br. Lease,  
pl. 12. cites  
22 H. 6. 34.

Br. Grants,  
pl. 14 cites  
S. C.

Br. Lease,  
pl. 12 cites  
22 H. 6. 34.  
per Paston.

a lease of the land to \* depasture, † and it is not like to a com-  
mon of pasture. Mich. 14 Car. B. R. between *Mountjoye and*  
*Terdrue*, per Curiam adjudged upon a demurrer upon such plea  
pleaded in trespass brought by A. against C. ]

26. A man can't give *emblems growing* without deed, per  
Eliot J. Br. Done, &c. pl. 40. cites 25 E. 3. 41. and Fitzh.  
Feoffments 69.

27. *Profits of courts* will not pass without deed. Arg. Godb.  
374. cites 22 H. 6. 34. b.

28. *View of frank-pledge*, is not good without deed. Br. Lease,  
pl. 5. cites 35 H. 6. 38.

29. A *warren* may be demised without deed. Arg. Godb. 374.  
cites 9 E. 4. 47.

— Ibid. pl. 17. cites 9 E. 4. 47. per Catesby.

30. *Herbage* for years can't be granted without deed. per  
Cur. Noy. 54. Tottel v. Howell. — cites 17 E. 4. 6.

31. Tithes or *offerings* only cannot be leased without deed, any  
more than *rent* can be granted without deed. Br. Lease, pl. 15.  
cites 15 H. 7. 8.

32. *Services* alone will not pass without deed. But by a  
feoffment of a *manor* without deed the services will pass. Godb.  
Arg. 374. Mich. 2 Car. in Bellamy and Balthorp's case. — cites  
21 H. 7. 21.

33. *Deputation of an office*, which lies in grant, ought to  
be made by deed, and not by parol. Br. Deputy, pl. 17. cites  
pl. 28 H. 8.

34. *Release of a right in chattels* cannot be without deed; per  
Anderson Ch. J. Hill. 29 Eliz. Le. 283. in case of Jennor v.  
Hardy.

35. A *reversion* cannot pass without deed, although it be  
granted *but for years*, and therefore pleading a grant of it *per*  
*scriptum*, without saying (*sigillat*) is not sufficient. Pasch. 33  
Eliz. Arg. Le. 310. in case of Maidwell v. Andrews.

36. *Liberties* cannot be granted without deed. Arg. Mo. 379.  
Mich. 36 & 37 Eliz. in Perrot's case.

37. A man may give or grant his *deed* to another, and such a  
grant by parol is good. Co. Litt. 232.

38. *Estovers in gross* cannot pass without deed. Perk. S. 61.

39. *Lease by baron and feme* is not good without deed; for  
without deed 'tis not the lease of the wife; per Hobart Ch. J. Trin.  
20 Jac. Winch. 34. Anon.

40. *Lease for life or years without impeachment of waste* ought to  
commence by deed; and without deed 'tis not good. Trin. 7  
Car. Cro. C. 221. in case of Rockey v. Huggens.

41. Whatever is to take effect out of an authority, or power, or  
by way of *appointment*, is good without deed; otherwise, where 'tis  
to take effect *out of an interest*, and is to enure as a grant; for  
then if it be of a thing incorporeal it must be by deed. Trin. 19  
W. 3. 2 Salk. 467. Sanders v. Owen.

(G. a. 2)



(G. a. 2) Where *diverse* Persons join in a Grant, Lease, &c. whose Grant, Lease, &c. it shall be said to be.

[ 1. ] If the *tenant of the land and a stranger* join in a lease for years by indenture, this is the lease of the tenant of the land only, and the *confirmation of the stranger*, Co. Litt. 45. ] Per Montague Ch. J. Pl. C. 59. in case of Wimbiſh v. Talboys.

[ 2. If *A. be ſeiſed of 10 acres, and B. of other 10 acres*, and they join in a lease for years by indenture, these are several leases, according to their several estates; and several confirmations. Co. Litt. 45. ] 1 Roll. 877. B. pl. 3.

[ 3. So if 2 tenants in common join in a lease for years by indenture; yet these are 2 several leases, according to their several estates; because they have several franktenements. ] Two tenants in common grant a rent of 10s. to B. these are several grants, and B. shall have several rents of 10s. Arg. Mich. 32 Eliz. C. B. 3 Le. 155. in the ſerjeant's caſe.

[ 4. But if 2 coparceners join in a lease for years; this is but one lease; because they have one franktenement, and shall join in an assise. ]

[ 5. So if 2 jointenants join in a lease for years, this is but one lease for the cause aforesaid. ]

[ 6. If *ceſty que uſe and his feoffees* had joined in a feoffment after the statute of 1 R. 3. this had been the feoffment of the feoffees, and confirmation of *ceſty que uſe*; for \* the estate at common law shall be preferred. Co. Litt. 49. ] Pl. C. 59.—\* 4 Rep. 71. Hynd's caſe.—Pl. C. 59.—Per Foſter

J. Raym 7.—If *ceſty que uſe, and his feoffees* join in a feoffment, it shall be said the feoffment of the † feoffees; for they have most authority to give it; per Montague Ch. J. Mich. 4 E. 6. Pl. C. 59. in case of Wimbiſh v. Talboys.—Co. Litt. 49.—1 Rep. 47. b. (c) the feoffment to the use in TALBOYS's case, was before 27 H. 8. 10. which makes a difference.—† S. P. for fiction is never admitted where truth may work. Hob. 311. in case of Wright v. Gerard.

[ 7. If *tenant for life, and he in remainder or reversion in fee*, join in a lease for years, this is the lease of the tenant for life, during his life, and the confirmation of him in remainder or reversion; and after the death of the tenant for life, it is the lease of him in remainder or reversion, and confirmation of the lessee; for the law construes, that the lease moves out of both the estates respectively according to their several interests. Co. Litt. 45. ] Tenant for life and reversioner join in a feoffment; it shall be adjudged the livery of the tenant for life, be-

cause he has most authority to make it; per Montague Ch. J. Mich. 4 E. 6. Pl. C. 59. in case of Wimbiſh v. Talboys. \*—Arg. 140. b. in case of Browning v. Beeston.—6 Rep. 15. Treport's case.—But had it been by *parol*, then it should be the feoffment of reversioner and surrender of lessee for life; for else nothing had passed being by *parol*. Ibid.—But where an estate is wrongfully made, (as by *tenant for life, remainder for life*) it shall be accounted in law the livery of all that join it; per Dyer. Le. 262. pl. 349.—There is a difference, when *tenant for life, and reversioner in fee*, join in a lease by deed and where without deed; for in the first case it shall be the lease of the tenant for life so long as he lives, and after the lease of reversioner, and yet they shall join in an action of waste; but in the other case it is first a surrender, and then the lease, or feoffment of him in reversion. Pasch. 11 Car. B. R. Hutt. 126. Baker v. Hacking.

\*[ 128 ]  
8. If

10 Rep. 49.

[ 8. If *tenant in tail* and he in *remainder in fee* grant a rent to another, and after *tenant in tail* dies without issue, now this is the grant of him in remainder only, and so shall be pleaded in an avowry. Hill. 44. El. B. Rot. 1459. adjudged; between Ellis and Cowne. Co. Litt. 45.]

9. *A. bargains and sells lands to B. by indenture, and before inrollment they both grant a rent-charge by deed to C. and after the indenture is inrolled; some have said, that the rent-charge is avoided; for (say they) it was the grant of A. and by the inrollment it has relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other, who had nothing in the land at that time. But the grant is good, and after the inrollment, by the operation of the statute, it shall be the grant of B. and the confirmation of A. But if the deed had not been inrolled, it had been the grant of A. and the confirmation of B. and so quacunque via data the grant is good. Co. Litt. S. 221.*

When 2  
join in a  
deed and  
one only  
has the in-  
terest, it

10. Where one *who has nothing* in the land, and one, *who has*, join in a feoffment, lease, &c. it shall be said the feoffment or lease of him who has, &c. and not of him who has nothing. Br. Feoffment de terres, pl. 18. cites 21 H. 7. 32.

enures by way of confirmation from the other, and not by way of estoppel. Mich. 41 & 42 Eliz. B. R. Cro. E. 701. Brereton v. Evans.—And he that has the interest may bring action without the other, because nothing passes from him. Clayt. 137. Brooks v. Foxcroft.—*Baron and feme* join in a lease of land of the inheritance of the baron, rendering rent; the baron dies; the wife brings debt for rent, and lessee pleads that 'twas the inheritance of the baron, and that the *feme* had nothing at the time of the lease made; and resolved, that the plea was good; and this can neither be estoppel, nor confirmation; for the deed is utterly void as to the feme, she being covert; and an estoppel ought to be mutual, whereas a deed of a feme covert cannot estop her. Cro. E. 700. Mich. 41 & 42 Eliz. B. R. Brereton v. Evans.—Le. 177. Hawkswood v. Husbands.

D. 191. pl.  
20 and 21.  
Butler v.

11. *When many join in an act, the law maketh it his act only that may do it.* Fin. Law. 8.

Lord Bray, S. P.—As feoffment by *disseisor* and *disseisee*; if the attorney makes livery, this settles the estate in disseisee, and so a good feoffment of disseisee. Arg. Trin. 13 Jac. B. R. Roll. R. 229. cites it to be so adjudged in case of Cromwell v. Andrews.

12. *Lessee for life, and reversioner*, joined in a lease for life, and afterwards joined in an action of waste, there needs no averment of the life of tenant for life; for he in reversion joined; per Gawdy J. Pasch. 39 Eliz. B. R. Le. 177. in case of Hawkswood v. Husbands.—cites 27 H. 8. 13.

13. *Lessee for years, and reversioner in fee*, make a feoffment in fee; this shall be taken as the livery and feoffment of the lessor or reversioner in fee, and surrender of the lessee. Arg. Trin. 1 Mar. Pl. C. 140. b. in case of Browning v. Beston.

14. If the *disseisee* enters, and then the *disseisor* and *disseisee* join in a feoffment by deed, with words of confirmation, it shall be said the feoffment of the disseisee and the confirmation of the disseisor. But if they join in such feoffment by deed before entry of the disseisee, and the disseisor makes livery of seisin, it shall be said the feoffment of the disseisor, and the confirmation of the disseisee. Perk. S. 157.

15. *A. tenant for life, remainder in tail to B. and A. levies a fine to his own use in fee, which is a forfeiture, and afterwards A. and B. join in a feoffment, by letter of attorney; this was held to be a discontinuance; for 'twas the feoffment of remainderman, and the confirmation of tenant for life.* D. 324 b. pl. 35. Pasch. 15 Eliz.

And. 286.  
Minter v.  
Collin. S. P.  
—Cro. E.  
135. Toft v.  
Tomkins.  
S. C.

16. If tenant for life makes lease for years, and *tenant for life and reversioner in fee confirm the estate of tenant for years*, to hold to him and his heirs; he shall have a fee; for the law adjudges the estate of tenant for life to pass first, and then the estate of the reversioner, and so to have *privity*, on which the release of reversioner may enure and enlarge the estate. Arg. Hill. 21 Eliz. B. R. Pl. C. 540. b. in case of *Paramour v. Yardley*.

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17. *Tenant for 30 years leases for 10 years, and they both surrender to reversioner in fee; the surrender is good for both the estates, as it seems per 14 H. 7. 2. and yet the lessee for 10 years by himself cannot surrender for want of privity; but when the other joins with him, his surrender shall be taken by the law to precede, and the surrender of lessee for 10 years to succeed, and so it shall be good.* Arg. Hill. 21 Eliz. B. R. Pl. C. 541. in case of *Paramour v. Yardley*.

18. Where an *authority* is given to *several by one deed*, there all ought to join; otherwise, where the authority is given *by will* to sell, &c. Arg. Pasch. 29 Eliz. B. R. Le. 60. in case of *Bonefaut v. Greenfield*.

19. *A. tenant for life, remainder to B. in tail, remainder to A. in fee; tenant for life, and remainder in tail, join a lease for 3 lives by indenture; this was the lease of A. and the confirmation of B. but had it been without deed, it had been the surrender of A. and the lease of B.* Pasch. 29 Eliz. B. R. Cro. E. 76. *Trevilian v. Pine*.

20. *A. tenant for life, remainder in tail to B. remainder in tail &c.—A. and B. join in a fine come ceo, &c. and then B. died without issue. The question was, if conusee should hold for the life of A. ? 'tis held that the remainder in tail goes first in judgment of law, though 'tis all by one and the same fine.* 1 Rep. 76. b. *Bredon's case*.

But per  
Hale Ch. J.  
The reason  
makes  
against the  
resolution  
which was,  
(that 'twas

no forfeiture of the tenant for life, but each granted what he lawfully might); for if the remainder in tail *passes first*, the freehold must go by way of surrender, and so drown, but they shall rather be construed, to pass *in simul & uno statu*. 1 Vent. 160. in case of *Bulmer v. Pawlet*.—And the court seem'd to think that the conusee should hold for the life of A.—Lev. 37. in case of *Stephens v. Brittridge*.—All passes from the tenant for life, and 'tis A's feoffment, and the confirmation of B. and on B's death without issue remainderman may enter on A. for a forfeiture. Ow. 130. *Peck v. Charnell*.—Vid. And. 286. *Mintern v. Collins*.

21. *Tenant for life and reversioner make a gift in tail rendering rent, the lessee for life shall have the rent during his life.* Mich. 36 & 37 Eliz. 6 Rep. 15. *Treport's case*.

22. When two join in a *fine* or matter of record, he who accepts of them is concluded to say, but that both gave it; but where it is *by deed* it is otherwise; for that cannot enure *by way of interest from one, and of estoppel from the other*; for one deed cannot

not so enure to *two intents*. Mich. 41 & 42 Eliz. B. R. Cro. E. 700. in case of Brereton v. Evans.

23. *Tenant for life and reversioner in fee make a gift in tail for the life of the tenant for life*, 'tis the gift of the tenant for life, but after his death, 'tis the gift of the reversioner. And if the estate tail expires during the life of tenant for life, he shall have the land again in his former estate, and here is no forfeiture, because reversioner of the immediate estate of inheritance joined with him in it, and so dispensed with it; cited Poph. 57. in case of King v. Berry and Palmer.

24. Every right, title, or interest, in *præsenti* or *futuro*, by the joinder of *all that may claim* any such right, title, or interest, may be barred or *extinguished*. Mich. 10 Jac. 10 Rep. 48. b. Lampett's case.

25. *Tenant of the land and grantee of a rent out of it* join in a feoffment of the land; it shall enure as feoffment of the tenant of the land, and as confirmation of the grantee of the rent; and so the rent is extinct. Pasch. 7 Car. B. R. Jo. 235. per Jones J.

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26. *Feme tenant for life remainder to baron in fee* made a lease to J. S. for years, wherein J. S. covenanted with baron and feme their heirs and assigns to repair, and they conveyed the reversion to A. And for default of repairs, A. brought action, as assignee to the baron, without averring the feme to be dead. And resolved to be well brought; because the *estate for life* being transferred with the fee, *is thereby drowned* and confounded in the fee. Mich. 8 Car. B. R. Cro. C. 285. Major v. Talbot.—cited Vent. 160.

Note, Hobart Ch. J. commends constructions of this kind, and

compares it to the chymists extracting and segregating the simples of a compound, and so the confusion removed. Hob. 278.

27. If *tenant for life remainder in tail to an infant join in a fine*; if the *infant reverses the fine* afterwards, yet the conusee shall hold it for the life of the conusor. Mich. 23 Car. B. R. Vent. 160. cites English's case.

28. *Baron seised in jure uxoris*, and intitled to be tenant by the *curtesy*, joins in a feoffment with his wife. The heir of the wife shall not avoid this during the husband's life. Mich. 23 Car. B. R. Vent. 160. in case of Bulner v. Ld. St. John. cites 1 Inst.

### (G. a. 3) Where a Grant shall enure as Two several Grants.

1. *JOINT* words of parties shall, by construction of law, be taken *respective* and severally. Mich. 31 & 32 Eliz. 5 Rep. 7. b. [d.] Justice Windham's case.—19 Slingsby's case.

2. Assise of 10 l. rent, which was granted to the baron and feme, and that if the baron died the feme should have 60 s. rent per annum. The baron died, and she brought assise of 10 l. rent, and because

cause the *last words* do not restrain the *first*, nor do they determine that he shall have only 60s. rent, therefore the grant remains good for the 10 l. rent, for it stands with, &c. and so it seems that a *wife* would have extinguished the 10 l. rent. Br. Grants, pl. 64. cites 8 Aff. 10.

3. A. granted to W. N. the office of mower of the manor of D. and to take 20 quarters of corn for executing the said office, for his life; and by another clause in the same deed it was, and the afore-said A. granted to the feme of the said W. N. the afore-said office habend' after the death of her husband, percipiend' ad totam vitam suam sicut prædictus vir suus percepit in omnibus; and it was awarded a good grant, and thereof the feme, after the death of her husband, might maintain an assise. Br. Grants, pl. 127. cites 30 Aff. 4.

4. J. held two parts of twenty acres of land for life, the reversion to R. who was seised of the third part also, which said J. granted twenty shillings rent to the plaintiff for his life, and R. by his deed confirmed the grant, and, by a præterea in the same deed, granted to the plaintiff twenty shillings rent to be perceived yearly out of all his tenements in the same vill; Persey said, that these are two rents, but per Tanke 'tis but one and the same rent only, so he passed it over and pleaded another plea, and therefore it seems that they are two rents. Br. Grants, pl. 80. cites 45 Aff. 13.

5. If the king grants the office of parkership of Dale and Sale, this is a several grant in itself, and if the grantee be ousted, he shall have several assises; per Danby and Port. Br. Assise, pl. 76. cites 22 H. 6. 9. 10.

S. P. per Danby and Port, which was not denied. Br. Grants,

pl. 42. cites 22 H. 6. 11.—Br. Patents, pl. 17. cites S. C.

6. So of a grant of a fair in D. and S. Br. Assise, pl. 76. cites 22 H. 6. 9, 10.

S. P. per Danby and Port, which

was not denied. Br. Grants, pl. 42. cites 22 H. 6. 11.—Br. Patents, pl. 17. cites S. C.

7. If the king makes a duke or earl, and gives to him 20 l. of land, &c. by the same name, so that the creation and the grant is all by one and the same patent, yet it is good. Br. Corporations, pl. 89. cites 2 E. 6.

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So of making of a corporation, and giving to them land by the same patent and name. Br. Ibid.

8. If a man seised of land in fee grant ten shillings rent issuing out of the same land to an abbot and a secular man, it shall enure as several grants, and either of the grantees shall have 10 s. because the grant shall be taken strong against him that made it, and for the benefit of the grantee; tamen quære. Perk. S. 106.

9. The grantor may grant to the grantee for life and his heirs, that he and his heirs shall distrein for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge. Co. Litt. 308. b.

10. If two tenants in common be, and they grant a rent of 20 s. per annum out of the land, the grantee shall have two rents of

Perk. S. 106.—But if they 20 s.

two make a 20 s. because every man's grant shall be taken most strongly against gift in tail, himself, and therefore they are several grants in law. Co. Litt. or a lease 197. a. for life, &c.

reserving twenty shillings rent to them and their heirs, they shall have but one twenty shillings; for they shall have no more than themselves reserved, and the donee or lessee shall pay but twenty shillings according to their own express reservation, and albeit the reservation of rents severable be in joint words, yet in respect of the several reservations, the law makes thereof a severance, &c. Co. Litt. 197. a.

11. If I grant *Black Acre, and the manor of D.* [and Black Acre was parcel of the manor of D.] there Black Acre shall pass as parcel of the manor; per Anderson Ch. J. who said, he could shew an authority to that purpose. And Periam J. agreed, because it enforced the first grant. Mich. 28 Eliz. C. B. Godb. 130. in case of Green v. Harris.

S. P. Arg. 12. A man seised of a manor, to which an advowson is appendant, Godb. 127. enfeoffs B. by deed of one acre, parcel thereof, and by the same deed So where a feoffment grants the advowson; the advowson shall pass as in gross; for they was dedi are several grants though by one deed. Arg. Trin. 31 Eliz. C. B. man arcam, 4 Le. 216. in case of Long v. Hemings. &c. and

also dedi & concessi villanum meum, it was held that the villein passed as in gross, and that they were several gifts, though there was but one deed. Arg. Godb. 127. cites 33 H. 8. D. 48.

2 Roll. 13. Two tenants in common join in a lease for years, it is two Trial. several leases. Brownl. 39, 40.—134. in case of Cradock and (K. g. 2) pl. Jones. S. P.—Cro. J. 166. Mantle v. Wallington. S. P. per two 25. S. P. — J. against one. But other- wise it is

of a lease made by two coparceners; for that it is only one lease. 2 Roll. Trial. (K. g. 2) pl. 26 cites M. 10 Ja. B. R.

14. If I grant annuity for life and twenty years after, these are two several grants, and the executor shall have it after the death of the tenant for life. Pasch. 17 Jac. Brownl. 19. Mordant v. Watts.

15. Feoffment to two habend' one moiety to one, and the other moiety to the other, this operates as several conveyances; for there must be two liveries, because there are several freeholds, and livery to one secundum formam chartæ, would not enure to the other; per Holt Ch. J. Hill. 1700. B. R. Wms's. Rep. 18, 19. in case of Fisher v. Wigg.

## [ 132 ] (G. a. 4) Where a Grant shall enure to a double Intent.

So a feoff- 1. A. Infeoff'd B. his son, to the use of A. himself for life, and after ment made before the statute of quia emptores terrarum, to hold of the grantee his decease, then to the use of B. and his heirs, and after A. and B. (upon communication that A. should re-have the land in fee) came together to the land, and upon the land, by parol, without any deed, B. delivered seisin of the land, to A. habendum sibi & hæredibus suis, &c. if this be a good feoffment or not quære. This



This was found by a special verdict in ejectment, and by the opinion of the court, it is a good feoffment, and that in law this *acceptance of livery implies two effects*, viz. *first a surrender, and after a feoffment*, as a \* surrender to the grantee of a reversion amounts to an attornment and a surrender. D. 358. a. pl. 48. Trin. 29 H. 8. *of the feignory, is a good attornment to the grantee of the feignory,*  
and also to make a tenure. D. 358. a. pl. 48. Marg. — \* Ow. 56. in case of Carter v. Lowe.

2. *Devisee enters into a term devised to him without assent of executor*, by which he is a wrongful seisor and disseisor, and after he grants his right to the executor. Adjudged a good grant, and that it shall enure first, as the agreement of the executor, by the acceptance of the grant, that the devisee had a term in him as a legacy; and secondly, the deed shall have operation by way of grant to pass the estate of the devisee to the executor, and so no wrong. Trin. 27 Eliz. Ow. 56. Carter v. Lowe, alias Lawes.

3. *Patron before the statute 13 Eliz. 10. was lessee of the living for 50 years*, and granted his lease to A. This was a grant, and a confirmation of the term, and so one deed, by one and the same person, to one and the same person, and at one and the same time, shall enure to two several purposes, viz. to a grant of the interest as lessee, and to a confirmation of the same interest as patron. Mich. 43 & 44 Eliz. in Parliament. 5 Rep. 15. case of Ecclesiastical Persons.

4. *Tenant for life grants rent-charge to reversioner in fee; reversioner grants it over to B.* and his heirs by deed; this is a good grant, and confirmation also, to make the rent good for ever. Mich. 43 & 44 Eliz. 2 Rep. 15 ut supra.

5. *Disseisor makes lease for life, remainder to disseisee; disseisee grants the remainder over*, it is a good grant, and confirmation also. 5 Rep. 15. ut sup.

6. *A second deed of covenant to stand seised to uses*, in which there is no express revocation, yet is a revocation of a former deed with power of revocation, and also a declaration of new uses. Mich. 10 Jac. Curia Ward. 10 Rep. 144. Scroop's Case.

(G. a. 5) How it shall take Effect, where made to two, and one is incapable, or refuses.

1. **D E B T** by the vicar of D. and two others, upon an obligation, the defendant said, that the one of the plaintiffs, who is named vicar, is a chanon professed, in such a place, in such religion, under the obedience of such a one, &c. Judgment if he shall be answered, and the plaintiff would have estopped him by the obligation, and could not; but it was agreed, that the obligation was good as to the others. Br. Nonability, pl. 2. cites 3 H. 6. 23.

2. If I infeoff A. on condition to infeoff B. and B. refuses, A. shall be seised to my use; but if the condition was to give in tail, it is otherwise. 20 Eliz. C. B. Le. 266. in Bracebridge's case.

3. *Feoffment in fee to J. S. on condition to grant a rent-charge to A.* If A. refuses, J. S. shall be seised to his own use; per Harpur J. 20 Eliz. C. B. Le. 266. in Bracebridge's case.

4. If

[ 133 ]

Cro. E.  
334. Fre-  
derick v.

Frederick.—Arg. 4 Le. 64. S. P.

4. If A. gives lands to B. and his eldest son, and B. has no son, B. shall take the whole. Arg. Trin. 23 Eliz. 1 Rep. 100. b. 9.

5. A. makes a *feoffment* to the use of B. for life, and after to the use of C. in fee; though B. refuses, yet the remainder is good. Trin. 23 Eliz. 1 Rep. 101. cites 37 H. 6. 36. a.

Roll. R.  
325. per  
Coke Ch.  
J. cites 18  
E. 3. 59.

6. Feoffment to J. S. and the right heirs of J. D. who is living; J. S. shall have the whole. Arg. Trin. 27 Eliz. B. R. 4 Le. 64.

7. Gift to J. S. and such wife as he shall have, he shall take the whole; and the wife nothing. Arg. Trin. 27 Eliz. B. R. 4 Le. 64.

8. If a *devise* be made to a monk for life, remainder over, this is a good remainder, as Perk. 108. pl. 567. But if a *lease for life* be made to a monk, the remainder over, both the estates are void; Per Coke Ch. J. Mich. 12 Jac. 2 Buls. 292. cites 9 H. 6. 24. and Perk. 109. pl. 568. and Pl. C. 35. in Colethirst's case.

9. Lease for life to A. remainder to the right heirs of J. S. and J. D. If J. S. dies, and then A. dies, living J. D. yet the heir of J. S. shall take but a *moiety*; per Coke Ch. J. Roll. R. 325. cites 18 E. 3. 59.

10. If an *alien* be tenant in tail, remainder to a subject, he in remainder shall never come in till the estate tail be spent, though the alien be incapable of taking an estate tail for his own benefit. Arg. 10. Mod. 120. Hill. 11 Annæ, C. B. in case of Thornby and Fleetwood, alias Dutchess of Hamilton's case.

11. Feoffment was to the use of A. for life, remainder to B. in tail, remainder to the right heirs of A. and A. is dead at the time of the *feoffment*; it was insisted, that the right heirs of A. shall take the remainder in fee; and Co. Litt. S. 578. was cited to prove, that a particular estate and a remainder may continue distinct in the same person; but Parker Ch. J. said, it seemed that the remainder in fee would be void, because there was *no such person as A. in rerum natura*, and it is all one as if the limitation had been to A. and his heirs, and there had been no such person as A. in esse. Wms's Rep. 399, 400. Hill. 1717. in case of Goodright v. Wright.

(G. a. 6) In what Cases several Grantees shall use the Thing granted jointly.

1. **T**HE Lord Mountjoy, seised of the manor of Canford in fee, did by deed indented and inrolled *bargain and sell* the same to B. in fee, in which indenture this clause was contained; Provided always, and the said B. did *covenant and grant to and with* the said Lord Mountjoy, his heirs and assigns, that the Lord Mountjoy, his heirs and assigns, *might dig for ore in the lands*, (which were great wafts) parcel of the said manor, *and dig turf also for the making of allom*. It was resolved that, notwithstanding this grant, B. and his heirs and assigns might dig likewise, and that it is like the case of common sans nombre. Co. Litt. 164. b.

(G. a. 7)

(G. a. 7) Grant. In what Cases shall take Effect as Extinguishment, or Surrender, or Grant.

1. **W**HERE a man before the statute of *quia emptores terrarum*, and within time of memory, gave land to hold by fealty, and two pence for all services and demands, this extinguishes *sine* for alienation, *heriot*, and all other services which were due or accustomed before; and per Strange, in this case the tenant shall not pay relief, by these words, (for all services, exactions, and demands.) Contrary Skrene, for it is incident. Quære. Br. Grants, pl. 28. cites 14 H. 4. 20.

2. Grant by the lord, or donor in tail to the disseisee or issue in tail after disseisin, to hold by less services or rent is good, though the tenant be only tenant as to the avowry, and not tenant in possession; and so of a release; contrary of a confirmation. Note the diversity. Br. Grants, pl. 29. cites 14 H. 4. 37.

3. If one be tenant for life of land, out of which a rent is issuing in fee, and purchases the same rent by grant, this grant is good to take effect in the heirs of the tenant for life, and yet he had possession in the whole land at the time of the grant, &c. Perk. S. 81.

4. If lessee for life grants his estate to him in the reversion in fee in his own right, and immediate to the particular estate; this grant shall enure by way of surrender, &c. Perk. S. 82. But if a woman who is sole seised of one acre  
of land in fee leases the same for life, and then takes husband, and the lessee grants his estate to the husband, that shall enure by way of grant; causa patet. Perk. S. 82.

5. If there be lessee for life, and the reversion descends to two coparceners, and one of them takes husband, and the lessee grants his estate to husband and wife, the same shall enure by way of grant for the whole, &c. Perk. S. 85.

6. A right shall not pass by way of grant, unless by extinguishment, &c. and by release it may be extinguished. Perk. S. 85. cites 21 E. 4. 2. 6 H. 7. 8.

7. If a man has a warren in his land, and grants the land, the warren is extinguished, for the grantee cannot have it; because it is not granted to him nor is it either parcel of or appendant to the land; and the grantor cannot have it, because he has not reserved it; per Vavisor. Br. Grants, pl. 86. cites 8 H. 7. 2.

8. Rent issuing out of the lands of the feme, was granted to the baron, by the words give, grant, remise, release, and renounce; the baron may take it either by way of extinguishment to the possession of the feme, or by grant to him and his heirs; and he devising the rent by his will, it amounts to an election to take by grant, and this being by letters patents of the Queen, and the words being *habend' & percipiend' redd' prædict. præfato le patentee,*  
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and to his heirs and assigns, the intent of the Queen appears to have the rent continue, if the patentee pleases, &c. D. 319. b. pl. 16. Mich. 14 & 15 Eliz.

(G. a. 8) Enure by *Moieties*.

If the tenant accepts, it is a good agreement and attornment. Br. Grants, pl. 11. cites 34 H. 6. 41. S. C.

1. **I**F there be lord and tenant and the lord grants the seigniority unto the tenant and a stranger, this grant shall enure by way of extinguishment for one moiety, viz. to the tenant, and for the other moiety it shall enure by way of grant unto the stranger, &c. Perk. S. 81.

[ 135 ] (G. a. 9) *Time of taking it.* Immediately; By Alteration of the Mesne Estate, after which the Grant was limited to take Place.

1. **I**N assise of rent, B. was seised in fee of 100 acres of land, and was condemned in 100 l. damages, upon which this land, as a moiety of all lands, was delivered in execution by extent on an *elegit*; and after B. granted 3 l. rent-charge out of this land to J. his son and heir apparent; and then B. granted, ratified, and confirmed by deed to the tenant by *elegit* the same land for life of the tenant; and after, by another deed, with warranty of him and his heirs, released all his right to the tenant by *elegit*; and by *Fishe*, first the tenant by *elegit* ought to have held it discharged, because the execution was made before the charge; but after, by the confirmation to hold for term of his own life, which enlarged his estate, he shall hold charged, and the same law by the release; for he was in of another estate than before, quod nota, and so see, that if the land be charged at the time of the making of the warranty, so that he warranted the land then charged, and not discharged, such warranty shall not make the grantor warrant the land discharged, but the tenant to whom such warranty is made shall hold charged. Quod nota bene. Br. Charge, pl. 29. cites 31 Aff. 13.

(G. a. 10) Enure to Grantee. In his *Politick* or *Natural Capacity*, or both.

So if rent be granted to J. S. dean and J. S. clerk, which is one and the same person,

1. **I**F J. S. be dean of P. I may give land to him by the name of dean, &c. and his successors, and to J. S. clerk, and his heirs, and there he takes as dean, and also as a private man, and is tenant in common with himself, per Pollard J. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

He shall join with himself in avowry. Br. Ibid. — So where the dean and chapter are lords, and the dean purchases the tenancy to him and his heirs, he is tenant to himself, and he and his chapter shall make avowry upon himself, and those cases were agreed, because he takes of another's gift; but all this does not prove that he may take of his own gift. Br. Ibid.

(H. 2.)

(H. a) At what Time the Thing granted is to be taken [to avoid a Lapse.]

[ 1. ] If a thing which lies in *prendre* be granted to another to be taken annually, if the grantee does not take it one year, he cannot take in another year the same thing with that which he ought to have this year; for if he may so do, he may prejudice the grantor by his own act. M. 37 El. B. R. between Southwell and Wade. ]

[ 2. As if a man grants to another and his heirs annually 200 fagots to be taken out of all his lands, and the grantee does not take the 200 fagots in one year, he cannot take 400 the next year after; for otherwise by such means he may destroy all the wood of the grantor. M. 37 El. B. R. agreed between Southwell and Wade. ]

[ 3. So if a man grants 10 load of fuel, to take in his wood at the feast of St. Michael from year to year for life or years or longer, if he does not take it by two or four years, he cannot take so much the fifth year, as he has neglected by his own folly, by reason of the prejudice to the grantor thereby. 27 H. 6. 10. per Curiam. ]

[ 4. So it is of a grant of 10 load of hay to take at a certain feast from year to year. 27 H. 6. 10. ]

[ 136 ]

Fol. 65.

Br. Grants, pl. 8. S. C.—S P. But must take it every year according to his grant. Arg. Pasch. 31 Eliz. B. R. in case of Scott v. Scott.—Cites 27 H. 6.

[ 5. So it is of a grant of common for 10 beasts by the year. 27 H. 6. 10. ] Br. Grants, pl. 8. S. C.

[ 6. If a thing which lies in *render* be granted to another and his heirs annually, the non-payment of it in one year shall not be any discharge, but he may be charged for it in the next year; because it is the default of the grantor, that it was not paid the first year, when it lies in render. M. 37 El. B. R. agreed between Southwell and Wade. ]

[ 7. As if a man grants to another and his heirs annually 200 fagots to be taken out of all his lands, with a clause of distress for them, and by the grant the grantor is to cut and make the fagots, and to carry them to the house of the grantee; so that the grantor is to do the first act, and then by consequence it lies in render, and therefore if the 200 fagots are not paid in the first year, nor any distress taken by the grantee; yet he may have 400 fagots the year next ensuing. And so it is, if there are diverse intermediate years; for otherwise the grantor by his own act may prejudice the \*grantee. M. 37 El. B. R. adjudged between Southwell and Wade. ]

\* Orig. (Moie)

8. A man sold all the trees in his wood, except 40 of the best ashes, to be cut in two years, and in trespass against the vendee, he justified for all, except 40 of the best, and that he warned the vendor to chuse them, and he would not; wherefore, because the vendee could

not stay any longer for his time, he cut the wood, except the 40 of the best, and adjudged it was a good justification. Br. Relation, pl. 4. cites 44 E. 3. 43.

9. In trespass it was held, that where a man, seised of land with trees growing, sells the trees, and makes a feoffment in fee before the cutting of the trees, yet the vendee shall have the trees; for the feoffor might have granted estovers, and this would be good against the feoffee, and the same law of a sale of the trees growing. Br. Contract, &c. pl. 6. cites 20 H. 6. 22.

10. Grant was of a rent-charge by reversioner on an estate for life; it shall not begin till after the death of the tenant for life. Hill. 39 Eliz. C. B. Cro. E. 547. Miles v. Willoughby.

\* If <sup>†</sup> tenant in tail grants trees growing, and the grantee does not cut them in the life of the tenant in tail, he cannot cut

11. A. sold all his \* trees to be taken in five years after. There vendee shall not take them after the five years expired. But if the time of taking be limited by way of covenant, be it a covenant on the part of the grantor or grantee for a certain time; this does not restrain the grantee from taking them at any time, as well after the five years as within the five years. But the parties are to have their remedy by action of covenant on disturbance. Pasc. 13 Jac. C. B. Mo. 882. Stewkly v. Butler.

them after; for the land, and all that is annexed to it, descends to the heir, and it was the grantee's own fault, that he did not take them before. 18 E. 4. 6. pl. 30 ——— And the property in the grantee was conditional, viz. If he cut them in the life of the grantor. 18 E. 4. 21. pl. 1. ———  
† Br. Contract, &c. pl. 26. S. P. cites 18 E. 4. 5. per Littleton and Catesby; ——— and therefore contra, as it seems, of tenant in fee simple. Br. Ibid.

There is a difference where the thing to be paid may without damage to the party's paying be as well paid at one time as another. As if 40l. rent be reserved payable annually,

12. A lease was made of a warren, rendering 10 l. per ann. rent, and 100 couple of conies payable weekly, between the feasts of St. Bartholomew and St. James, by such a number as lessor should appoint. Lessor sues for 49 couple of conies in arrear; but after verdict and damages given for the plaintiff it was objected, that it is not alleged that lessor had appointed how they should be paid; and after argument it was resolved, that without such appointment the lessee was not bound to pay them \*; as well because the appointment was made part of the contract and reservation, as because of the inconvenience to the warren, which by this means would be destroyed all at once. Lat. 128. 271. Bayley v. Baxter, alias Bayly v. Bugs.

between Midsummer and Michaelmas by such sums weekly as lessor shall require; there though lessor does not require it, yet he shall not lose it, but shall have action for it at the end of the year; because the lessee, if it was not required of him weekly, might have laid it up 'till that time. ——— But it is otherwise of things which cannot be so. As if a lease be of a dairy, reserving 100 pound of butter, payable between two feasts, by such quantities weekly, &c. there the party shall not be compelled to pay all the last week. So if 100 brace of woodcocks be reserved in such manner, and the last week is after the time of their departure beyond sea, lessee is not bound to pay all in the last week. So of a reservation of roses between Midsummer and Christmas; per Jones J. Lat. 128. 271. Bayly v. Baxter, alias Bayly v. Bugs.

\* [137]

### (H. a. 2) Lapsed. When.

Br. Taile & Dones; pl. 1. cites

1. IF cesty que use in tail, or \* tenant in tail gives or sells trees, and dies before severance, yet the vendee may cut them; per Fitzh.



Fitzh. and Shelley; which was not denied. Br. Trespass, pl. 2. S. C. per Fitzherbert and Shelly. cites 27 H. 8. 5.

———\* Br. Contract, pl. 26. cites 18 E. 4. 5. Contra per Littleton and Catesby. — Br. Contract, pl. 2. cites S. C. and 11 H. 4. 32. Contra.

2. A. leased land to B. *for life*, and if A. died without heir of his body, then B. *to have* the land to him and his heirs; in this case, if B. dies first, and then A. dies without heir of his body, the heir of B. shall not have the land; for if he should, then he should be in as a purchaser; whereas the word heirs in the grant are only words of limitation. Mich. 17 & 18 Eliz. Pl. C. 483. Nichols's case. 1 Rep. 105 S. C. cited in Shelly's case.

3. When an interest or estate is *to be reduced to a certainty on a contingent precedent*, and the lessor or grantor, or lessee or grantee, dies before the contingent happens, the lease or grant is void, and shall not take effect. As in Pl. C. 273. b. Say v. Fuller. If a man makes a lease to B. for so many years as his executors shall name, it is void; for it ought to be reduced to a certainty in the life of the parties. Arg. Mich. 40 and 41 Eliz. B. R. 1 Rep. 155. b. in Chedington's case. — And judgment accordingly. Ibid. S. P. per Altham B. Lane 102. cites Pl. C. Say v. Fuller.

4. The plaintiff's wife's father made a *feoffment to uses for 13 years to raise portions* of 400 l. for his daughters; the father being dead, the *feoffees suffer the son and heir to enter* into the said land, who *sold the same*; and yet, after a descent after the death of the first purchaser, at a third hand, although the money was due, yet the court would not charge the lands with the said money, the example being dangerous. Toth. 184. cites Hill. 43 and 44 Eliz. Manwayring v. Dudley. A. seised in fee conveys his land to the use of himself for life, and to his daughters that shall be unmarried at the time

of his death, until every one of them shall and may levy 500 l. first unto the eldest daughter, until she hath levied 500 l. then to the second, so to the third, &c. The father dies, the son enters and continues possession for a certain time, and will not suffer the eldest sister to take the profits. Walmsly inclined, that she shall have her remedy against the son for the time that he hath continued in possession, and not to begin now to levy the 500 l. in prejudice of the other sisters; for it was her folly to suffer the son to continue in possession. Noy. 33. Bradford v. Laffels.

5. A. being seised of an advowson in fee, grants to B. (the church being full,) *quod ipse ad dictam ecclesiam, clericum suum presentare possit quodocunque & quomodocunque ecclesia prædicta vacare contigerit*; after this grant, the church becomes void: B. ought to present at this time, if he will; [but] he shall have no other presentation. Adjudged and affirmed in error. Jenk. 301. pl. 69. Tr. 8 Jac.

6. Where an *interest depends on a precedent estate*, the person, to whom it is limited, must take it upon the determination of the first estate, or else he never shall take it; per Haughton J. Hill. 13 Jac. B. R. Roll. R. 319. Blandford v. Blandford. [ 138 ]

(H. a. 3) *Enlarged by what Words, in the same Deed, &c.*

1. **L**IVERY made *secundum formam chartæ* cannot enlarge the grant. Co. Litt. 4. b.

M 3

2. A.

2. A. had two daughters, one married to B. and the other to C. and in his life made a partition of his lands between them and their heirs, and because he had allotted the greater share to B. of lands in possession, much of C's moiety being in jointure to M. his wife, he charged B.'s moiety with a *rent during the life of M. habend' to C. and her assigns, during the life of M. &c. And if it happen, &c.* that then it shall be lawful for the said C. and his heirs, during the life of M. to distrain, &c. C. died and devised the rent to his wife. This, after a long contest at law and in equity, was decreed not to be determined by the death of C. but that in this case he had a fee simple determinable on the death of M. and so the devise good. Trin. 8 Eliz. D. 253. pl. 99. and 100. Vernon v. Gatacre.

3. Grant of estovers to B. to be burnt in his house, and that B. and his heirs may take them at certain times of the year; adjudged that this was but estate for life of B. because *the word heir is not in the grant itself*, though it is in the sequel of the deed. D. 253. pl. 100. Marg. cites it as Lord Paget's case.

4. Land is given to two & *hæredibus*, with warranty to them & *hæredibus suis*; it was adjudged that this does not enlarge the estate; per Doderidge. Mich. 13 Jac. 3 Bulf. 126. cites 19 H. 6. and 22 H. 6. 15. and Br. tit. Estates 4.

Agreed per Doderidge J. but he said that if grantor grants that J. S. and

5. Grant of a *rent to A. for life*, and afterwards, that *he and his heirs shall distrain* for it. This limitation of distress to him and his heirs shall enlarge the estate, and make it a fee simple, and this without all question; per Coke Ch. J. Mich. 13 Jac. 3 Bulf. 128. cites 8 H. 4. and 46 E. 3.

his heirs shall distrain for it, it is otherwise. 3 Bulf. 130. in case of Gough v. Howard. But when one limits an estate in *rent to A. for life*, and doth also further express, that if it be behind, that it shall be *lawful for him and his assigns to distrain* for this rent, this shall not enlarge the former estate; per Doderidge J. 3 Bulf. 130.

### (H. a. 4) Interfering Grants!

And. 245. S. C. by the name of Goddard's case.—Cro. E. 208. Carter v. Ringstead S. C.—Ow. 84. Carter v. Kungsted. S.

1. A. seised of the *manor of Stapely in Odiham, and other lands in Odiham*, suffered a common recovery of the whole, and by indenture declared the uses thus; viz. Of all his lands and tenements in Odiham, to the use of his wife for life, the remainder over, &c. and of the manor of Stapely to the use of his youngest son in tail. Per tot. Cur. though the manor of Stapely was in Odiham, yet the wife shall have nothing therein; for his intent was, that the son should have that, and the wife the residue. 2 Le. 47. Carter's case.

C.—cited per Coke Ch. J. Roll. R. 376.—Arg. S. C. cited 2 Roll. R. 276.—Arg. S. C. cited Lane 69. in case of Arden v. Darcy.—S. C. cited per Coke Ch. J. 3 Bulf. 68.—S. C. cited Jo. 22.—D. 261. b. Marg. pl. 27.

[139] See S. C. sup.

2. A. makes feoffment of the *moiety of the manor of C. and all other his messuages, lands, tenements and hereditaments*. The other moiety of the manor passes. 2 Roll. R. 279. cites it as adjudged and affirmed in error in the case of Moyle v. Ewer.

(H. a. 5.)

(H. a. 5) What Things may be granted to a Man, his *Executors*, *Administrators*, and *Assigns*. Or for Years.

1. **T**HE *custody of an idiot* is not grantable to a man, his executors, administrators and assigns. But if the emolument and advantage, that by law is given to the king, in case of an idiot, could be separated from the trust, then clearly it might be transferred; and it differs from the case of a *ward*; for the king has the first as a trust, though coupled with an interest; but he has the other, purely as an interest, service, and duty owing to him, and it came to the king in point of tenure, and so he might grant the custody of a ward, *cum acciderit*, but not so of an idiot; per Lord Nottingham. Mich. 1681. Vern. 11. Prodgers v. Phrazier.

2. The *office of policies of insurance* may be granted for years, contrary to the opinion in Sir George Reynold's case cited in Vern. 12. as the case of Vane v. Bier.

3. Grant of the place of *teller of the exchequer* to a man and his assigns, was held to be good. Cited Vern. 12. as Squibb's case.

(H. a. 6) *Not exclusive of the Grantor.*

1. **I**F a man had granted his *ward to J. S. to marry him, or to have his service, &c.* which is a profit, he cannot retake him. Br. Grants, pl. 93. cites 8 E. 4. 7. But if he had granted him for *erudition*, or instruction, he may retake him; because this is a charge to the grantee, and not a profit. Br. Grants, pl. 93. cites 8 E. 4. 7. per Littleton and Moyle.

2. A. covenants and grants with B. and his heirs, that B. and his heirs may *dig turfe in a great wast to make allom* there; yet A. and his heirs and assigns may dig there also; and 'tis like the case of *common sans nombre*. cited. Pasc. 25 Eliz. C. B. Godb. 18. as Lord Mountjoy's case. Co. Litt. 164 b.

(H. a. 7) *Inchoate*, where it must be *perfected in the Life of the Grantor, or Grantee, &c.* or both.

1. **C**onfirmation of the grant of a *bishop* after his death is void. Arg. Trin. 26 Eliz. B. R. Godb. 25. cites 31 E. 3. alb. 20. & 33 E. 3. Confirmation 22.

2. Grant of the *next presentation* or avoidance is good, though the grantor dies before the church becomes void; and it is a *chattel*, and grantee may grant it over, though no assignee be mentioned in the deed; and this, where the grantor had a fee in the patronage. Br. Grants, pl. 112, cites 7 H. 4. 2.

M 4

3. If

[ 140 ] 3. If a *reversion descend to a feme covert*, and the *baron grants it to J. N.* and the tenant for life attorns, and after the *baron dies, living the feme and the tenant for life*, the grant is void; because it was not executed in the life of the baron, and he had nothing but in jure uxoris. Br. Grants, pl. 97. cites 10 E. 4. 8.

4. If a man will take by *livery within view*, he must enter during the life of feoffor, or all is void. Arg. Trin. 26 Eliz. B. R. Godb. 25. cites 7 E. 6. Br. Leases 66.

(H. a. 8) Avoided. Where a Man shall avoid  
his own Grant.

1. **I** T was held, that if a man be seised in fee, and gives, sells, or grants trees growing, and after makes feoffment before severance of them, yet the grantee shall have them; and the grantor might have granted estovers, and therefore the grantee shall have the trees. Br. Grants, pl. 113. cites 20 H. 6. 22.

2. If a man, who has granted rent-charge, says, that he was in by disseisin made to K. at the time of the gift, which K. afterwards released to his possession, this shall not defeat the grant; and yet the release countervails entry and feoffment. Br. Warrantia Chartæ, pl. 11. cites 21 H. 6. 41. and 22 H. 6. 22.

If a feme,  
having  
title to  
dower,  
disseises the  
heir, and  
makes a  
lease of the

3. If I disseise my father, and enfeoff J. S. and then my father dies; though a new right descends to me, yet I shall be barred. But if this discontinuance, or grant, had been defeated by entry, or otherwise in my life by my father, or any other, in that case, I may shew the special matter, as 15 E. 4. 5. is, and so avoid my own deed. Pasch. 26 Eliz. B. R. Arg. Godb. 25. cites 39 H. 6. 43.

land, and afterwards recovers dower, she shall not have execution thereof, during the term; per Moor. Arg. Mo. 315. in Englefield's case.—So if one, intitled to be tenant by the curtesy, makes a lease, and his wife dies; he shall not avoid the lease; per Moor. Arg. 4 Le. 138.—But if a son disseises his father, and levies a fine with proclamation to a stranger, upon whom the father enters and dies; the son may re-enter against his own fine. Het. 97. Pasch. 4 Car. C. B. Itham v. Lawne.

1 Le. 9.  
S. C. by the  
name of  
Cater's case.  
—The  
queen  
being te-  
nant for life  
quandiu  
sola, &c.

4. A. staying beyond sea without license, and after a privy seal to recal him, the queen, being intitled for the contempt, made a lease of the lands, *quandiu in manibus nostris ratione contemptus fore contigerit, &c.* afterwards the freehold of the land, for the life of the fugitive, was given to her by act of parliament, by which her estate was altered; yet notwithstanding she shall not avoid the lease; adjudged. Mo. 111. Knowles v. Luce.

granted a rent-charge, afterwards the reversion descended to her; quære, whether the rent-charge shall continue. Dy. 141. a. pl. 44.—She may avoid the grant; per Egerton, Arg. Mo. 319. and 4 Le. 140. in Englefield's case.—Cites Benl. R.—She cannot; per Coke. Arg. Mo. 324 S. C.

7 Rep. 11.  
b. S. C.—4  
Le. 135.  
169. S. C.

5. A. covenanted to stand seised to the use of himself for life, remainder to B. in tail, with a proviso, that the limitation should be void upon tender of a gold-ring by himself, or by any for him to B. by attainder of A. the queen became tenant for his life of the estate

estate, and made a *lease* thereof, and afterwards authorized certain persons to make a tender of the ring to B. who refused it, whereby the limitation of the uses became void, and the queen *became intitled to the inheritance*; and the question was, whether she could avoid the lease made by her, when she was only tenant for life; and adjudged she might, for now she comes in by virtue of the condition, *by a title paramount that of the attainder and estate for life, under which the lessee claims.* Trin. 32 Eliz. Mo. 303. Englefield's case.

6. If mortgagor and mortgagee join in a *lease* for years, and afterwards the mortgagor performs the condition; yet he shall not avoid the lease. Arg. 7 Rep. 14. a. in Englefield's case.

S. P. Arg. Mo. 315. and 4 Lo. 138. S. C.

7. If tenant for life of the office of marshall grants such *inferior office for life* of another person, and then surrenders; that surrender shall not alter or destroy the estate of the grantee; because grantor shall not by his act defeat his grant; per Holt. Ch. J. 12 Mod. 557. Sutton the Marshall's case.

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And for that reason, if he forfeits his estate, yet the

under-grantee shall continue in for the life of the grantor; per Holt Ch. J. 12 Mod. 558. — And though the late marshall's place be determined by parliament, yet that shall not affect the under officer; for 'tis for the marshall's own offence that he is turned out, which shall not prejudice his grantee; per Holt Ch. J. 12 Mod. 558. Mich. 13 W. 3. B. R. Sutton the Marshall's case.

8. If tenant for life makes a *lease for years*, and then surrenders or forfeits his estate, yet the lease for years remains good during his life, if the years continue so long; per Holt Ch. J. 12 Mod. 558.

## (H. a. 9) What Actions, &c. Grantee shall have as Grantee, or Assignee.

1. A N assignee of land shall have a *scire facias ad computandum* against a conusee, though the assignor, who might have had it, neglected it. Mo. 662. Arg. — Ibid. 664. cites 30 E. 3. Fitzh. Scire fac. 101.

2. A terre-tenant shall have an *aud. quer. on a defeasance*, though he that enfeoffed him did not bring it in his time. Arg. Mo. 662.

3. Where the feoffor himself was barred of an *audita querela* for restitution, or contribution, there the feoffee shall never have it. As where the conusor, after the extent of his land, alone sells the land, the vendee shall not have contribution against other purchasers of the lands of the conusor after the conufance; because the conusor himself could not. Arg. Mo. 662.

4. A feoffee shall not have a *ne injuste vexes*. Arg. Mo. 662. cites 18 E. 3. Fitzh. Avowry. — F. N. B. 11. (C) The notes cite 18 E. 2. Fitzh. Avowry. 217.

5. A grantee of a feigniori shall not have a *writ of escheat* upon title before his grant. Arg. Mo. 663. cites 19 R. 2. Fitzh. Escheat.

6. A feoffee shall not have an *assise of nuisance* for a nuisance done

done before his time, but shall have a *quod permittat*, &c. by reason of the tort continuing in his time. Arg. Mo. 663. cites it as adjudged in case of Foster v. Bartlet.

7. A feoffee shall have a *warrantia chartæ*. Arg. Mo. 664. cites 46 E. 3. Fitzh. Warrantia chartæ.

8. A feoffee shall have a *contra formam feoffamenti*. Arg. Mo. 664. cites 14 H. 4.

9. If the conusee releases to the conusor, and then the conusor makes a feoffment, and then the conusee sues execution, the feoffee shall have an *audita querela*. Arg. Mo. 664. cites 20 Ass. pl. and 17 E. 3. 6.

10. Feoffee of conusor shall have a *writ of error*. Arg. Mo. 664. cites 18 E. 3. 25 and 27 Ass. pl. 24.

So grantees  
of the re-  
version  
shall have a  
*scire facias*  
against him who had execution, and had levied the money. Arg. Mo. 664. cites D. 1.

11. Feoffee of a conusor shall have a *scire facias* against the assignee of the conusee when the money is levied. Arg. Mo. 664. cites 46 E. 3. Fitzh. Scire facias 124.

scire facias against him who had execution, and had levied the money. Arg. Mo. 664. cites D. 1.

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(H. a. 10) Repugnant.

As if a feoff-  
ment in fee be  
made to  
W. N.  
during the  
life of J. S.  
these words [during the life of J. S.] shall be void; for they are contrary to the fee. Br. Estates, pl. 50. cites 21 H. 8. — Contra of a feoffment in fee so long as Paul's sceptle shall stand. Br. Estates, pl. 50 cites 21 H. 8.

1. **W**HEN words in deeds are repugnant, they shall be *rejected*, and we ought to *adjudge upon the other words*; per Fenner J. and judgment was accordingly. Mich. 37 & 38 Eliz. B. R. Cro. E. 420. Sharplus v. Hankinson.

these words [during the life of J. S.] shall be void; for they are contrary to the fee. Br. Estates, pl. 50. cites 21 H. 8. — Contra of a feoffment in fee so long as Paul's sceptle shall stand. Br. Estates, pl. 50 cites 21 H. 8.

2. If a man *be bound to N. in 40 l.* and he grants to him that he *will not sue him upon this obligation*, if the grant be in the same deed, it is void; per Babbington; and it seems to be good law; for it is repugnant; but if he grants it by another deed, it is good in bar; per Marten; and so by covenant; per Babb. Br. Negative, &c. pl. 16. cites 7 H. 6. 43, 44.

3. The master and fellows of a college *demised all their lands in L. except the manor of L.* where in truth they *had nothing in L. besides the manor of L.* and it was adjudged a void exception. Pasch. 13 Jac. C. B. Mo. 881. per Warburton J. cited 18 Eliz. B. R. Dorrell v. Collins.

4. 'Tis an infallible rule in the exposition of deeds, that when *two clauses* are contained in a deed, the *one contradicting the other*, the first shall be good, and the last void. One gave land to R. with A. his daughter in frank-marriage, habendum to R. and his heirs, with warranty to him and his heirs; they died; and their son brought a mordancestor; and because the first clause was in frank-marriage, and the other in fee, the justices doubted to which of them they should have regard, and at last adjudged, that when there were several or two *clauses* in a deed, *repugnant, or of divers natures*, that *more regard ought to be taken to the first, then to the last*; but otherwise in wills. Arg. Hill 14 Jac. Bridgm. 101. in



101. in case of Newsham v. Carew.—Cites 2 E. 2. Feoffments and Deeds.

5. *Words of known signification, but ill-placed in the context of a deed, so as they make it repugnant and senseless, are to be rejected equally with words of no known signification.* Vaugh. 176. Hill. 23 & 24 Car. C. B. Crowley v. Swindles.

As A. by indenture in consideration of former service done

to him by B. granted to B. and M. his wife a rent of 20l. a year, issuing out of all his lands and hereditaments situate in K. *habendum* the said rent to the said B. and M. and their assigns, after the decease of one C. and D. or either of them, which first should happen, during the lives of B. and M. and the longer liver of them, at Lady-Day and Michaelmas by equal portions; the first payment to begin at such of the said feasts as should first happen next after the decease of the said C. and D. or either of them; and if the aforesaid yearly rent of 10l. and of 20l. shall be unpaid at any the days aforesaid, in part or in all, that shall be lawful for the said B. and M. at any time during the joint natural lives of the said C. and D. if the said B. and M. or either of them should so long live, and as often as the said rents of 20l. or any parcel should be behind, to enter into all the said A. the grantor's lands in K. aforesaid, and to distrain; so as the sense must run, that, if the rent were behind, it should be lawful to distrain during the joint lives of C. and D. which was before it could be behind; for it could not be behind till the death of one of them, therefore those words, [during their joint natural lives,] being insensible ought to be rejected. Judgment pro defendente, Hill. 23 & 24 Car. C. B. Vaugh. 173, 174. 176. Crowley v. Swindles & al.

(H. a. 11.) *Insensible.* Made good or not by Construction.

1. A. The defendant covenanted to pay to B. the plaintiff 153l. 10s. by articles to this effect, viz. *Memorandum, 14 March 1687. Imprimis, it is covenanted by and between B. of &c. of the one part, and A. of &c. of the other part; whereas B. by virtue of these presents hath covenanted, concluded, and articted all that his messuages, &c. unto the said A. his heirs and assigns. Item, for the sum of 315l. the one half to be paid the 2d February, 1688. Item, the said A. to enter the 2d February aforesaid. Item, the said A. is to pay the other half the 2d February 1689, &c.* It was objected, 1. That the words being in the *preter-tense*, here was no covenant to oblige B. to convey; but it was answered for B. that the words may be construed as in the *present-tense*, ut res valeat, and cited 1 Leon. 25. BEDOW's case, and Mo. 31. and the rather in this case, because the deed is [Imprimis it is covenanted, &c.] and also because the words in another place are, that the plaintiff *hath covenanted &c. by these presents*. 2. Objection was, that there are no words to oblige plaintiff to convey, the words for this purpose being only that *B. by virtue of these presents hath covenanted, &c. all that his messuages, &c. to the within named A. &c.* to which it was answered, that the intent of the parties appeared by the frame of the deed, that defendant should have the lands to him and his heirs; for 1st. he was to pay the value, and 2dly. he was to enter the 2d of February, 1688, and he could not have them without a conveyance, and cited Saund. 319. PORDAGE v. COLE, to prove that the words would amount to a covenant. 3. Objection, that the [whereas] made the whole deed a recital only, to which it was answered, that the words [by these presents] demonstrate that he covenants by the deed, and then the word *whereas* is idle and to

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to be rejected, and for this cited Vaughan 173. CROWLEY's case; and for the same reason the word *item* in the clause for payment shall be rejected also; and if (whereas) and (item) be rejected, and the words (*both covenanted*) be taken in the *present-tense*, as they may appear as before, then the sense will be thus, viz. B. doth covenant to convey all his messuages, &c. And it was adjudged for B. the plaintiff by the opinion of the whole court. Lutw. 493. to 496. Hilton v. Smith.

(H. a. 12) *Void or Voidable.* What Grants are.

1. **I**F an *infant grants a rent by fine*, this grant is voidable by himself *during his nonage* by writ of error; but if he does not avoid it during his nonage, 'tis good for ever, and notwithstanding he dies during his nonage, before he has avoided it, yet his heir shall not avoid it. Quære, if the conusor dies pending the writ of error. Perk. 9. S. 19. cites Mich. 18 E. 4. 13.

2. If one *non sanæ memoriæ*, being seised of land, *grants a rent out of the same in fee, and dies*, and his heir enters, and the grantee distrains for the rent behind, the *heir shall have action of trespass*. But if the grantee had distrained in the life of the grantor for the rent behind, the grantor should not have an action of trespass, for he can't avoid his deed, by disabling of himself. Perk. 10. S. 21. cites P. 12 E. 4. 8. H. 39 H. 6. 42.

(H. a. 13) *Habendum.* Necessary or not. In what Cases a Grant is good, without any Habendum.

1. **I**F land be given to *J. S. & si contingat ipsum obire sine hærede de corpore suo, quod tunc revertat* to the donor and his heirs, without any habend' in the deed, and *livery of seisin* is made according to the deed, as ought to be intended; this gives the donee an estate tail, though not given to him and his heirs; for the statute of *Westminster 2. 1. is quod voluntas donatoris secundum formam in charta doni sui manifeste expressam, &c.* Perk. S. 173.

[ 144 ] (I. a) *Habendum.* What, and its Office. What Habendum shall be said good, and what not. [And where it contains more than is in the Premises.]

10 Rep.  
107. b.—  
9 Rep. 47.  
b.—

\* And it

need not re-

peat the thing given.

[ 1. **T**HE office of the *premisses* is to express the grantor, grantee, and the thing to be granted, and the office of the \* *habendum* is to limit the estate, Co. 2. 55. Buckler's case. Co. 9. 49. b. Earl of Shrewsbury's case. ]

2 Rep. 55.—S. P. Pl. C. 106. b. in case of Wrotesley v. Adams.

It's

It's office is to limit the estate, so that the general implication of the estate, which will pass by construction of law by the premisses, is always controlled and qualified by the habendum. A lease to two, habendum to one for life, remainder to the other for life; this will alter the general implication of joint-tenancy of the frank-tenement; which had there been no habendum, would have been made. 2 Rep. 55. a. b. Mich. 39 & 40 Eliz. Buckler's case.

[ 2. An habendum cannot pass more land or other thing, than is comprehended either expressly or by implication, in the general words of the premisses of the grant. 38 H. 6. 34. b. 36, 37. ] If a man be enfeoffed by deed of two acres to have and to hold three acres, and livery be made to him according to the deed in the two acres; the third acre, of which there was no speech in the premisses of the deed, shall not pass by the deed: but if livery and seisin be made in this acre, then it shall pass by the livery of seisin, &c. Perk. S. 165.

[ 3. But see 42 E. 3. 12. a case is put, that by fine a man acknowledged the right to the conusee of the third part of the manor, who grants and renders 2 parts, habendum all the manor. ]

[ 4. If the king grants a manor habendum una cum advocacione, this shall pass the advowson; because the advowson would pass at the common law without naming, and it is sufficient naming within the statute. 38 H. 6. 34. b. 9 H. 6. 27. b. ] Br. Feoffment de terre, pl. 73. S. P. in case of a common person.—

[ 5. But if a man grants a manor habendum una cum another manor, or una cum advocacione of another manor, this is not good; because it was not included in the premisses. 9 H. 6. 27. b. in the grant of the king. ] Una cum in an habendum cannot pass more things than are in the premisses, but is good to pass things appurtenant or appendant. But if an una-cum comes before the habendum, 'twill make a good grant of new things. Mo. 881. per 3 J. in case of Stukely v. Butler.—\* S. P. in case of a grant by the king. Contra if the una cum be after the habendum Br. Patents, pl. 56. cites 8 H. 7. 1.

[ 6. If the king grants quendam insulam to another habend' simul cum omnibus exitibus & amercementis infra insulam emergentibus. This shall not pass the issues and amercements. Because they were not comprized within the premisses. Contra 9 H. 6. 27. b. ]

[ 7. So if the king grants land, habendum una cum una acra terre in D. The acre shall not pass; because it was not mentioned in the premisses. Contra 9 H. 6. 27. b. ]

8. If one leases the manor of D. to hold to the lessee for twenty one years, without repeating the manor in the habendum, yet it is a good lease; per Welsh and Weston J. Quod fuit concessum; for this includes all which is comprized in the premisses. Pasch. 6 Eliz. Mo. 55. in pl. 160. Anon. Dal. 57. pl. 3. in S. C. Anon. and in the very words.

9. If a term for years of a manor be limited in the premisses of an indenture of lease; though here be no habendum, yet the lease is good enough; per Dyer and Brown. Mo. 56. in pl. 160. Dal. 57. pl. 3. Ow. 31. S. C. Anon. —And if the lease had been, habendum every part and parcel of the said manor, it had been a good lease for all the manor, for the parts include and comprehend the whole manor; per Dyer and Brown. Mo. 56. in pl. 160.—Dal. 57. pl. 3. S. C. Anon.—Ow. 31. S. C. Anon.

10. When several things are granted in a deed, and after the habendum comes to limit the estate, if the habendum recites again [ 145 ]

*again particularly all the things*, it does a thing which is not it's office, and is *superfluous*; and therefore all the recital shall be of no effect. But the habendum shall be construed, as if no such recital had been, nor other thing besides habendum & tenendum. But where a deed or demise contains several limitations of estate; viz. one of certain parcels of the premises for 20 years, and of other premises another estate for 10 years, or for life, there the certainty of the diverse habendums is to be regarded; but not where there is one habendum only; per Manwood Ch. B. Hill. 28 Eliz. Scacc. Mo. 223. in Catew's case.

An interest cannot be granted jointly and severally.

11. Grant of an advowson to three, habendum *eis & uni eorum conjunctim & divisim*. The severance of the habendum above seems void in law. D. 304. b. pl. 54.

Ibid. in Marg. cites 5 Rep. 19. Slingsby's case.—See Presentment. (M) pl. 2.

And the habend' shall not declare the person or the lease,

12. The habendum is only to *limit the estate*, and not to give any thing; and there ought to be a *grantor and grantee in the premises* of the deed, otherwise it is void. Cro. E. 903. Buftard v. Coulter.

but the estate, which shall be in the lease. 3 Le. 33. M. 15 Eliz. Anon.—If the premises contain the lands granted, but saith not to whom, though the *habend'* is to J. S. who was a party to the deed, 'tis not good. Cro. E. 903. Mich. 44 & 45 Eliz. B. R. Buftard v. Coulter.

13. One habendum to *two demises* is well enough. Cumb. 190. Pasch. 4 & 5 W. & M. B. R. Moor v. Parndon.

14. In a quo warranto against one for executing the office of bailiff of a hundred, the defendant pleaded, that K. Cha. 1. was seised of the said *franchise jure coronæ*, and granted the same to N. habendum the hundred to him and his heirs, which by several mesne assignments came to the defendant, and so justified to have *retorna brevium*. Upon demurrer it was argued, that this claim was not good; for that this *grant of the franchise*, habendum *the said hundred*, can never include the said hundred; because nothing can pass by the habendum, which is not mentioned in the premises, in which nothing was mentioned but the franchise; and it was adjudged accordingly. 3 Mod. 199. Pasch. 4 Jac. 2. B. R. The King v. Kingsmill.

## (I. a. 2) Habendum. It's Operation on the Premises.

And. 226. Baldwin v. Martin. 2 Rep. 94. a. Ld. Coke's note on Baldwin's case.—Hot. 80. Arg.—

Cro. J. 476. Thurman alias Turnman v. Cooper.—Adjudged in C. B. that it may *explain* the premises.

1. **T**HE habendum may *enlarge* the premises, but *not abridge* the same. Co. Litt. 299. a. (e).—The habendum may *enlarge* the premises. 2 Jo. 4. Arg. cites 8 Rep. 154. Cro. J. Thurman v. Cooper.—And may *abridge* the premises. 9 H. 6. 22. b. 21 H. 6. 7. 37 Aff. 15. Perk. S. 170. 176. 35 Aff. P. Br. Estate, 36. And may *explain* the premises. D. 160. Mo. 43. and may *avoid* the premises. 2 Rep. 55. Bukler v. Harvey. Roll. Estates, 854.

premises. 2 Jo. 4. Pilsworth v. Pyet.—It may alter, abridge, and utterly frustrate a grant; as a feoffment habendum after the death of the feoffor. Hob. 171.—But not frustrate it, where it was compleat before; as if the lessee for years grant all his estate, habendum after his death. Ibid.

2. If in the premises, lands are leased, or a rent granted, the general intendment is, that an estate for life passes. But if the habendum limit the same for years, or at will, the habendum does qualify the general intendment of the premises. Co. Litt. 183. a. (k). Mo. 26. per 2 J. against 1.

3. If a manor was granted or rendered by fine, habendum one acre to him and his heirs, which acre was parcel of the manor, he shall have the manor for life, and the acre in fee; because there is no limitation of the estate for the residue of the manor. Arg. Pl. C. [ 146 ] 157. b. Pasch. 3 Mar.

4. Lease to three of three acres, habendum one acre to one for twenty years, another acre to another for forty years, and the third acre to the third for sixty years, is a void limitation; for he cannot by his habendum divide the estates in such manner, which were joint before; per Weston J. Trin. 4 Eliz. Mo. 44. in pl. 133. Where a deed or demise contains several limitations of estate, viz.  
one of certain parcel of the premises for twenty years, and of others another habendum for ten years, or for life, there the certainty of diverse habendums is to be regarded, but not where there is but one habendum; per Manwood Ch. B. Mo. 223. in Carew's case.

5. The habendum cannot frustrate a grant which was compleat before, but will be repugnant. Trin. 6 W. & M. B. R. Arg. Skin. 531. cites Hob. 171. and cites it as so resolved. Jo. 205. in Goshawk v. Chickell, and in Pl. C. 520. Welkden v. Elkington.—Per Treby Ch. J. Though the habendum cannot frustrate the premises, yet it may restrain them as a grant to J. S. and his heirs, habendum to him and his heirs during the life of J. S. is good. Skin. 543. in case of Jerman v. Orchard.—And per eundem, where the premises are general, there the premises may frustrate the habendum, as a feoffment of land to J. S. habendum, to J. S. for life. The feoffment is good upon the premises of the deed, and the habendum void and repugnant. Skin. 544. Jerman v. Orchard.

(I. a. 3) Habendum. Where it differs from the Premises, in respect of the Limitation. See (K. a) pl. 15.

1. IF a lease be made to two, habendum to the one for life, the remainder to the other for life, this alters the general intendment of the premises; and so it has been oftentimes resolved. And so 'tis if a lease be to two, habendum the one moiety to one, and the other moiety to the other; the habendum makes them tenants in common. And so one part of the deed explains the other, and no repugnancy between them. Et semper expressum facit cessare tacitum. Co. Litt. 183. b. (l).

the custom of copyholders is that this word successively shall hold place, this is good there by the custom, contrary of franktenement at the common law. Br. Jointenants, pl. 53. cites 30 H. 8.

But if a lease be to A. B. and C. for life habendum to A. for life, remainder to C for life; this

2 Rep. 55. a. b. Buckler's case. —If a lease be made to two for life successively, yet this is a joint estate; but where

This habendum has severed the joint estate limited by the premisses, and hath distinguished it into remainders. But if the habendum had been *habendum successive*, the estate had remained joint. Le. 10. Mich. 25 & 26 Eliz. C. B. Sutton v. Dowse.—S. C. Cro. E. 25. Dowse's case.—\* The court held that they are not jointenants. D. 160. b. pl. 43. Pasch. 4 & 5 P. & M.—So where the words were *to A. B. and C. and to the survivor of them modo & forma sequenti*; per Dyer and Weston, that it is not a joint lease. But Brown J. contra, and the habendum is void. Dal. 30. pl. 10.—Mo. 26. pl. 87. Trin. 3 Eliz. S. R. with Dal. 30.—Where the lease was made by indenture *to the mother and son, habendum to them for term of their lives, and the longest liver of them successively one after the other, as named in the indenture, and not jointly*, and livery of seisin made by attorney accordingly; whether the entire franktenement was in the mother only, was doubted in a special verdict in replevin; and ruled per Cur. that it was, and the remainder to the son and not jointly; and this without argument. D. 361. pl. 8. Hill. 20 Eliz. Anon.—But D. 361. pl. 8. Marg. cites B. N. C. 140. directly contrary; that successive is void. But serjeant Finch remembered the case of OWEN AND PREES, and took the difference when the successive is general, as B. N. C. is, and when special, as in this case; or if (viz.) or any other explanation ensue immediately and cited Trin. 3 Car. C. B.

2. Lease to baron and his wife and a third person, habendum *to baron for eighty years*, if he shall so long live, and if he die within the term, the remainder of the said term to the wife, and the third person, if they so long shall live. Per 2 Just. the limitation is good, and all the interest of the term is in the baron, and nothing in the others 'till after his death. Trin. 4 Eliz. Mo. 43. pl. 133. pl. 388. S. P.

[ 147 ] 3. If a lease be made of the *manor of S. habendum the manor of D.* the lease is void for the whole; per Dyer and Brown. Pasch. 6 Eliz. Mo. 56. in pl. 160. Anon.  
So if one makes a lease to J. S. habendum, to J. K. for a term of years, the lease is wholly void; per Dyer and Brown. Pasch. 6 Eliz. Mo. 56. in pl. 160. Anon.

4. By the opinion of the judges, a lease is good, though *no lessee is named in the premisses*, but in the habendum. Toth. 226. cites 22 Eliz. Buller v. Doddington.

It is a joint estate, and the proviso shall not sever it. Cro. E. 89. 107. S. C.—  
5. Lease *to A. B. and C. for their three lives*, and the life of the survivor, and after the habendum as before, it is said provided always, and it is covenanted between the parties, that *A. shall take all the profits during his life, and then B. during his life, &c.* yet resolved this a joint estate. Mich. 30 & 31 Eliz. B. R. Le. 317. Scovel v. Cavel.  
Mo. 267, 298. S. C. by name of Leverage v. Cable.—But it was said per Coke, a counsel, arg. that perhaps an action of covenant lies upon it. Le. 312. in S. C.

6. Grant to *A. and his heirs*, habendum to *A. and his assigns*, is a good fee. Arg. 2 Roll. R. 361. Trin. 21 Jac. B. R. in case of Ld. Zouch v. Sir Ed. Moor.

See (I. a) (I. a. 4) Habendum, Where it differs from the Premises, in respect of the Things granted, and is more.

1. WHERE the habendum is of another thing; not contained in the premisses of the deed, it is not good; as grant of common out of land, habendum the land, or of herbage of a park,



park, habend' the park. Arg. Pasch. 3 M. Pl. C. 160. in case of Throgmorton v. Tracy.

2. If a man be *enfeoffed* by deed of two acres, to have and to hold three acres, and livery be made to him according to the deed in the two acres; the third acre, of which there was nothing said in the premisses of the deed, shall not pass: but if livery and seisin be made in this acre, then it shall pass by the livery of seisin, &c. Perk. S. 165.

3. If the thing is *comprehended in the premisses*, and hath another name in the habendum, which contained the thing, the habend' is good; as if the nomination of an *advowson* is granted, habendum the *advowson*, the habendum is good, though it varies in name; for 'tis one and the same thing. Pl. C. 157. b. Pasch. 3 Mar. in case of Throgmorton v. Tracy.

So a gift of a manor, habendum the services; it is a good habendum. *Causa quæ supra.* Pl.

C. 157. b. in case of Throgmorton v. Tracy.

4. When the habend' is *used for a limitation*, it cannot be void, but all the lease shall be void; as if a man leases his manor of D. to have and to hold one acre, parcel of it, for term of years, the lease is void for the whole. Mo. 56. per Dyer and Brown, pl. 160.

Ow. 31. S. C. Pasch. 6 Eliz. Anon.

5. The grantor conveyed *situm rectoriæ cum decimis eidem pertinent'*, habendum the *aforsaid scite with the appurtenances* for 20 years; it was insisted, that the tithes did not pass; for though they were mentioned in the premisses, yet they were left out of the habendum, and therefore would not pass; but adjudged, that since *tithes are* \* *parcel of a rectory*, they shall pass together with the scite thereof, with the appurtenances, for the said term of 20 years. 1 Le. 281. Pasch. 28 Eliz. in Scacc. Cary's case. — Mo. 222. S. C.

\* But had they been several intire distinct things, which did not depend one upon the other, but were in gross by 282. S. C.

themselves, it had been otherwise. See Le.

6. A. grants the next presentation to a church to B. C. and D. habendum *eis & uni eorum conjunctim & divisim*; the habendum seems void in law. D. 304. b. pl. 54. Mich. 13 & 14 Eliz. Anon.

[ 148 ] An interest cannot be granted jointly and

severally. Ibid. marg. cites 5 Rep. 19. Slingsby's case.

(I. a. 5) Habendum. Where it differs from the Premisses, in respect of the Things granted; and is less.

1. THE king granted to the dutchess of E. *insulam de B. & Castrum cum pertinentiis*, habendum, &c. *simul cum omnibus exitibus finibus amerciamentis proficuis omnium gentium tenentium*, &c. And per Vampage clearly, all that is after the habendum, and is not expressed in the concessimus before the habendum is void, unless of *advowson*, which is appendant to the manor or land which is comprised in the concessimus. Quod nota. Br. Patents, pl. 4. cites 9 H. 6. 27.

So of a gift or grant of one acre, habend' with another acre this is void as to the last acre. Br. Grants, pl. 60. cites 38 H. 6. 34.

2. If the king, or a common person *grant a manor to J. N. or land habend', &c. with the advowson of the church of D.* this is good, if the advowson be appendant, though it be in the habend', and not in the grant or gift; contrary, if it be an advowson *in gross*; for there the grant is void as to the advowson, if it be not as well in the grant, as in the habend'. Br. Grants, pl. 60. cites 38 H. 6. 34.

Walsh and Weston, J. thought the limitation of the word (members) void, because after the habendum; and that so it was

3. Lease of a manor with all members and appurtenances, habend' *all the members* of the said manor to lessee for term of years; by the better opinion of the justices this is only an estate at will of the manor; and there is a diversity between a thing which *lies in grant*, and a thing *of which livery* may be made; for if a man makes a *lease of a manor*, and of *an office*, to have and to hold the manor for term of years; the office passes for life, notwithstanding that it be *left out in the habend'*. Pasch. 6 Eliz. Mo. 55. per Dyer and Brown. pl. 160. Anon.

leased by the premisses, without the habendum, and that such lease had been held good; as where one leased the *manor of D. habend' to the lessee for 21 years*, without repeating the manor in the habendum, it is a good lease. Mo. 55.—Dal. 57. pl. 3. S. C. Anon. in the same words. Ow. 31. Anon. S. C.

4. But if a man makes a *lease of two acres, habend' one acre for term of years*; this is a lease of this acre for years, and of the other acre but *at will*. Pasch. 6 Eliz. Mo. 55. pl. 160. per Dyer and Brown. Anon.

But if J. infeoffs A. and B. of two acres

5. If J. infeoffs A. and B. of an *acre of land, habend', the one moiety to A. in fee, and the other moiety to B. in fee*; this is good, for it stands well with the premisses. 3 Le. 126. Arg. pl. 60.

of land, habendum *one acre to A. and the other acre to B.* the habendum is void; for it is contrary to the premisses; for each of them is excluded out of one acre, which was given to him in the premisses. 3 Le. 126. Arg. pl. 60.—The habendum is void, because repugnant to, and inconsistent with the premisses, by which the whole two acres were expressly granted to both; per Holt, Ch. J. Wms's Rep. 19. in case of Fisher v. Wigg.

But if the premisses of the deed are of two acres, and the habendum is

6. So if an acre of land be given to two by deed, to have and to hold *one moiety to one and his heirs, and the other moiety to the other, and the heirs of his body*; the habendum is good and effectual. Perk. S. 175.

but of one acre, and the estate of none of them is enlarged by the habendum, it is a void habendum; because it *excludes the offices of part of that which was given*. Perk. S. 175.—But if *this acre be warranted unto them*, this warranty is good notwithstanding it does not extend unto all their land which was given, or unto all the persons that were infeoffed, &c. Or if the warranty be made by *one of the feoffors*, it is good. Perk. S. 176.

[ 149 ]

7. A *demise* was de toto illo mesuagio & tenemento habend', dictum mesuag' *sive tenement'*; this is a demise of one of two things, and the lease is not good for both, nor for either of them before election. Mich. 42 & 43 Eliz. B. R. Mo. 682. cites the case of Biby v. King.

(K. a) In what Cases the Habendum shall be repugnant to the Premises.

[ 1. ] If a man lease to three, habendum to one of them for life, remainder to the second for life, remainder to the third for life; this is a good habendum, and they shall take in succession by remainders. D. 4 & 5 Ma. 160. 43. 8. E. 3. Fitzh. Feoffment 73. ]

*If lands be given to J. S. and T. K. in the premises of the deed, and no estate is expressed in the premises of the deed, to have and to hold to J. S. for life, the remainder to T. K. and his heirs, this habendum is good and effectual, because it is not repugnant to the premises; but makes a declaration of the premises how they shall take the land, &c. Perk. S. 174.*

[ 2. If by the premises no certain nor express estate is given, otherwise \* than the law would give, there it may be altered, or abridged, or utterly made void by the habendum. Hobart's Rep. 231. ]

\* Fo. 66.

Hob. 170.

—If a man be infeoffed of land, and no estate is expressed in the premises of the deed; to have and to hold to him and his heirs, the habendum is good and effectual, because it is not repugnant; for it includes the premises and more; for if livery or seisin be made, and no estate expressed to him to whom the livery is made, he has an estate for life; and by the habendum he had an estate in fee, which includes the premises of the deed, and more, &c. Perk. S. 167.—So shall it be if an estate for years, or for life, or for the life of another, be expressed in the premises of the deed, to have and to hold to him and his heirs, &c. Ibid.

[ 3. As if a man makes feoffment of land, habendum to the feoffee and his heirs after the death of the feoffor; this is a void feoffment, because an estate of franktenement cannot commence in futuro, and here no estate is limited by the premises. Hobart's Rep. 231. cites Mich. 33 & 34 Eliz. B. R. adjudged between Hodge and Crosse. ]

Cro. E. 254.  
S. C. Mo.  
881. 5 Rep.  
94 b. 11  
Rep. 18. 2  
Roll. 10. pl.  
3. Hob.  
171. S. C.

cized Skin. 544.—A. seised in fee, in consideration of affection, and 5 s. by deed inrolled bargains and sells to B. his grandson, and his heirs, habend' immediately after the death of A. to B. and the heirs male of his body, with diverse remainders over. A. enjoyed the lands during his life without interruption; but upon his death, M. the mother of B. and daughter and heir of A. entered, and in ejectment brought by B. it was adjudged by the whole court, that though the habend' of a future freehold is void, yet the grant in the premises being expressly to B. and his heirs, the indenture shall enure upon the premises, and pass the estate to B. immediately upon the premises, and the continuance of the possession by A. the grantor all his life after was tortious, and will not alter the case, though perhaps he thought and intended that nothing should pass till after his death; for his intent cannot alter the law, and make a future frank-tenement good, and a present frank-tenement void. 3 Lev. 339. Carter v. Madgwick.

[ 4. If A. makes a lease of land for three lives, and after grants the reversion to another, habendum to the grantee for life, and after follow these words, (which said estate for life to begin after the death of the three first lessees) this is a good estate in reversion for life, for it was a perfect estate before those last words came. Hobart's Reports, 231. cites Underwood and Underhaye's case. Hil. 34 Eliz. B. R. adjudged. ]

Cro. E.  
266. S. C.  
—Hob.  
171.—The  
difference is  
between a  
grant of the  
reversion,  
habend'  
after the

death of tenant or tenants for life, and where it is habend' after the death of a stranger. In the first case it is good; for it is but a limitation when he shall have the possession; but in the last case it is not good. Cro. E. 585. in case of Buckler v. Hardy.

[ 5. If a termor, reciting by indenture his term and lease, grants all his term, estate, and interest to another, habendum immediately after

And. 141.  
cites S. C.  
—Jo.

205. Goshawk v. Chickel.—Hob. 171. —Cro. C. 110.—A. demised a

*after the death of the grantor; this habendum is void, and the grantee shall have it presently; for the grantor may overlive the term, and then the grant shall be utterly defeated by the habendum.* D. 10 Eliz. 272. 30. between *Lilly and Witney*. Com. Wels. Elk. 520. b. Hobart's Reports, 231. D. 7. E. 6. ]

*cottage, barn, and two acres of land to B. for 1000 years, which by diverse mesne assignments came to C. who about forty years after by indenture reciting the said demise did grant, assign, and set over to D. all the said cottage, barn, and lands, and all and singular other the premises before recited, together with the said recited lease, and all writings and evidences concerning the premises, habend' the said cottage, barn, and premises immediately after the death of the said C. and M. his wife, for and during all the rest and residue of the said term of 1000 years, which shall be then to come and unexpired. This was adjudged by Holt, Ch. J. and Dolben (Eyre justice seeming to dissent) to be void; but upon error brought in Cam. Scacc. this judgment was reversed by six against two; and all resolved that the assignment was good upon the premises of the deed, and rejected the habend'; for the estate being limited in the premises, and the grant perfect, an habend' is not necessary, and it shall not make that void which was perfect before; *ut in per inutile non vitiatur*. And here the question was, if by the grant of the cottage, barn, and lands, and all and singular other the recited premises, together with the said recited lease, and all writings and evidences concerning the premises, to M. and her executors and assigns, the term, estate, and interest passed; and in this the justices did not agree, for many of them held, that he having recited his estate and interest from A. and deduced it to himself, and said, that the estate, term, and interest of the premises, was in himself; and then having granted the said cottage, &c. and all other the recited premises; that this passed his estate, term, and interest, which he had shown and recited, as well as if it had been particularly mentioned; and if he had granted his term to M. and her executors, &c. without question it had passed all, as it is ruled in GOSHAWK and CHICKELL's case. Jones 205. and Cro. Car. 154. and justice Rookby said, that the words [the said recited lease] would carry the estate and interest; but Treby Ch. J. seemed to deny it, and doubted also of the words [recited premises] and said that they extend but to other things of the same nature with the cottage, barn, and close, and were put in only to supply the defect, if any of the things demised were omitted; and he said, that the words upon which he founded his judgment were [all the said cottage, close, barn, and two acres of land;] the which joined, with the recitals of the deed, are sufficient to pass the whole estate and interest of the term; for though he admitted, that if a man be seised in fee of Bl. Acre, and grants Bl. Acre to J. S. and his heirs, that by this his estate passes, and J. S. has a fee; yet to say, that if tenant for years of Bl. Acre grants it to J. S. and his executors, that J. S. has the term also, will not hold; but with the recital he said, that it would be an assignment of the term and estate in the land; and as to what was said by Baron Powell, that the term is a thing intire, and cannot be severed, he denied it, and said, that without question a man might grant his term and estate, *habendum* to the grantee, his executors and administrators, for two or more years; for though the *habendum* cannot frustrate the premises, yet it may restrain them; as a grant to J. S. and his heirs, *habendum* to him and his heirs, during the life of J. S. is good. Skin. 542, 543. Trin. 6 W. & M. in Scacc. Jerman v. Orchard. —12 Mod. 11. S. C.—1 Salk. 364. S. C.—*

[ 6. But if he had granted the land, *habendum* after his death, this had been good. ]

See Estate (Y. a) pl. 1, 2.

[ 7. If a man has an interest of a term to commence after the death of a lessee for life of the land, and recites it, and grants the premises, *habendum* the land after his death; this had been a good habendum, and not repugnant; for the grant of the premises is intended [a grant of] the land. P. 43 Eliz. B. R. agreed between Juell and Lingley. ]

[ 8. If a man gives land to J. S. with his cozen in frank-marriage, *habendum* to them and the heirs of the body of the baron begotten; by this habendum the feme has only for life. 19 H. 6. 22. b. per Fortescue. ]

Cro. J. 476. S. C.—A gift to A. and his heirs, viz. to A. and his heirs of

[ 9. If a man gives land to one and his heirs by the premises of the deed, yet by the *habendum* he may explain the premises, and shew his intention what heirs he intends, and so make it an estate tail. P. 16. Ja. admitted per Curiam between Thurman and Cooper. ]

his body; the donee has but an estate tail, because the viz. being in the same sentence, controuls and diminishes the precedent limitation; but otherwise it is where the word *habend'* is used, for this

this being in a distinct and subsequent sentence of the limitation of the estate, cannot controul the precedent limitation; per Haughton J. 2 Roll. Rep. 23. in case of Thurnian v. Cooper.

[ 10. As if a man gives to one and his heirs, *habendum to him and his heirs of his body*; this is an estate tail in possession, though he gives a fee in possession by the premisses. 21 H. 6, 7. 45 E. 3. 20. Co. 8. 154. b. Altham's case. Perkins S. 170. ]

Pl. 24.—  
These words are not repugnant to the premisses:

for their heirs are not excluded to have the land by these words, but it is by them declared what manner of heirs shall have this land; and so they may stand together, &c. Perk. S. 169.

[ 11. If a man grants a rent to J. S. his heirs, executors, and assigns, in the premisses, *habendum to him, his heirs, executors, and assigns, during the life of W. N.* This is a good habendum, and J. S. has but an estate for life; for the word \* (heirs) is not utterly defeated by the habendum, because the heir shall have it as a special occupant. P. 7. Ja. B. between *Whiskins* and *Parrot*, plaintiffs against *Davie*. Per Curiam. But Tr. 7 Ja. same case contra per Curiam. ]

[ 151 ]  
\* Cro. J. 282. Trin. 9 Jac. B. R. Bowles v. Poore

[ 12. So if a man grants a rent to J. S. his heirs, executors, and assigns in the premisses, *habendum to him, his heirs, executors, and assigns, for the life of W. N.* This is a good habendum, and J. S. has but an estate for life; for the limitation for the life of W. N. goes as well to the estate limited in the habendum, as to the use. P. 7. Ja. B. between *Whiskins* and *Parrot* plaintiffs, and *Davie* defendant. But Tr. 7 Ja. B. contra per Curiam in the same case. ]

A rent was granted out of land to A. and his heirs, habendum to him and his heirs, to the use of him and his heirs for the life

of J. S. and it was adjudged, that only an estate for life descendible passed, not a fee simple. Mo. 876. pl. 1227. WILKINS v. PERRAT. cites 2 E. 2. Fitzh. Judgm. 99. 39 E. 3. 8 Eliz. D. 253. 21 H. 6, 7.

[ 13. If a man grants land by deed, *naming no person in the premisses, habendum to B.* This is not a good grant, because he was not named in the premisses, the which is to design the person, and the thing; and the habendum is to \* limit the estate. M. 37 El. B. R. per two Justices. Contra Co. Litt. 7. ]

Sup. (La) pl. 1. See Facts (C. a. 3)

67.

[ 14. If a bargain and sale be in such a manner; *this indenture &c. between A. B. of the one part, and R. S. of the other part, &c. witnesseth, that A. B. in consideration of 30 l. paid by R. S. hath given one messuage in D. habendum to the said R. S. &c.* it seems that this is a good bargain and sale to R. S. for by the naming him to be party to the indenture in the beginning of the deed, it is a sufficient naming of him in the premisses. Contra Mich. 37 Eliz. B. R. per two Justices. ]

[ 15. If land be given to J. S. *habendum to him and a stranger*, for a certain estate; this is void to the stranger, because he was not mentioned in the premisses. Tr. 15 Ja. B. R. between *Brookes* and *Brookes*. Agreed per Curiam, Mich, 11 Jac. B. R. adjudged between *Cobbe* and *Betterton*. ]

2 Le. 1. KIRKMAN v. REIGNOLDS. S. P.—And if J. S. die, there shall

be no occupancy; for the lives of the others in the habendum was intended an estate to them, and not a limitation of the estate of J. S. Mich. 30 Eliz. C. B. 2 Le. 1. 4 Le. 3. Kirkman v. Reynolds.—If J. S. be infeoffed to have and to hold to J. S. and T. K. and livery of seisin is made to J. S. according to the deed, it is void to T. K. Perk. S. 174.—But if livery of seisin had been made to T. K. according to the deed, then he takes by the livery of seisin, and not by the deed. Perk. S. 174.



[16. So if land be given *to the baron, habendum to him and his wife*, and to the heirs of their two bodies; the feme takes nothing by this grant, because she was not mentioned in the premises of the deed. Tr. 15 Ja. B. R. between *Brookes and Brookes*. Agreed per Curiam Mich. 11 Ja. B. R. adjudged between Cobbe and Betterton.]

[17. If a gift be to one, *habendum to him with the daughter of the donor in frank-marriage*; this shall pass an estate in the frank-tenement to his daughter, as well as to the baron, because she was *the cause of the grant*, and it cannot be a frank-marriage without it, and so otherwise the *intent of the donor* shall be defeated. Tr. 15 Ja. B. R. between *Brookes and Brookes*. Agreed per totam Curiam. Com. Throg. 158. 4 E. 3.]

\*[152]

† Contra per Holt Ch. J. 1 Salk. 391. and Wms's Rep. 16. 17. and said, that the case in Poph. 126. is of no authority, it being among the additional cases, and there is no mention of that point in the report of the S. C. in Cro. J. 434. — The resolution in this case, was founded upon the custom of the manor, viz. that a person

[18. If a man *surrenders a copyhold in fee* into the hands of the lord *out of court, without limiting any use*, which surrender is *presented* by the homage at the next court, and after at the same court the surrenderor takes a new copy of the lord of the land, \* which is in such manner; the surrenderor *cepit de domino extra manus, cui dominus concessit seisinam*, *habendum to him and his wife, and the heirs of their two bodies begotten*, the remainder to the right heirs of the baron; in this case the feme shall take an estate tail, as well as the baron, because it appears that it was *the intent* of the parties, and a † *copyhold is to be expounded as a will according to the intent*; for in as much as the surrender was general, and at the next court he accepted this copy, it shall be intended that the intent of the surrenderor was to surrender the copyhold to the use here expressed, and so it enures by way of explanation of the surrender, and the manner of the grant of the lord is not material. Secondly, if it shall be said the grant of the lord only, yet there is no express grant in the premises; for the words (*cepit de domino cui dominus concessit seisinam*) cannot make a grant, and then the grant comes only in the habendum, and so good enough. Tr. 15 Ja. B. R. between *Brookes and Brookes*. Per totam Curiam. But they would not give judgment, because the heir against whom it should be given was in danger of being disinherited. But Mich. 15 Ja. Judgment was given according to this resolution.]

named after the habendum should take an estate limited to him; per Holt Ch. J. Wms's Rep. 17. Hill. 1700. B. R. in case of *Fisher v. Wigg*.

Cro. J. 434. S. C. adjudged contra. — Copyholder in fee surrendered into the lord's hands, who regranted it

[19. If the lord of a manor be seised of a *copyhold* estate, and grants it to another, *habendum to him and his wife, and to the heirs of their bodies*, the feme shall take nothing by this grant, because she was *not mentioned in the premisses*, and here is *not any surrender precedent to direct the grant*, but it passes only by the grant, and therefore ought to be expounded according to a conveyance at the common law. Tr. 15 Ja. B. R. held per Houghton between *Brookes and Brookes*.]

thus; viz. *Memorandum quod J. W. cepit de domino, the same lands, cui dominus concessit inde seisinam, habund eidem J. & E. uxori ejus, & haeredibus eorum de corporibus suis exsistentibus, remanere* to the said J. W. said J. W. dies, the lessor as his heir enters, it was adjudged for the defendant; for although there be no words of grant in the copy, nor is there any grant to the feme, but an *habendum* only,



only, yet it was held good enough; for the intent of the lord appears that both should take, and there is no more granted to the baron than to the feme; for there are not any words of grant to the baron, but [*cepit de domino cui dominus concessit feisinam*;] but all the words of grant and limitation are in the habendum; and in many manors there are no other forms of grant or limitation. Cro. J. 434. Brooks v. Brooks.—Grant of copyhold lands to D. habend' to D. for life, and E. his wife for her widowhood, was held good, and that such habend' is common in copies. Cro. E. 323. Pasch. 36 Eliz. B. R. Downs v. Hopkins.

[ 20. If a copyhold tenant surrenders to the use of himself, habendum to him and his wife, and the heirs of their bodies, it seems that it is void; because it is in the nature of a grant at the common law. ]

[ 21. If a man devises land to one habendum to him and his wife, it is a good estate in the feme for the intent. Tr. 15 Ja. B. R. between Brookes and Brookes, per Montague and Croke. Com. Throg. 158. and Newis and Scholastica 414. where it is habendum after the death of the wife, and so only by implication. 13 H. 7. 17. b. ]

Fol. 68.

[ 22. A man may take a remainder by the habendum, though he be not named in the premisses of the deed. M. 11 Ja. B. R. admitted per Curiam, between Cobb and Betterton. ]

[ 23. If a man grants a copyhold to A. habendum to him and B. his wife and one of the sons of the said A. and B.—B. and their son cannot take jointly with A. because they are not named in the premisses; and they cannot take by way of remainder, because it is uncertain which of them shall take first. M. 11 Ja. B. R. adjudged between Cobbe and Betterton. ]

Mo. 8. pl. 32 S. P.

[ 24. If a man gives land to one and his heirs, habendum to him and his heirs of his body; this is an estate tail only and no fee expectant to him; for the habendum explains the premisses, what heirs he intends, and is not only to explain the estate in possession, and to leave the fee in him according to the premisses; for it cannot be intended that he meant two several heirs in the premisses and habendum, but that the habendum explains the heirs which he intends in the premisses. Co. 8 Ed. Altham 154. b. Perkins S. 170. contra 21 H. 6, 7. 45 E. 3. 20. contra P. 16 Ja. B. R. between Thurman and Cooper, resolved per Curiam. Co. Litt. 21. ]

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[ 25. If a man gives land to A. a man and B. a woman and to their heirs and assigns for ever, to hold of the chief lord, habendum to them and to the heirs of their bodies, the remainder to them and the survivor of them for ever, with warranty to them and their heirs; this is an estate tail in possession, and a fee expectant; for though no mention be of their heirs in the remainder, yet his intention is apparent to be so by the limitation, that he shall hold of the chief lord, and by the limitation of the remainder to them. For if it shall not be a fee it is utterly void, they having a greater estate before limited to them, and the words (for ever) and the warranty to them and their heirs shew his intent to be so, and the putting of the word (heirs) in the premisses will be sufficient to pass the fee, where the intention appears that the habendum should be only to make it an estate tail in possession, and that they shall have the fee

Cro. J. 476. S. C.

expectant: P. 16 Ja. B. R. between Thurman and Cooper, adjudged per totam Curiam, but they principally relied upon the case as if this intention had not so appeared.]

[ 26. If a man gives land to one and his heirs, habendum to him and the heirs of his body, the remainder to a stranger in fee; this shall abridge the estate given by the premises, and so the habendum explanatory what heir is intended in the premises; for otherwise the limitation of the remainder over would be void. P. 16 Ja. B. R. per Dod. in Thurman's case. ]

[ 27. If a man gives land to one and his heirs males, habendum to him and his heirs males of his body; this is only an estate tail and no fee expectant; for the habendum is explanatory what heirs males were intended in the premises. P. 2 & 3 Ma, 126. 50. P. 16 Ja. B. R. per Houghton in Thurman's case. ]

[ 28. If a gift be to one and his heirs, to have and to hold to him and his heirs for ever, if he has issue of his body; and if he dies without heir of his body, that the lands shall revert to the donor and his heirs; this is only an estate tail without any fee expectant, 35 Aff. 14. adjudged. ]

29. The following diversities were taken and agreed in Baldwin's case. 1st. As to things which take their essence and effect by the delivery of the deed, without any other ceremony, and which lie in grant, there, in such limitation as in the said case (which was a demise to one and his heirs habendum for years) the habendum was repugnant and void.—As in case where man grants rent or common, &c. out of his land, by the premises to one and his heirs, habendum for years or life; the habendum is repugnant; for a fee passes by the premises, by the delivery of the deed, and therefore the habendum for years, or for life, is void.—2dly. One by deed grants rent in esse, or seigniorie in the premises to one and his heirs, habendum for years or life; though other thing or ceremony is requisite, viz. attornment, besides the delivery of the deed, yet inasmuch as the thing lies in grant, and both the estates, viz. as well the estate in fee as the estate for years or life, ought to have one and the same ceremony, viz. attornment to pass it as seigniorie, &c. therefore in such case the habendum is void.—3dly. When a man gives land by deed in fee in the premises, habendum to the lessee for life, there the habendum is void, as hath been said; for one and the same ceremony, viz. livery is requisite to both estates; and therefore when livery is made according to the form and effect of the deed, it shall be taken more forcible against the feoffor, and most for the advantage of the feoffee, and the habendum in such case is void, and till livery is made the feoffee has only estate at will.—4thly. When to the estate limited in the premises a ceremony is requisite to the perfection of the estate, but to the estate limited in the habendum nothing is requisite to the perfection and essence thereof, but only the delivery of the deed there, though the habendum be of less estate than is mentioned in the premises, the habendum shall stand as in the principal case. To the fee simple limited by the premises, it is requisite to have livery and seisin, and till livery is made, nothing will pass but an estate at will (if the deed

deed had stopt there) and therefore the habendum for years is good now by the delivery of the deed for years, it appearing to be the intent of the parties. 2 Rep. 23. Baldwin's case.

30. So nota, a diversity between estate in the premisses implied and expressed; as if A. grants a rent to B. generally, this by implication and construction of law is an estate for life; but if the habendum be for years this is good, and shall qualify the generality and implication of the premisses. And upon consideration of the whole indenture these words *to the heirs* of the lessee were void; and if livery had been made it had not changed the case; for at the commencement it was made but for years. 2 Rep. 24. a. b. the note of the reporter upon Baldwin's case.

31. A. gave land to B. in tail, and if A. dies without heir the land to remain to J. S. and his heirs, the remainder is void, 2 And. 141.

(K. a. 2) Habendum differing from the Premisses, in respect of the Parties. See (K. a) pl. 15. &c.

I. ONE that is not named in the premisses, shall not take by the habendum. Pl. C. Throgmorton v. Tracy. See Faits (C. a. 3) — This is

true in feoffments and grants, but it is otherwise in case of \* copyholds. Poph. 126. Brook's case. — In copyholds it is sufficient that the parties be named in the habendum only, and in many manors the words of grant and limitation are all in the habendum. Cro. J. 434. Brooks v. Brooks and Wright. — 3 Le. 34. pl. 60. per Manwood J.

2. Land demised to A. habendum to A. and B. aforesaid, and to C. and D. for life, and for the life of the longest liver successively; A. and B. died living C. and D. None could take by the deed immediately but A. because only he was party, the rest not being named but by the habendum. Then they cannot take but by way of remainder, which cannot be joint, because of the word successive, &c. and in succession they cannot take for this uncertainty who shall begin, and who shall follow, not being successive sicut nominantur in charta. Hob. 313. Windsmore v. Hubbart. — Palm. 35. Tyles v. Greenwood. — als. Tyler v. Fisher. So it is in Hob. 313. but it seems it should be habendum to A. aforesaid, and to B. C. and D. &c. and so it seems by Godb. 51. S. C. and by Hutt.

87. 88. S. C. and by 4 Le. 246. S. C. by the name of Grubham's case. — Ow. 38. 39. S. P. Anon. P. 27 Eliz. — Palm. 25. Tyles v. Greenwood, als. Tyler v. Fisher. — But where the demise was to A. habendum to A. and B. his wife uni post alterum sicut scribuntur in indentura & nominantur in ordine, it was adjudged and affirmed in error, that B. the wife had a good remainder for her life. Jenk. 338. pl. 87. cites 13 Jac. Cro. 373. Wheadon v. Sugg.

3. A. by indenture between A. of the one part, and J. S. and R. S. of the other part, in consideration of 100l. paid by J. S. granted, released confirmed, &c. to J. S. habendum to J. S. and R. S. their heirs and assigns they are joint-tenants by the limitation of the use in the habendum, by the statute 27 H. 8. of uses. Ley. 13. Sammes's case. S. P. but nothing said about it. 2 Vent. 141. Tretheway v. Ellesden.

4. A lord of a manor, of which a copyhold farm is parcel, makes a feoffment to B. of this farm, habendum to B. and his eldest son in fee, to the use of B. and his eldest son and their heirs; the father [155] Ley. 11. Trin. 7

Jac. Sammes's case.  
—13 Rep.  
54. Mich.  
7 Jac. in  
the court of  
Wards S. C.

father and son are *joint-tenants*; the habendum is void to the eldest son, he not being named before the habendum; yet the *limitation of the use* is good; for B. has all the fee, and if B. dies, the eldest son takes all, and if he was within age he should not be in ward because of the joint-tenancy, though *B. was in by the common law, and the eldest son by the limitation of the use*; for the statute 27 H. 8. of *uses*, puts them, as to the possession, in the same quality as the use is, and the use is for jointenancy. Jenk. 330. pl. 60.

(L. a) Habendum, *differing* from the Premises; in respect of the *Estate limited* and is *less*.

1. **SOME** hold that if lands are given by the premises of a deed to *two men and their heirs*, to have and to hold to them and the heirs of their two bodies begotten, that the donees have estate in tail, and also fee simple expectant upon the estate tail, which is not law as I conceive; for they have a joint estate for their lives, and are tenants in common of the estate, and they have no estate tail, nor any fee simple, and the reason is apparent, &c. Perk. S. 170.

Cro. E.  
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2. It is a rule in law, that an habendum, being *contrariant*, or repugnant to the premises, is void and the premises shall stand.

3. *As*, if lands by the premises are given to *A. and his heirs*, habendum to him for life, this habendum is void; because *fee simple is expressed* in the premises, and but estate for life in the habendum, which is repugnant and void, and this was agreed by both sides. 2 Rep. 23. b. and so resolved. Ibid. 24. Because one and the same ceremony, viz. livery, is requisite to both the estates, and therefore when livery is made according to the form and effect of the deed, it shall be taken strongest against the feoffor, and most favourable to the feoffee; and the habendum, in such case is void, and 'till livery made the feoffee is only tenant at will. 2 Rep. 23. b. in Baldwin's case.

4. *A. demised, and to farm let to B. and his heirs*, habendum to B. and his heirs for 99 years, and so from 99 years to 99 years, &c. and B. covenanted for himself and his heirs to pay the rent; and A. covenanted at the end of the said term to make a new demise to B. and his heirs; this habendum was adjudged not to be repugnant; for by the fourth resolution there, *when to the estate limited in the premises a ceremony is requisite to the perfection of the estate, but to the estate limited in the habendum nothing is requisite to the perfection and essence thereof, but only the delivery of the deed*, there, though the habendum be of less estate than is mentioned in the premises, the habendum shall stand. As in the principal case, to the fee simple limited by the premises, it is requisite to have livery and seisin, and till livery is made nothing will pass but an estate at will, (if the deed had stop'd there) and therefore the habendum for years is good now by delivery of the deed for years. See And. 223. Baldwin v. Marton.—And. 2 Rep. 23. Baldwin's case.

5. Grant

5. Grant of land to *A. and his heirs*, habendum to him and the heirs of his body; *A.* shall have the land in tail, and the fee simple after the estate in tail. When the estate is certain in the premises the habendum shall not control it. Brownl. 45.

Litt. R. 345. cites ALTHAM'S Case. 8 Rep. 154. contra, that

it is only tail, but if it had been to *A. and the heirs of his body*, habendum to *A. and his heirs*, it is tail with remainder in fee expectant.—Br. Estates, pl. 19. cites 20 H. 6. 7.

6. Grant of a rent to *A. and his heirs*, habendum to *A. his heirs*, executors and assigns to the use of the said *A. and his assigns* during the life of a stranger; whether it was in fee, or for life, was the question? and whether the habendum be contrary to the premises, or do stand with the estate? If the habendum had been to *A. and his heirs* during his own life, it had been void, but it was held otherwise for a stranger's life and no occupancy can be of a rent. Brownl. 169. Wilkins v. Daure.

[156] See (K. a) pl. 11. S. C. by name of Whiskins, &c. v. Davie.

7. Lands given to *A. and the heirs of his body*, habendum to the donee to the use of him, his heirs, and assigns for ever. Resolved 1. that the limitation in the habendum did not encrease or alter the estate contained in the premises of the deed. 2. That tenant in tail might stand seised to an use expressed, but such use cannot be averred. Godb. 269. Pasch. 14 Jac. B. R. Franklin's case.

S. C. Cro. J. 400. is a feoffment to *A. habendum to A. and his heirs of his body to the use of*

*A. and his heirs and assigns for ever.* The opinion of the court was that *A.* was tenant in tail, and that the limitation of the use out of the tail is void as well after the statute as before. Cro. J. 401. adjournatur. Cooper v. Franklin & Walter.

8. *A.* grants lands to baron and feme and their heirs, habendum to them and the heirs of their bodies, remainder to them and the survivor of them for life, to hold of the chief lord of the fee with a warranty to them and their heirs; this is an estate tail with a fee expectant. Cro. J. 476. Turnman als. Thurman v. Cooper.

For first it is given in fee and the habendum, though it limits an estate tail,

doth not limit the estate to any other; so the fee remains as it was limited at first; and this is enforced by the tenure limited, which cannot be if it were an estate tail; and this is further enforced by the warranty being to them and their heirs. Ibid.—See Jermin and Cooper S. C.

9. So lands given to *A. and a feme sole*, and their heirs and assigns for ever, habendum to them and the heirs of their bodies, remainder to them and the survivor of them for ever; they have estate tail with a fee simple expectant. Godb. 272. Jermin v. Cooper.

See Thurman v. Cooper & Turnman v. Cooper S. C.

10. There is a difference when the limitation is in one and the same sentence, as a gift to *A. and his heirs*, if he has heirs of his body, is an estate tail only, because it is in one and the same sentence; but when the limitation is first absolute, as to *A. and his heirs*, and then is restrained by the habendum, as to *A. and the heirs of his body*, and doth not limit the estate over to any other, that stands well with the first, and both shall stand. Cro. J. 476. in case of Turnman v. Cooper.

See Thurman v. Cooper and Jermin v. Cooper S. C.—Land is given to *A. B. and his heirs tenendum sibi & heredibus*

first, if the said *A.* has issue of his body; this was adjudged an estate tail, and no fee simple, quod nota. Br. Estates, pl. 36. cites 35 Aff. 14. and says it seems that this word (if) makes it conditional.

11. Lessee for years granted all his estate and interest therein to his daughter Hester, habendum to himself and his wife for life, and afterwards

Cro. C. 154 S. C.



*afterwards to his daughter till she marry and have issue and after her marriage and having issue, then to have to her, her executors administrators and assigns, during the residue of the term, provided if H. die before marriage having no issue of her body lawfully begotten, then the grant to be void; adjudged that H. shall take immediately by the grant, and that the habendum is repugnant to the premises, and therefore void; for when in the premises all the term was granted to Hester the habendum to him and his wife for life was void; and then the case is no more than that the said term was assigned to Hester with a proviso, that if Hester died unmarried having no issue lawfully begotten to be void, and then to go to Diana, so that Hester dying without issue unmarried the proviso made the term to cease and to go over to Diana. Jo. 205. Pasch. 5 Car. B. R. Goshawke v. Chigwell.*

S. P. 5 Rep.  
13 Mich.  
41 & 42  
Eliz.  
Roffe's  
case.

12. Lease by prebendary of a tenement to *A. and his heirs, habendum to A. and his heirs for three lives*, with a letter of attorney to deliver seisin to *A. his heirs, executors or assigns*; the tenement was accustomedly let and ancient rent reserved; adjudged a good lease, and the habendum expounds the premises. T. Jo. 4. Pillsworth v. Pyet.

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13. In replevin; defendant justified under a grant of an annuity to *B. for life by indenture*, whereupon the plaintiff demanded oyer of the indenture, which was to the purpose following, viz. an indenture was made between *A. of the one part, and B. and C. of the other part*, reciting a surrender of a former grant of an annuity to *B. and then A. [for so it may be stated] granted unto B. and her heirs, one annuity of 10 l. to be issuing and going out of &c. habendum &c. to the said B. and C. and the survivor and survivors, of them, &c.* and if it shall happen the said yearly rent to be behind after any of the said feasts, that then it shall and may be *lawful to and for the said B. during her natural life, and for the said C. after her death, to enter into the premises and distrain, &c. in witness &c.* whereupon the plaintiff demurred, and defendant joined in demurrer; it was argued that the grant is to *B. and her heirs*, and that the habendum cannot alter the premises in the limitation of the estate in the grant of the rent, and the defendant's plea setting forth that *B. was seised of the said rent for life*, there is a material variance between the indenture and plea; and the court were of opinion that the conveyance setting forth an estate for life, whereas there passed an estate in fee, was a material variance; Pollexfen Ch. J. seemed to incline that it was a rent-charge for life, (for the power of distress was given her only for life) and a rent-seck in fee and that it was as a grant of two several rents; but the other Justices held that it was one intire rent and that she had it with a privilege of distress for her own life only. 2 Vent. 141, 142. Hill. 1 & 2 W. & M. C. B. Tretheway v. Ellefden.

14. *A. grants a term of 1000 years to B. his executors, &c. habendum to B. his executors, &c. after the death of B. for the residue of the term of 1000 years; the habendum is repugnant and void.*



void. 1 Salk. 346. Mich. 3 W. & M. B. R. in the Exchequer chamber and affirmed in Dom. Proc. Trin. 6 W. & M. German v. Orchard.

(M. a) Habendum differing from the Premises, in respect of the Estate limited, and is larger.

1. **I** F land be given by these words, Sciant, &c. quod ego, &c. dedi D. & J. uxori ejus, & ego the feoffor, warr. prædict. terras, &c. dict. D. & J. uxori ejus & hæred. de corpore eorum exeunt. and livery of seisin be made according to the deed, they shall have only an estate for their lives, &c. Perk. S. 166.

2. If lands be given to two for their lives in the premises of the deed, to have and to hold the moiety of this land to them and their heirs; the habendum is good, because it is not repugnant; for by the habendum their estate is enlarged in the moiety, so that they have a fee simple in this moiety, and a freehold in the other moiety. Perk. S. 177.

3. If lands be given to husband and wife, to have and to hold, &c. unto the husband for life, and to the wife and her heirs; the habendum is good and effectual, &c. Perk. S. 177.

4. If A. gives land to B. and the heirs of his body, habend' to him and his heirs; B. has estate tail and fee simple expectant; for generalis clausula non porrigitur ad ea que antea specialiter sunt comprehensa, and so the general and special words shall stand. 8 Rep. 154. in Altham's case.——cited Litt. R. 345. in Beck's case.

Br. Estate, pl. 19. cites 21 H. 6. 7. See Godb. 269. Franklin's case. 272. Jermin v.

Cooper.——Some hold that B. shall take nothing, but the habendum is void, and the deed shall take all its effect upon the premises, which is not law (as I think). But the habend' shall take effect to such intent, viz. That the estate tail shall be executed in the donee by force of the premises of the deed, and the fee simple shall be expectant upon the estate tail by force of the habendum, &c. Perk. S. 168. cites 45 E. 3. 20. 5 H. 5. 6.

5. Land is given to baron and feme to the use of baron and feme, and the heirs of their bodies begotten; resolved that 'tis an estate tail, and resolved that the word (use) is surplusage. D. 386. marg. pl. 1. cites Cro. C. 231. Young v. Dimock.

[ 158 ] This is not a limitation of the use, but of the

estate, and they are in by the common law, and 'tis not an use to be executed by the statute, nor is it as if the use and estate had been limited to different persons. Cro. C. 230. Mich. 7 Car. B. R. Jenkins v. Young.——and 245. S. C. Hill. 7 Car. B. R. by name of Meredith v. Jones.

(N. a) Habendum differing from the Premises in Words only,

1. **A** Man grants dispositionem advocacionis ecclesie, habend' ad-  
vocationem prædict. 'tis good; for 'tis comprised before. D. 126. pl. 48.

\*

2. Grant

- B** ut *herbagi-*  
*am parci ha-*  
*end' parcum*  
 s not good, because 'tis of another thing. Ibid. Mich. 2 and 3 P. & M. in case of Throgmorton v. Tracy.
2. Grant of *proficuum terræ, habend' terram*, 'tis good, because it is comprised before. D. 126. pl. 48.

(O. a) What *passes* by the Words.

1. **I**F the king or another grants *one thing una-cum another thing before the habend'*, that which is in the *una-cum* passes well, for it shall serve as a copulative; per tot. Cur. Br. Grants, pl. 86. cites 8 H. 7. 2.

2. *Habend' dicta tenementa & cotagia cum omnibus eorum pertinentiis præfat. A. B. &c.* By this *habend'* *lands appurtenant to the mesuage* passed by the word *tenementum*. Cro. J. 175. Trin. 5 Jac. B. R. Ward v. Walthew.

(P. a) *Ad Opus & Usum.*

1. **H**Abend' eis & hered' suis in perpetuum ad opus & usum ipsorum A. B. et C. in perpetuum (*without hæredum suorum*) with warranty to them hæred. & assign' in *forma prædicta* gives only estate for life. D. 169. pl. 21.—Trin. 1 Eliz. In Cur. Ward. 2 And. 199. cites D.

Le 125.  
 S. C. that it is a forfeiture.—  
 So is Owen 64. Hone v. Clark.—  
 It is a forfeiture, because the *habend.* is absolute, and the use is another clause, and though he limits the use but for life, yet the law limits the remainder of the use to the feoffor. Godb. 141. Sir

2. *Jointress* takes a second husband, and they by deed convey the land to A. and his heirs, *habend' to him and his heirs, to the use of him and his heirs for the life of his wife only*. Gawdy held it no forfeiture, and that the words (*for the life of the wife*) shall refer to both; for in construction of a deed, where the words are doubtful, reasonable construction shall be made; and when words are in a deed to express the parties intent, they shall not be taken as void. And here the words (*for the life of the wife*) are put in to exclude the forfeiture, and to save the estate. And of this opinion were Wray and Shute upon the first motion, but Clench contra. But at another day, it being moved again, Gawdy held his former opinion, but Wray and the other justices held it a forfeiture; for Wray said, by the deed at first a fee simple did pass, and that to the use of the feoffee, then the estate and the use are several things, and cannot be coupled to the words (*for the life of the wife*). And Wray said, he had demanded the opinion of the justices of his house, and they held it clearly a forfeiture in the words, and that \* the words (*for life, &c.*) shall refer only to the use, and it was so adjudged. Cro. E. 131. Pasch. 31 Eliz. B. R. Piers v. Hoe.

Ra. Egerton's case.—(Nels. Abr. 918. pl. 15. S. C. says (to the feoffee)——The use cannot abridge the estate, but that 'tis forfeited, but yet it seems the use may enlarge an estate. Arg. Roll. R. 385. cites it as adjudged in the case of Piers v. Home.——The words (*during the life of the feoffor*) shall be put to the use limited, cited per Tanfield Ch. B. Lane 38. as adjudged in the case of Gour v. Piers.——The words (*pro termino vitæ of the wife*) refers ad solum usum, and not to the estate and use. D. 169. marg. pl. 22. cites Price v. Hone.——But Roll. Estate (J. b.) pl. 1. cites H. 32 El. B. R. S. C. contra. That it is not any forfeiture: for the last words (*during the life of the feme*) shall guide all the precedent sentence, ut res magis valeat quam pereat; but says, Dubitatur.

## (Q. a) Pleadings of Grants.

1. **A** Lease contained a *mesuage in the demise*, but *land also in the habendum*, which land had been many years enjoyed accordingly; yet the Lord Chancellor's opinion was, that no continuance would make a void lease good, especially against a purchaser. Toth. 184, 185. cites 25 Eliz. Meld v. Cooper.

2. A. leases for life to B. and afterwards levies a *fine* to the use of R. for life, the remainder to A. in fee, with a proviso or *power to make leases* for 21 years, or three lives; and that the *conu-tees* should stand seised to such uses: Afterwards A. covenants to stand seised to the use of P. in tail, with divers remainders over. And after A. grants the reversion aforesaid to L. for life, who distrains C. and avows; and judgment was given against the avowant, because the pleading was naught; because he pleaded it by grant of the *reversion* aforesaid, which was limited to A. himself in fee upon the fine; for he ought to have pleaded it *as it is by limitation in the indenture*. So if the reversion be by *bargain and sale*, or if it be by way of *release*; if that be pleaded as by grant, it is naught. Noy. 66. Pasch. 37 Eliz. C. B. Cooke v. Bromehill.

(R. a) Grants made good in Equity, tho' not strictly good in Law. See Facts, (T. a)

1. **A** Verdict was at the common law to avoid a *lease for three lives*, because the lease was *to commence at a time to come*, which is void in law; yet an injunction to continue possession. Toth. 180. cites 23 Eliz. Bury v. Conisby.

2. The *mistake of a name of corporation* was holpen in equity. But contra Toth. 228. cites 32 & 33 Eliz. Lord Audley v. Sidenham. 19 June, 33 Eliz. Willis

v. Sprint.—But 38 & 39 Eliz. holpen. Brook v. Daniel.—26 May 42 Eliz. Ibid. Pawlet v. Fry.

3. Decreed that the plaintiff should enjoy *leases* made by the defendant's father, which he supposed were void in law, and the defendant was required to consent to the decree, and was told that if he did not consent, it should be judicially against him. Toth. 225. cites 36 Eliz. Little-John v. Fortescue.

4. A. possessed of a *lease for 99 years*, assigned to B. his son and M. wife of B.—B. and M. 19 Eliz. assigned to C. and K. wife of C.—C. died.—K. 6 Jac. granted to D. and J. his wife *two several annuities of 15 l. out of the same, during the residue of the 99 years, if D. and J. or any issue of their bodies should so long live, to have, &c. the one annuity from Lady Day or Mich. first happening after K's death*. Afterwards, in 1623. K. devised to E. and S. his wife, 10 l. a year out of the *premisses* during the years to come, if they so long live, and gave to F. son of E. 20 nobles a year out of the *premisses*,

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*misses, if he so long lived. K. in 22 Jac. assigned the lease for 20 years to commence after her decease to the said C. and made C. covenant to allow all annuities by her granted or to be granted. And in the 1 Car. she granted by deed 10 l. annuity to W. R. out of the premises during the term, to hold after K's death. And in the 2 Car. K. died. C. survived, and by several deeds confirmed the said annuities; and by his deed, 2 Car. C. assigned his interest to J. N. in trust to pay his debts, &c. and died. It was objected, that the annuities were void in law, because of the incertainties in the habendum, and that the covenant of C. extended only to grants, and not to bequests, and that he assigned his interest to J. N. before he confirmed the annuities, so as they are void in law; but decreed the grants and annuities good in equity to bind C. and all claiming under him; and that J. N. pay the annuities and arrears accordingly. 4 Car. 1. 1 Chan. Rep. 6. Cornwallis's case.*

(S. a) Relief in Equity. In Respect of the Consideration.

1. **A** NNUITY granted *without a valuable consideration* is not relievable in Chancery against a former grantee, for a valuable consideration of the land in fee, and the bill dismissed. 16 Car. 1. 1 Chan. Rep. 147. Pickering v. Keeling.

2. A bond voluntarily entered into *without consideration appearing*, and without compulsion, restraint or fraud used, yet the court looked upon it as entered into upon some consideration, there having been dealings between the plaintiff and defendant in trade, and would not relieve the plaintiff against a judgment had thereon, but dismissed the Bill. Chan. Rep. 157. 21 Car. 1. Wright v. Moor.

3. Bond of 1600 l. penalty for payment of 800 l. *was given by one drunk, and on the loan of 90 l. only.* Lord Keeper would give no relief in equity to the lender, not so much as for the principal he had really lent, but dismissed the bill. Chan. cases 202. Pasch. 23 Car. 2. Rich v. Sidenham.

4. *Lease* by tenant in tail was endeavoured to be set aside by remainderman, to whom the estate was come by death of lessor without issue. Per Cur. if the lease was *gained by fraud or unjust consideration*, 'tis to be deemed void, and the estate discharged of it as if no such lease had been made. See Mich. 1703. 2 Vern. 445. Striblehill v. Brett.

5. A. *being taken by B. going to bed to B.'s wife*, gave him a note for 500 l. and afterwards improved the security, first by a judgment, and afterwards by a surrender of copyhold lands. A. by bill prays relief against these securities, and *pretended that 'twas a contrivance to catch him*, and that he was terrified and compelled by threats to enter into them. But the bill was dismissed. Mich. 1708. Ch. Prec. 266. Woodman v. Skute.

## [Guardian and] Ward.

(A) Ward to the King shall not *devest* a *Chattel* *vested*.

Fol. 35.

[ 1. ] If tenant by knight's service die, his *heir being* within age, and *in ward* to a common person, and *afterwards* land held of the king *in capite descends* to him from another ancestor, the king shall not *devest* either the wardship of the body or of the land, \* because it is a chattel vested. 3 E. 1. Rot. Claus. M. 15 expressly agreeing with the command to the escheator who had seised him to deliver him to the lord, and the king said, that so *compertum est habito tractatu cum concilio suo* ]

Br. Parol demur, &c. pl. 22. S. P. cites 22 Aff. 28. where in such case the justices surceased and commanded

the plaintiff to sue to the king, which Brook wonders at; for that the executors of the first guardian ought to have had the ward, and that with this agrees in effect the 40 Aff. 14. And also because the common person *might have sold or married* the ward before the falling of such title to the king. Br. Garde, pl. 46. S. C. cited by Shard. 24 E. 3. 44. as the Earl of Warwick's case. Ibid. pl. 115. cites S. C. 20 E. 3. and that in such case the king shall have only the ward of the land held of him.

\*[161]

## (B) Ward because of Ward.

[ 1. ] If there be lord, two mesnes and a tenant, and the first mesne is *in ward*, and the second mesne *in ward because of ward*, the tenant likewise may be in ward because of ward to the lord paramount. 43 Aff. 15. ]

[ 2. If there be king, lord, mesne and tenant, and the tenant is *in ward to the mesne*, and afterwards the mesne dies, and his heir is *in ward to the king*, the king shall not have the tenant in ward because of ward; for this goes to the executor of the mesne, being a chattel vested. 22 Aff. 28. ]

S. P. But if the king had first had the ward of the mesne, and then the tenant had

died, his heir within age, the king should have him as ward because of ward. Br. Garde, pl. 63. cites S. C.

3. If ward, who holds of the heir female *in ward*, falls mesne between 14 years and 16 of the first ward, there the daughter who is the first ward shall have it, and not the lord; for she is out of ward at 14 years to every intent, except to tender marriage, and therefore the lord shall not have the second ward as guardian because of ward. Br. Garde, pl. 7. cites 35 H. 6. 40.

4. Note that the king had a seignory which belonged to the prince, and before the prince had livery, a ward escheated to the king by this seignory; and after the prince had livery of the seignory, and then the guardian died, his heir within age, who was in ward of the king ut supra, before the livery; and the opinion of all clearly was, that the prince shall have this ward; because the seignory by which

it came, was in the prince when this second ward fell. And it was held by all, that the king shall have ward by reason of ward, and if the first ward comes to full age, and the king makes livery to him, and after the other ward, which comes because of ward, dies, his heir within age, the king shall not have the ward of this last heir; because by the livery made to the first heir his right and prerogative was gone. Br. Garde, pl. 71. cites 13 E. 4. 10.

5. The king has a ward because of ward; an office is found that the land of the ward, because &c. is held of the king in capite, or is held of his ward. During this wardship because of ward there can be no traverse; for during this wardship because of ward the king's hands cannot be moved. Jenk. 330. pl. 59. cites Mich. 7 Jac. in Cur. Ward. Holmes's case.

### (C) Who shall have it.

[ 162 ] [ 1. ] If the king hath the mesne in ward and grants him over, and afterwards the tenant dies, his heir shall be in ward because of ward to the king, for he continueth guardian; for the heir ought to sue livery. But 1 E. 1. Rot. Claus. Membrana. 2. Parte 4. the king recites that he had granted the ward of the mesne (viz one Bursby) to his mother; and afterwards the tenant died, and that the ward belonged to his mother, and commanded that he and also his land be delivered to her. ]

[ 2. 9 E. 1. Rot. Finium. M. 8. The king being the committee of a ward had ward because of ward. ]

[ 3. If the king hath the mesne in ward, and grants over the ward of the body and land with fees and advowsons, and afterwards the tenant dies his heir being within age, the grantee shall have him in ward because of ward, and not the king. 17 E. 3 67. b. ]

[ 4. Rex senescallo salutem. Cum dederimus & concessimus venerabili patri T. Herefordensi episcopo custodiam terræ & hæredis de O. defuncto, qui de nobis tenuit in capite habendum usque ad legitimam ætatem hæredis ipsius T. cum wardis eschaetis & omnibus aliis ad custodiam illam pertinentibus: et jam per inquisitionem, quam per vos fieri fecimus, accepimus, quod R. nuper defunctus de prædicto P. (the ward) tenuit in capite die quo obiit per servicium militare, per quod custodiam illam liberetis, habendum usque ad legitimam ætatem heredis ipsius Stephani cum omnibus ad custodiam illam pertinentibus, &c. 6 E. 1. Rot. Claus. Membrana' 9. ]

The father has the wardship of his son,

5. The father shall have the ward of his son or daughter and heir, be the land held of the king or not, and be he tenant by the curtesy or not. Br. Garde, pl. 6. cites 33 H. 6. 55.

*jure naturæ*: It is not a chattel which shall go to the executor. But if the father dies, having the wardship of the body of his son and heir, and the son continues within age, the lord by knight's service shall have the wardship of the body and land. Jenk. 267. pl. 78. cites Litt. cap. Chivalry.

6. A seignory was granted for the life of the tenant, the remainder over in fee. The tenant died. Barkley J. thought the grantee of the



the particular estate should have the ward, but Jones J. seemed to doubt of it. Pasch. 15 Car. Mar. 24. pl. 52. cites 44 E. 3. 13.

(D) What will draw a Wardship, what Tenure.

Fo. 36.

[ 1. **T**ENURE in *socage* does not draw wardship to the king. 45 E. 3. 19.]

(E) What Estate will draw Wardship.

[ 1. **I**F the father and eldest son purchase to them and the heirs of the father, and the father dies, the son shall not be in ward; for as to the franktenement it is in him by the first feoffor during his life. 43 E. 3. 36. ]

[ 2. If there be tenant for life, remainder in fee to another, and he in remainder dies, his heir being within age, living tenant for life, he shall not be in ward during the life of tenant for life, because the lessee continues tenant to the lord. \* 24 E. 3. 33. b. admitted. ]

\* Br. Garde, pl. 51. cites S. C. For though he was the first in whom the land vested,

yet it vested in him by descent of the remainder, and so is no purchaser, and therefore shall be in ward.

[ 3. But if tenant for life die afterwards during the non-age of him in remainder, he shall be in ward; for now he is tenant to the lord, and his ancestor died in the homage of the lord. 24 E. 3. 33. b. adjudged. 27 E. 3. 80. ]

[ 4. If two are seised, and to the heirs of one, and he who hath the fee dies in the life-time of the other, his heir being within age, yet he shall not be in ward during the life of the other; for only a remainder descends. ]

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[ 5. So if baron and feme are seised, and to the heirs of the baron, and the baron dies, his heir being within age, yet he shall not be in ward during the life of the feme. 28 E. 3. 93 admitted by issue. Contra admitted 27 E. 3. 80. ]

[ 6. If there be lessee for years, remainder in fee to B. and B. dies, his heir being within age, whether he shall be in ward during the years? quere. ]

The Lord in chivalry shall not oust the

tenant by statute merchant by the ward of the heir of the conusor; per Babbington. Contra; per Cotefmore. But in the time of H. 8. it was agreed often by all, that the lord cannot oust the tenant, &c. no more than he may avoid a rent-charge granted by him. Br. Garde, pl. 106. cites 11 H. 6. 7.

7. In quare impedit; the defendant made title, because A. B. was seised of the land in fee, with the advowson appendant, and enfeoffed one R. upon condition to re-enfeoff A. B. his feme, and G. his son, and after A. B. died, and G. the son died within age after request made to re-enfeoff him, and after J. his son died also within age, and W. his son being within age, one H. as his next kin entered, by which the defendant as lord, seised the ward, and the church voided, and he presented, and it was admitted for good title

title to have the ward, where the *heir entered into the land within age for condition descended*, quod nota. Br. Garde, pl. 58. cites 39 E. 3. 37.

8. Note, per Fortescue and all the other judges in the Exchequer chamber, in effect, that if a man *gives land to one for term of life, the remainder to another in fee, and he in remainder has issue within age and dies, and after the tenant for life dies, the issue shall be in ward, and shall have his age; for though the remainder was not vested in the father, yet the remainder is descended; quod nota.* Br. Garde, pl. 4. cites 33 H. 6. 5.

9. A man has *issue a son, and his feme dies, and after he takes another feme, who is heir to certain land, and has issue a son, and the feme died before the baron entered into the land descended to his feme; there the baron shall not be tenant by the curtesy, and his second son shall be in ward to the lord; and the father shall not have the ward of him, by reason that he is not his heir, because he had a son by his first feme, who is his heir; for the father shall not have the ward of any son, but of him who is heir apparent to him only, which see in New Nat. Brev. fo. 143. a good case.* And see there that a man shall have writ, *quare filium & hæredem suum rapuit, the same of daughter and heir, and so de consanguineo et heræde suo rapto; and so see that a man shall have the ward of his heir, and not the lord.* Br. Garde, pl. 110. cites F. N. B.

10. If the *tenant makes a feoffment and dies without notice given to the lord of such feoffment, yet the lord shall not have the ward of the heir of the feoffor.* Br. Avowry, pl. 15. cites 34 H. 6. 46. per Moyle.

### (F) What Estate will draw a Wardship for a Collateral Respect.

[ 1. ] **I** F a man *lease for life and die, his heir shall be in ward, as to his body; for the reversion is held of the lord.* 28 E. 3. 96. ]

[ 164 ] [ 2. So if a man gives *in tail, and afterwards dies, his heir shall be in ward, as to his body; for the donor is tenant to the lord.* ]

### (G) Wardship by Priority. What shall be said Priority.

[ 1. ] **I** F a man purchase land, which is held by knight's service, of one lord, and afterwards purchase other land held of another lord by knight's service, he holds by priority of him, *of whom the land, which he first bought was held: for the priority goes according to the purchase of the tenancy, and not according to the creation of the tenure.* Fitz. Na. 142. f. 29 E. 3. 46. b. 28 E. 3. statute of wards and reliefs. ]

[ 2. And

[ 2. And so is the law of Scotland. Skene Regiam Majestatem. 56. b. vers. 2. ]

[ 3. If the grandfather be seised of divers lands holden by service of chivalry of divers lords, and enfeoffs the father of the land holden of one A. who is one of the lords, and afterwards dies, by which the lands holden of the other lords, descend to the father, and afterwards the father dies, the son shall be in ward to A. for his body; for the father held by priority of him by force of the purchase, and not of the others by force of descent. 30 E. 3. 7. 1

[ 4. If a man hold lands of divers lords, and dies, his heir shall be in \* ward for his body to him of whom he holds by priority.

44 E. 3. 15. Da. 1. Canistry 35. 1 H. 4. 2 b. 7 H. 4. 9 b. Fitz. Nat. 142. f. 10 H. 6. 18 b. † 11 H. 6. 16. 17 E. 3. 25. 18 E. 3. 29 b. 21 E. 3. 41 b. 2 E. 2. A. Action on the statute 23. D. 28 H. 8. 11. 42. Britton. fo. 169. b. Westm. 2. cap. 16. ]

if the lord by priority will not take him, the lord by posteriority cannot take him. pl. 81. cites 24 E. 3. 55.

[ 5. With this the law of Scotland agrees. Skene Regiam Majestatem. 56 b. vers. 1. ]

[ 6. But he shall have only the land held of himself in ward. 1 H. 4. 2 b. ]

[ 7. Cestuy que use of land held by priority, and of other land held by posteriority, before the statute 27 H. 8. made a feoffment of both to the use of himself; the priority shall hold in use as it was before in the land, and there shall not be an equality; because the first use continued unus & idem usus. D. 28 H. 8. 11. 43. between Ld. Roos and Cunstable, adjudged. ]

[ 8. If there be lord, mesne and tenant, and the mesne holds by priority, and the tenant in a writ of mesne forejudges the mesne, by which the mesnalty is extinct, and the tenant holds of the lord, by the same services, by which the mesne before held; in this case, the tenant shall hold by priority; because the stat. Westm. 2. which gives the forejudger, provides that he shall hold by the same services and customs, and in such a manner as may be done sine prejudicio alterius, but this will be a prejudice to the lord by priority, if he should lose this benefit. Co. Magna Charta. 392.]

priority shall have the ward; for he has held longer of him than of the lord paramount, of whom he held the other land by the forejudger; per Shard. quod non fuit negatum; for where the feignory does not remain, but another feignory, as here, [come] by the forejudger, or where the feignory is extinct in a mesnalty for one part, and for other part not; there this may alter and change priority into posteriority; for now he holds de novo of another lord. Quod nota diversitas inde bene. Br. Garde, pl. 117. cites 33 E. 3. and Fitzh. Gard. 12.—But F. N. B. 143. (F) (134). If I do forejudge the mesne of whom I hold by priority, &c. yet I shall hold by priority of the lord paramount as I held of the mesne before, &c.—But ibid. 334 in the notes there (b) this is denied to be law; for when I forejudge the mesne, the services due to the mesnalty are gone, and I am become tenant to the lord de novo, so that I shall hold of the lord by the services of the mesne; wherefore if I ought to hold in chivalry, \* and so it is agreed, that by the forejudger I am now tenant to the lord paramount by posteriority; cites 11 E. 3. Garde, 115. and the case above 33 E. 3. Garde, 12.

[ 9. This priority holds not against the king, for he shall have the ward of the body, though the tenant holds of him by posteriority. 12 H. 4. 25. Fitz. Na. 142. f. 14 H. 4. 9 b. 21 E. 3.

Q 3

51. b.

Fol. 37.

† Br. Garde, pl. 107. cites S. C.—But Br. Garde,

If I hold of one by priority, and of another by posteriority, and forejudge the lord by priority in writ of mesne; now the lord by poste-

\* [165]

A man held of one in chivalry by priority,

and of another by posteriority, 51. b. 24 E. 3. 31 b. Skene Regiam Majestatem 57. vers. 3<sup>a</sup> accordingly.]

ty, and the queen purchased the manor of which the tenant held by posteriority, and surrendered it to the king in fee, and took estate again of term for life, remainder to the prince in fee; the tenant died, his heir within age; the lord by priority seised the ward, and the queen brought writ of ward; and per Green, and the opinion there, though the queen be a subject, yet the priority of the defendant is gone and determined; for, by the purchase of the king in fee, the priority of every subject is extinct, and when it is extinct, it cannot revive against any subject who shall have the manor after; quod nota; for a thing extinct cannot revive. Br. Garde, pl. 48. cites 24 E. 3. 65.

[ 10. But the alienee of the king of such seignior, by posteriority shall not have the ward of the body, because the prerogative passes not by grant. 14 H. 4. 9. b. ]

\*Br. Garde, pl. 37. cites S. C. adjournatur.

[ 11. So if the king alien the seignior by posteriority to the prince of Wales as duke of Cornwall, and his heirs kings of England, he shall not have the prerogative; for he is only as a common person. Dubitatur. \* 21 E. 3. 41. b. Contra Dod. Nobility 8. Contra Stamford Prerogative 11. ]

Br. Garde, pl. 28. cites S. C.

[ 12. But if the K. has a ward, and grants it over during his minority with fees and advowsons, and one, who holds by posteriority of the ward, dies, his heir being within age; the grantee of the ward shall have the ward, because of ward, by the prerogative, because he has it in right of the king (for the king continues guardian and livery ought to be sued, and so the king partakes of the benefit.) 12 H. 4. 18. b. 25. by the justices. ]

[ 13. If the guardian by priority never seises the body of the ward, yet the guardian by posteriority, though he seize him, shall not have the value of his marriage at full age; for he hath no more cause than any stranger; for this belongs to the guardian by priority. 44 E. 3. 15 b. Curia. 2 E. 2. Action on the stat. 23. admit. 7 E. 2. Action on the statute 32. ]

[ 14. If the king grants a seignior in capite to the queen for her life, and afterwards a ward happens, the queen shall have prerogative as the king himself would have had for the reversion, which is in the crown. Stamford Prerogative, 10. b. 5 E. 3. 4. ]

[ 15. If a man holds land in Ireland of a lord there by priority, and other land in England of another lord here by posteriority, and dies in England, his heir being here, and seised first by the lord here, yet the priority shall hold, and he shall be in ward to the lord in Ireland by the priority. M. 7 E. 1. 6. Rot. 126. ]

16. If the lord by priority grants his seignior to a stranger, and the tenant attorns, this grantee shall have advantage of the priority, as well as the heir of the grantor should have it, if it was descended to him; for the grant of the lord does not make alteration of the priority. Contra of the grant of the tenant, as appears supra; quod nota, by judgment in Fitzh. Gard. 2. Br. Garde, pl. 116. cites 2 E. 2. and 3 E. 3. Fitzh. Gard. 19. and there temp. E. 1. 134. acc.

But the tenant may change priority into posteriority; as if he makes a feoffment of

17. If land descend to the son of the part of his father, which is held in chivalry, and other land descend to him from his mother, held of another lord in chivalry, the lord of the priority shall have the ward of the body, and every lord shall have the ward of the land held of him; but if he holds any of the king in chivalry, there no priority

priority shall hold for the body, \* but the king shall have it if he holds of him in capite, or otherwise. Br. Garde, pl. 115. cites Old Nat. Bre.

both, and retakes in fee first that which was

held by posteriority, and after retakes that which was held in priority, there that which was posteriority shall now be priority; but if he retakes estate of both all at one and the same time, and dies, his heir within age, there he who first gets the ward shall retain him. Ibid.

18. And 20 E. 3. Land held of the earl of Warwick descended to an infant within age, by which he seised the ward by chivalry, and after other land held of the king in capite descended to the same heir, and yet the earl retained the ward; because it was a chattel vested in him before the title of the king; and the king shall have only the ward of the land held of him. Ibid.

And the same law of land held of another lord, which descends separately one after another

by several ancestors; for the priority and posteriority does not come in debate but where both descend by one and the same ancestor, and at one and the same time; contra, where it descends by several ancestors, and at several times. Br. Garde, pl. 115. cites Old Nat. Bre.

19. If a man holds two acres of the king, and two acres of a common person, and two descend to the heir general, and the other two to the heir male by tail, or to the youngest as heir in borough english, which is found by office according to the truth, the king shall not have the land tailed or borough english; for the statute of prerogativa regis 1. quod Rex habebit custodiam, &c. is not intended but where one is heir to both lands; and there the other shall have ouster le main cum exitibus. Br. Garde, pl. 95. cites 12 E. 4. 18.

Br. Traverse de office, pl. 37. cites 2 E. 4. 18. but it should be 12 E. 4. 18.

## (H) Without Priority to diverse. Equality.

Fol. 38.

[1. WHERE there is no priority of tenure, but the tenant comes to the land holden of several lords by one feoffment, he who first seises the ward shall have it. 44 E. 3. 15. 29 E. 3. 46. b. Britton fo. 169. b.]

[2. So if the ward holds of them by equality of feoffment, though it was by several feoffments, yet he who first seises him shall have him. 10 H. 6. 18. b. 18 E. 3. 29. b.]

[3. If the king comes to a seignory, of which the tenant holds by posteriority; the posteriority is extinct by this, and shall not be revived, though the king grants his seignory over. (It seems that then it shall be held by equality.) 24 E. 3. 31. b.]

## (I) What Person shall be in Ward in respect of his Estate.

[1. THE heir of a disseisor shall be in ward. 48 E. 3. 8. b. Co. Litt. 76. b.]

If my very tenant be disseised and

dies, I shall have the ward of his heir; and if the disseisor dies, I shall have the ward of his heir also, if they are within age; per Fincham, which was denied. Br. Garde, pl. 42. cites 15 E. 4. 10.

\*Br. Garde,  
pl. 24. cites  
S. C. but

[ 2. The heir of the disseisee shall be in ward. 9 H. 4. 5. 17 E.  
3. 64. Co. Litt. 76. b. Contra \* 7 H. 4. 12. ]

Brooke refers to Tit. Escheate. Ibid. Where he says there are three cases, that the right may escheat; as if the disseisee dies without heir, the lord may enter for the escheat, which, he says, proves that the tenant remains tenant to the avowry, and consequently his heir shall be in ward.

See Br. Escheat, pl. 5. S. P. But if the disseisor dies, or aliens, the lord cannot enter upon the heir. cites 7 H. 4. 17.

[ 167 ]

[ 3. If disseisor die seised, his heir being within age, by which he is in ward, and afterwards disseisee dies, his heir being within age, he shall not be in ward; because by the descent to the heir of the disseisor, he is tenant to the lord. ]

[ 4. If tenant in tail be attainted of felony or treason, yet his issue shall be in ward; for this descends to the issue per Formam Doni. 7 H. 4. 33. Co. 8. Digbie 166. ]

S. P. Br.  
Garde, pl.  
58. cites 39  
E. 3. 37.

[ 5. If the tenant makes feoffment on condition, and the feoffor dies, and afterwards it is broken, and the heir of the feoffor, being within age, enter for the condition broken, he shall be in ward, because the condition restores him to the land in nature of a descent. Co. Litt. 76. b. ]

\* Br. Dis-  
cent, pl. 67.  
cites S. C.

[ 6. So if the heir recover in a \* dum non fuit compos mentis, or formedon in descender or remainder, he shall be in ward; for here a right descended to him, and then he is restored also to the possession, and being within age he shall be in ward. Co. Litt. 76. b. ]

So where a  
man gives  
land in tail,  
[to one]  
who dis-  
continues

[ 7. So if there be tenant in tail remainder in fee, and the tenant in tail makes feoffment in fee, and dies, and feoffee enfeoffs the issue in tail within age, by which he is remitted, he shall be in ward. Co. Litt. 76. b. ]

in fee, and the tenant in tail dies, his heir within age, he shall be in ward, and yet there is no tenure; per Filpot. But per Fincham, there is a tenure, notwithstanding the discontinuance. Br. Garde, pl. 42. cites 15 F. 4. 10. — The discontinuee is tenant in possession, and writ of ward lies of his heir; but the heir in tail is tenant in right. Br. Avowry, pl. 31. cites 48 E. 3. 8.

[ 8. If A. gives land to B. in tail, and B. makes feoffment in fee, and dies, his issue being within age, he shall be in ward to the donor; because he is tenant in right to him, and feoffee is not tenant in deed to him, for he cannot avow upon him. Co. Litt. 77. 4 H. 6. 21. quere. 21 E. 3. 58. in case of the king. ]

[ 9. But if there be tenant in tail, remainder in fee, and the tenant in tail makes feoffment in fee, and dies, his issue being within age, he shall not be in ward to the lord; because the feoffee is tenant in deed to him, and he may avow upon him, and there is no priority between the lord and the issue, the gift being made by another, and not by the lord. Contra Co. Litt. 76. b. ]

[ 10. The heir of the feoffee of tenant in tail shall not be in ward to the donor, but to the lord paramount; because he is tenant in deed to him. Co. Litt. 77. Contra 48 E. 3. 3. 8. b. ]

11. All lands in gavelkind are held in socage, and not in chivalry, and therefore the heir shall not be in ward for these lands. Br. Garde, pl. 92. cites 9 E. 3. & Fitzh. Prescription. 63.

12. Estate



12. *Estate was made by fine to A. B. for term of life, the remainder to C. and D. his feme in tail, the remainder to the right heirs of the baron, to hold of the chief lord; the baron and feme have issue and die, and after the tenant for life dies; the lord shall have the ward of the issue; for though he is the first in whom the land vested, yet it vested in him by descent of the remainder, and therefore he is no purchaser, and so he shall be in ward.* Br. Garde, pl. 51. cites 24 E. 3. 33.

13. *If a man leases for life, the remainder over in fee, and he in remainder dies, his heir within age, his heir shall not be in ward; but contra if the tenant for life, who was tenant to the lord, dies; for there the heir has the remainder and land by descent. Quod vide in the writ of ejectment of ward in Old Nat. Brev.* Br. Garde, pl. 113.

*But if a man leases for life, reserving the reversion, and dies, the heir within age,*

*he shall be in ward in the life of the tenant for life; for he in reversion is immediate tenant. Contra of him in remainder living the tenant for life.* Br. Garde, pl. 113. cites Old Nat. Brev.

14. *If the father had leased to his son for life and died, and the fee had descended to him, so that the franktenement was extinct, yet he should not be in ward; because he had the possession by purchase.* Br. Garde, pl. 53. cites 9 E. 4. 18.

*Br. Estate, pl. 25. cites S. C. per Pigot and Choke.*

15. *If the heir within age recovers by writ of entry sur disseisin, he shall be in ward; for he is as if his ancestor had died seised, and he is in by descent; and the same law if the heir within age recovers by writ of coignage.* Br. Garde, pl. 42. cites 15 E. 4. 10. per Browne.

\*[168]

16. *If the king's tenant aliens in fee without licence and dies, his issue within age, yet he shall not be in ward; because nothing is descended to him.* Br. Garde, pl. 85. cites 26 H. 8.

17. *A man made a feoffment before the statute of executing of uses to the use of himself for life, the remainder to W. in tail, the remainder to the right heirs of the feoffor, the feoffor died, and W. died without issue, the right heir of the feoffor within age, he shall be in ward for the fee descended; for the use of the fee simple was never out of the feoffor.* Br. Garde, pl. 93. cites P. 32. H. 8.

*And the same law where a man gives in tail, the remainder to the right heirs of the*

*donor, the fee is not out of him. Ibid.—Contra, where a man makes a feoffment in fee, upon condition to re-ensfeoff him, and the feoffee gives to the feoffor for life, the remainder over in tail, the remainder to the right heirs of the feoffor; for there the fee and the use of it was out of the feoffor, and therefore in such case he has a remainder and not a reversion. Ibid.*

18. *Tenant by knight's service makes a gift in tail to hold of him by knight's service; the donee dies, his heir within age; the donor dies, and his reversion descends upon that heir. The heir, as to the land, shall not be in ward to the lord by knight's service; for the reversion only was held of him.* Jenk. 267. pl. 78.

19. *A. seised of lands in fee, by deed and fine settled them upon B. his son and M. his wife for their lives, remainder to C. the second son of B. in tail, with divers remainders over. A dies, B. and M. die, by which the lands descend to C. an infant. J. S. intituled himself as guardian in socage both of the person and lands of the infant, whom the defendant detained. Defendant demurred,*

*It was said at the bar, that one might be a ward in socage, though he be in by*

*red,*

purchase; because guardian in socage is to have no profit, but is a curator only to do all for the ward's benefit; and so there needs no descent, as is necessary in case of a ward in chivalry; for that being in respect of the tenure, the guardian is to have profit. 2 Mod. 177. in S.C.

red, because where there is *no descent*, there can be no wardship; for C. is in by purchase and not by descent; for here is no mention of the reversion in fee, and so may be intended to be conveyed away; and should it be intended to continue in A. after this settlement, yet it cannot be thought to descend to the ward, because it is *not said who was heir*; for though it be said, that the father of the ward was son to A. yet it is not said son and heir; and of that opinion was the whole court in both points; for there *must be a descent, otherwise there can be no wardship*. And no descent appears here, it not being said, that the reversion did descend, or who was heir to A. 2 Mod. 176. Hill. 28 & 29 Car. 2. C. B. Quadring v. Downs.

### (K) What Person shall be in Ward.

[ 1. ] F A. levy a fine executory (as *sur grant and render*) to B. and his heirs, and he grants and renders this to A. in fee, and afterwards A. dies before execution, his heir being within age, he shall not be in ward; because his ancestor was never tenant to the lord. Co. Litt. 76. b. ]

Fol. 39. [ 2. If tenant in tail discontinue for life, and dies, his heir shall be in ward to the donor for the privity. 4 H. 6. 21. Quere. Contra 48 E. 3. 8. ]

[ 169 ] [ 3. If *cefty que use*, before the statute 27 H. 8. had died, his heir being within age, his heir would have been in ward, by the statute of 4 H. 7. and if the heir of the feoffee had died, his heir being within age, he should be also in ward by the common law. Co. Litt. 76 b. ]

Sec (C) pl.  
5.

### (L) In what Cases one shall be in Ward, for a Collateral Respect.

[ 1. ] F there be lord and feme tenant, and the feme makes feoffment in fee upon condition, and afterwards takes the lord to baron, and they have issue a son, and the feme dies, the issue enters for the condition broken, the lord enters into the land as guardian in chivalry, and makes his executor and dies: in this case the executor shall have the ward of the land, but not of the body; for in judgment of law, the lord had the ward of the body as father, and not as guardian; for *nature is to be preferred*. Co. Litt. 84 b. ]

[ 2. A feme tenant takes an alien to baron, and hath issue, and the feme dies; the issue shall be in ward, and the father shall not have the custody of him, because in law, he is not his heir apparent. Co. Litt. 84 b. ]

(M) What

(M) What Act or Thing will bar a Man of the Ward.

[ 1. ] If my tenant by knight's service die, his heir being within age, and I accept the services of him, (which are afterwards due) as of my tenant of full age, I cannot afterwards take him for my ward; inasmuch as I have accepted him for my tenant. Temp. 1 E. 1. Age 119. adjudged. ]

Br. Garde,  
pl. 121.  
cites S. C.

[ 2. If the lord render the land to his ward, as of full age, he cannot take him for his ward afterwards. Temps. E. 1. Age 119. per Berr. ]

3. The son, who was in ward, was a knight in the life of his father, and yet was in ward by the death of his father; for it seems that the statute of magna charta, cap. 3, So nevertheless, if the heir within age be made a knight, yet the land shall remain in the hand of the lord 'till he shall come to his full age, is intended where he is made a knight within age, and in ward after the death of the ancestor, and not where he is made knight in the life of the ancestor; for then, by covin of the ancestor, he may be made knight in the life of the ancestor to defraud the lord of his ward, which shall not be suffered. And so it happened in the case of SIR ANTHONY BROWN. 2 E. 6. and so see a diversity, where he is made knight within age in the life of the ancestor, and where he is made knight within age after the death of the ancestor. Br. Garde, pl. 42. cites 15 E. 4. 10.

Br. Garde,  
pl. 72. cites  
S. C.

(N) How long a Man shall be in Ward. [for a [ 170 ]  
Collateral Respect.]

[ 1. ] If A. the tenant make feoffment in fee to the use of B. and his heirs, 'till A. pays 100 l. at such a day and place, and afterwards B. dies, his heir within age, by which he is in ward; if A. pays the 100 l. at the day and place, the lord shall lose the ward of the body and land, and shall be divested of it; for he cannot have a more absolute estate in the ward, than the ward hath in the land. Co. Litt. 76. b. ]

[ 2. If the conusor of a fine executory die his heir being within age; the lord shall have the ward of the body and land: but if the conusee enter, this shall be divested: for the heir of the conusor by this shall lose the land. Co. Litt. 76. b. ]

[ 3. If the heir of the disseisee be in ward, and afterwards the disseisor dies seised, his heir being within age, by which he is in ward also, yet it seems that this shall not divest the wardship of the heir of the disseisee, though, by the descent to the heir of the disseisor, he become tenant to the lord. Dubitatur. Co. Litt. 76 b. ]

[ 4. If

S. P. But if such heir be made a duke, marquis, &c. this will not discharge his wardship. Pasch. 5 Jac. 6 Rep. 73. b. 74. Sir Drue Drury's case.—Vid. more of this, 2 Inst. 11, 12.

[ 4. If the king make his ward within age (after the death of his father) a knight, this puts him out of ward for his land and body for the time afterwards; for by making him a knight, the king allowed him to be of full age, so that for the time to come, the wardship is to cease, and consequently the profits, and he is to have his livery immediately; but the king is to have the value of the marriage, and the profits before well received, because they were vested in the king before. Hobart's Reports, 64. 125. Puckering's case: ]

5. J. M. committee of the mayor and aldermen of London, brought ravishment of ward of one W. N. orphan of London, and counted upon the custom, and that the mayor, aldermen and chamberlain, ought to make disposition of orphans and of their goods and tenements, 'till their age, &c. and there it is agreed, that they should have the infant and his land 'till his age, and that then they should render an account thereof, and that the mayor and the aldermen should adjudge his age, and that he shall be in their ward 'till his age be adjudged, though he be of the age of 30 years; and if the mayor and aldermen delay to adjudge his age, a writ shall come to them out of the Chancery, commanding them to adjudge. Br. Ravishment de Garde, pl. 32. cites 32 E. 3. and Fitzh. Garde, 31.

## (N. 2) Guardian. The several Sorts.

\* 3 Rep. 37. b. Ratcliff's case.

\* But by the 12 Car. 2. 24. all tenures by knight service, in capite and socage in capite, (together with all charges inci-

dent thereto, as homage, livery, primer seisin, wardship, &c.) are taken away and are turned into free and common socage.—This sort of guardianship was a sort of dominion of masters over servants and vassals, and was introduced among the gutbick nations to breed them to arms; but, being a great burthen upon the people, is fallen now with the tenures. Pasch 8 Geo. 1. G. Equ. R. 172. E. of Shaftsbury v. Shaftsbury.—The taking away the tenures and dissolution of the court of wards, was attempted in parliament, 18 Jac. but without effect. 4 Inst. 202.

\* [171]

\* The father has the wardship of his eldest son jure nature.

Hill. 34

1. I N the law of England there are three sorts of guardianship, viz. by common law, by statute, and by custom. By the common law there are \* four sorts of guardians, viz.

1st. Guardian in \* chivalry. Co. Litt. 88. b.—At common law, if tenant by knight service died, his heir male being under 12 years of age, the lord should have the land held of him 'till twenty-one, and likewise the marriage of him, if unmarried at the death of his ancestor; if an heir female and under fourteen and unmarried, then he had the \* wardship of the land 'till sixteen, to tender conveyable marriage to her without disparagement. Co. Litt. 74. b. 75. a. S. 103.

2dly. Guardian by \* nature, as the father is of his eldest son. Co. Litt. 88. b.—'Till he comes to the age of twenty-one years. But that is with respect to the custody of the body only. Per Holt Ch. J. Trin. 8 Will. 3. Carth. 386. The King v. Thorpe.—But not of his younger children. The true reason of which is, that by

by our law they cannot inherit any thing from him. Ibid.— Eliz. 3  
5 Mod. 224. S. C. Rep. 39. b. Ratcliff's

case.—Of his *heir apparent*. Litt. S. 114.—Which words include the *daughter* so long as she continues heir apparent. Co. Litt. 84. a.—Br. Gard. pl. 6.—Resolved 2 And. 207. Gorge's case.—But not *after the birth of a son*; for then he is heir apparent and not the daughter. Pasch. 40 & 41 Eliz. in the court of wards. 6 Rep. 22. S. C.—Nor does it extend to any *collateral heir*; for though trespass or ravishment of ward lay for any ancestor, male or female, against a stranger who tortiously takes away an heir apparent, (whether male or female, and of what age soever the heir be) yet none but the father could maintain it against the guardian in chivalry, viz. the lord of whom the land is held in chivalry. Co. Litt. 84. a.—3 Rep. 38. b. Ratcliff's case.—So if the father was tenant by knight service of lands in *borough english*, he should not have the custody of his youngest son, because it was possible he might have a younger. Arg. 3 Rep. 38. Ratcliff's case.—Per Coke. Arg. Mo. 739. Gorge's case.—6 Rep. 22. a. S. C.—And none can be said to be heir in borough english to his father so long as his father lives; per Jones and Croke, J. Hill. 9 Car. Cro. C. 412. Reve v. Malster.—So if the father be an *alien*, or *attainted*, he shall not have the custody of his son, because in the eye of the law, he is not his heir apparent. Co. Litt. 84. b.—*Et ita custos propinquus, viz. parens legitimus vel bastardus.* Fleta lib. 1. cap. 9 S. 6.—The father of a *bastard* child, to whom the mother left a good estate, was on application to the court, appointed guardian, preferable to others of the mother's relations. Mich. 11 Geo. 9 Mod. 116. Ord v. Blacket.—The *mother* might have the custody of her son or daughter heir apparent *against a deforcer*, but not against a guardian in chivalry, as the father should. F. N. B. 143. (G) in Notis. at (c) cites 9 E. 4. 53. and 3 Rep. 38. b. Ratcliff's case.—Co. Litt. 84. b.

If a person had a double title to the custody of his son, the one as lord the other as father; yet in judgment of law, he should have it as father; for that title was immediately vested in him by the birth of a son, and, being in respect of nature, was *prior to any wardship in respect of signiory*, and is inseparable from his person, and therefore *cannot be waived* in order to claim the custody by the other title of lord. Co. Litt. 84. b.—3 Rep. 39.

3dly, Guardian in \* *socage* is where tenant in *socage* dies, his \* Vid. (O)  
issue, whether male or female, (or if no issue, his brother or cousin)  
being under the age of fourteen; the *next of the blood, to whom the*  
*inheritance cannot descend*, shall have the wardship of the land and  
body, 'till the age of fourteen years. Co. Litt. 87. b. S. 123.

4thly, Guardian by \* *nurture*. Co. Litt. 88. b.—Such guar- Br. Gar-  
dian may be, *though no land descends*, whereas guardian, in *socage* dein. pl. 19.  
must be where land in *socage* descends. And such guardian *hath* cites S. C.  
*nothing but the governance* of the child. Br. Gard. pl. 70. cites \* None  
8 E. 4. 7. can be  
guardian  
by nurture

but the *father or mother*. But such guardian may deliver the infant to another for education, and take him back when he pleases. And though he grants over the ward, yet he may retake him; per 4 J. But per 2 J. the grant is good against the guardian; yet the infant may choose whether he will stay with the grantee. Br. Gard. pl. 70. cites 8 E. 4. 7.—This guardianship continues 'till the age of discretion, viz. 14 years, whether the infant be male or female. Ibid.

2. By the statute \* 4 & 5 Ph. M. a guardianship is appointed of † It was  
*female children*, in two manners; either of the † father or mother agreed  
without assignation, or of any other to whom the father shall appoint that these  
the custody, either by last will, or by any act in his life time. Co. words *fa-*  
Litt. 88. b. ther and *mo-*  
ther shall  
be taken

father or mother after the death of the father, which is well expounded by the clause subsequent.  
3 Rep. 59. a. Hill. 34 Eliz. B. R. in Ratcliff's case.

3. By the custom of the *city of London*, the mayor and alder- [ 172 ]  
men of the city have the custody of orphans, and their committee So in other  
shall have ravishment of ward. 4 Inst. 248. cities and  
boroughs. Co. Litt. 88. b,

(N. 3) *Who may be appointed Guardian, and by whom, and what shall be an Appointment within 12 Car. 2. cap. 24.*

\* The intent of this statute is to privilege the father against common right to appoint the guardian of his heir, but leaves the heirs of all other ancestors wards in focage; per Vaughan Ch. J. Trin. 16 Car. 2. C. B. Vaugh. 179.

I. 12 Car. 2. ENACTS that where any person hath, or cap. 24. S. 8. shall have any child or children under the age of twenty-one years and not married at the time of his death, it shall be lawful for the \* father of such child or children, whether born at the time of the death of the father, or at any time in ventre sa mere, or whether the father be † within the age of twenty-one or of full age ‡ by deed executed in his life time, or by will in writing in the presence of two or more witnesses, in such manner, and from time to time as he shall think fit, to § dispose of the custody and tuition of such child or children, 'till the age of \*\* twenty-one years, or †† any lesser time, to any person in possession or remainder, other than ‡‡ papist recusants.

S. 10. Provided that this act shall not extend to alter or prejudice the custom of the city of London, or of any other city or town corporate, or of the town of Berwick upon Tweed, concerning orphans, or to discharge any apprentice from his apprenticeship.

in case of Bedel v. Constable.—The words of the act authorize only the father to appoint a guardian, and therefore though the mother has the same concern for her heir as the father, yet she cannot by the act name a guardian. Ibid.—And as by the words of the statute, the father only can appoint a guardian, so the guardian appointed by him cannot appoint another guardian; for it is a personal trust and not assignable, any more than ¶ guardianship in focage. Besides the father is restrained from giving it to a papist, but if transferrable by him whom the father appoints, it may come to a papist, against the meaning of the act. Vaugh. 179, 180.—Trin. 9 Geo. in Cano. 9 Mod. 42. Reynolds v. Lady Tenham.—cites Duke of Beauford's case.—Mich. 29 Car. 2. 2 Ch. cases 237. Foster v. Denison.—¶ Guardian in focage granted the wardship to a stranger, and that grant awarded good. F. N. B. 143. (P.)

At common law before the act, the father, tenant in focage, could not dispose of the custody of his heir; for the law gave it to the next of kin, to whom the land could not descend, and the father had not such an interest in it as to grant it over, but it was inseparably annexed to his person. Per Vaughan Ch. J. Vaugh. 178, 180.—cites Ld. Bray's case.—At common law the father could not appoint a guardian, whether tenant in chivalry or in focage. Pasch. 8 Geo. 1. G. Equ. R. 176. E. of Shaftsbury v. Shaftsbury.

† By this statute, tenant in focage, under age, may grant the custody of his heir, but he cannot demise or devise his land in trust for him directly; for then the land would (as in other cases of leases for years) go to the representative of the father's nominee, and consequently the trust follow the land. But yet he may do it obliquely; for by appointing the custody, the land follows as an incident given by the law to attend it, not as an interest devised or demised by the party. As where there is land belonging to an office, it shall pass as incident by grant of the office without livery, because the office is the principal, and the land but pertaining to it; per Vaughan Ch. J. Vaugh. 178. in case of Bedel v. Constable.

‡ A guardianship was given by the infant's father to J. S. by deed and to the mother by will. The will is a revocation of the deed. Mich. 29 Car. 2. Fin. Rep. 323. E. of Shaftsbury & al. v. Lady Hannam.—The spiritual court cannot prove a will concerning the guardianship of a child, being a thing conusable here, and to be judged whether it be devised pursuant to the statute, and a prohibition was granted. Pasch. 24 Car. 2. B. R. Vent. 207. Lady Chester's case.

§ A man said on his death bed that he expected his father would take care to see his, (meaning the dying man's) child educated a protestant. This was held a good appointment to make the grandfather guardian. In Dom' Pro. 1. Trin. 9 Geo. 9 Mod. 42. Lady Tenham's case.—If the father devises his land to J. S. during the minority of his son and heir, in trust for him, and for his maintenance and education, 'till he be of age, this is no devise of the custody within this statute; per Vaughan Ch. J. Vaugh. 184. in case of Bedel v. Constable.—And as a lease devised shall not operate into a custody, so the custody devised shall not operate into a lease. Ibid.

\* \* The



•• The guardianship at common law, before the statute, was only to the age of 14. Vaugh. 179.—Co. Litt. 89. a.—By custom of Kent now, and by the old common law, it was 'till 15. Robinson of Gav. 185.

†† If one devises the custody of his heir apparent to J. S. and no time is mentioned, yet it is a good devise of the custody within the act, if the heir be under fourteen at the death of the father. Because by the devise, the *modus habendi custodiam* is changed only as to the person, and left the same as to the time. But if the heir be above fourteen, then the devise is void for the uncertainty. For the act did not intend every heir should be in custody 'till twenty-one, but so long as the father appoints not exceeding that time, and if he appoints no time, there is no custody devised; for if the father might intend as well any time under that, there is no reason to say, he only intended that; per Vaugh. Ch. J. Vaugh. 184, 185. in case of *Bedel v. Constable*.

†† The guardian appointed was suggested to be a papist, and to intend the removing the infant out of the kingdom. It was therefore decreed, that the infant should continue with her 'till such a time; by which time she was to produce a certificate of her having received the sacrament, and to enter into a recognizance of 1000 l. not willingly to permit the infant to be sent beyond sea, nor to be married without leave of the court, and then to be protected. Mich. 29 Car. 2. Fin. R. 323. *E. of Shaftsbury & al. v. Hannam*.

Where the law appoints who shall be trusted, as in the several guardianships at common law, the trust cannot be refused; but where the party names the trustee, as under the statute, it may be refused; per Vaughan Ch. J. Vaugh. 182. *Bedel v. Constable*.

\* [173]

### (N. 4.) Guardian. *Who shall be upon the Death, &c. of the former.*

1. IF tenant of a bishop dies, his heir within age, and the bishop dies before seisure, the successor may seise him, and after have writ of ravishment of ward of him, if any takes him. And it was said by some, that the successor may have writ of ward of him; quod quære. Br. Ravishment de Gard. pl. 7. cites 2 H. 4. 19.

2. Where the king is possessed of land in ward, and dies, it shall descend to the new king, and not to the executor. Br. Livery, pl. 16. cites 7 H. 4. 41.

3. Ravishment of ward was brought by executors, where the testator was possessed, and the defendant ravished him. The defendant said, that he held in socage, and not in chivalry, and he took him for cause of nurture, and it was found for the plaintiff, to the damage of 200 l. It was debated whether the heir shall have the ward or the executors; for the statute of Westminster 2. 35. which gives the writ of ravishment of ward, enacts that if the plaintiff die before the plea determined, if the right belong to him by reason of his proper fee, the plea shall be resummoned at the suit of the heir of the plaintiff, and the plea shall pass in due order. But the testator took action, therefore no resummons can be sued, wherefore it was awarded that the parties should recover their damages, &c. and Hill said, that the makers of the statute were not apprized in the law. The reason seems to be, because a ward is a chattel, and appertains to the executors. And ravishment of ward lies without actual seisin of the heir; for it is transitory, &c. Br. Ravishment de Garde, pl. 12. cites 11 H. 4. 54.

4. But it is said elsewhere, that the heir never shall have the ward fallen in the time of the ancestor, unless the ancestor took a writ of right of ward in his life; for this is a real action, which may descend; and the ancestor was out of possession. Br. Ravishment de Gard, pl. 12. cites 11 H. 4. 54.

2 Wms's  
Rep 121.  
Per Lords  
Commis-

5. On the death of guardian in *socage*, his *executors* shall not have the guardianship. Mich. 7 & 8 Eliz. B. R. Pl. C. 293. b. Osborn v. Carden and Joye.

fioners. Hill 1722. in case of Eyre v. Lady Shaftsbury.——\* So of guardianship *by nature*, it being inseparable from the person. Hill. 34 Eliz. 3 Rep. 39. a. Ratcliff's case.——Mich. 7 Jac. B. R. Cro. J. 99. Shoplane v. Roydler.——2 Inst. 260.——Co. Litt. 90. a.——It determines with the death of the guardian, there being an *implied condition*, viz. *if he live so long*. It is not in its nature testamentary, as it cannot pay debts or legacies, nor is accountable for to the ordinary, as intestates goods are. And though it is an *interest*, it is *joined with his trust for his ward*, and *not for himself*, which it must be in order to be transferrable, or go to executors. And if transmissible to executors or administrators, it *may by this means come to a papist*, against the meaning of the statute 12 Car. 2. 24. which prohibits the father from giving it to such a one; per Vaughan Ch. J. Trin. 16 Car. 2. C. B. Vaugh. 180, &c. Bedel v. Constable.——Nor can it be forfeited by outlawry or attainder. Co. Litt. 84. b.——Br. Gard. \* pl. 6.——For it is annexed to the person. Trin. 1 Jac. C. B. Ow. 115. Shopland v. Radlen.——3 Rep. 39.——And the guardian has it not to his own use, but to the use of the heir. Co. Litt. 88. b.——Who by this means should lose the account. Cro. J. 99.——And the wardship is in respect of the presumed *natural affection*, which will not hold in the case of the king or an executor. Pl. C. 293. b. 294.——Yet if the *father be attainted*, he shall not have the custody of his son. Co. Litt. 84. b.

\*[174]

S. P. Trin.  
17 Jac.

Hob. 285.

Where the

keeping

and educa-

tion of the

infant was

likewise

given to the

wife. And

the court

held

clearly, that

it being a

term given

to her own

use, it ac-

crued to the husband.

And the keeping and education of the infant is *not of such particular privacy*,

but it *may be performed effectually by another*. Balder v. Blackborne.——Hutt. 36. S. C.——

Brownl. 79. S. C.——If a woman guardian in *socage* takes husband, the *husband* shall not be

guardian in *socage* after the death of the wife. Mich. 30 & 31 Eliz. Ow. 45. Willis v. Whitewood.

——Pl. C. 294 a.——Because the wife had the guardianship *en autre droit*, in right of the heir.

Co. Litt. 89. a.——F. N. B. 142. (1) Contra; for it is a chattel *vested in him*.

Benl. 82.

S. C. And.

5. S. C.——

\* S. C.

cited Poph.

204. Lat.

163.——If

two per-

sons are

appointed

guardians

by virtue

of the

statute of

4 & 5 Ed.

& M. and one of them dies, it will not survive, it being a *naked authority*, to a special purpose

viz. to make the ravisher criminal. But a testamentary guardian under 12 Car. 2. 24. has not

a *naked authority*, but, being made after the manner of a guardian in *socage*, has an *interest*,

which,

6. A. surrendered to the lord, to the intent that the lord should grant back again to him for life, remainder to his wife 'till his son came to twenty-one, remainder to the son in tail, the remainder to wife for life, remainder over. Before the grant was made A. died; then the lord granted as above. Afterwards the *feme took baron and died intestate*. The baron kept possession. The lord granted the lands during the nonage to the administrator of the wife, who entered upon the baron; but his entry was adjudged unlawful; for the wife's interest, being a *term, by the death of the wife vested in the baron* by the law of the land, unless a particular custom be pleaded to the contrary. But otherwise it would have been, if the wife had been only a guardian or prochein amy of the land. Hill. 8 Eliz. Dy. 251. a. pl. 90. Anon.

7. The lord Bray granted the *custody*, rule, order, government and marriage of his son and heir apparent to A. B. C. and D. and also levied a fine of certain lands, to hold to them, and the survivor of them and their assigns, 'till his age of twenty-one, for the maintenance of him, and such wife as he should marry by their appointment, remainder to his said son, &c. A. died before the appointment of any marriage, and it was held by three judges, that there could be *\* no survivorship*; and that † by the death of A. the authority of the rest was determined. But two judges contra, held that an *interest* passed to them, which therefore survived. Mich. 2 & 3 Eliz. Dy. 189. Lord Bray's case.

which,

which, though it be neither assignable nor transferrable, is yet such an interest as shall  $\dagger$  survive. G. Equ. R. 176, 177. Pasch. 8 Geo. E. of Shaftsbury v. Shaftsbury.—And, were it an authority only, it must be construed *joint and several*, else the more guardians are appointed for the security of an infant, the less secure he would be; because upon the death of any one of them the guardianship would be at an end. Ibid. 175.—The case of a guardian is compared to that of an executor, which is not assignable, but yet survives; per Lords Commissioners. 2 Wms's Rep. 121. cites Vaugh. 128. Gardiner v. Sheldon.—And though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship by appointing an executor by his will, yet the case of a guardianship devised to two is *strictly like the case of an administration granted to two*, (especially where the debts amount to as much as the assets;) for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship. It will not go to his executors or administrators, but to the surviving administrator. Such administrator is accountable to the creditor for every thing as much as the guardian is to the infant, and he can make no profit. Ibid. 121, 122.

$\dagger$  This case is upon the clause of the statute of 4 & 5 Ph. & M. 8. "That whoever marries a damsel unmarried, and under sixteen, out of the custody of the father or mother, or such to whom the father in his life-time, or by his will, or by any act in his life-time, has appointed the same, shall suffer 2 years imprisonment, or be fined as the court shall appoint." So that by that act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as a guardian, but only a bare authority. Hill. 1722. 2 Wms's Rep. 122, 125. per Lords Commissioners.— $\dagger$  2 Wms's Rep. 107. S. C. and P. For per Ld. Macclesfield, each of them seems to be a complete guardian. Eyre v. Countess of Shaftsbury.—S. P. per Lords Commissioners. Ibid. 121.

## (N. 5) What the *Infant* may do without a Guardian. [ 175 ]

1. **O**NE cannot answer for an infant as guardian in chancery or any other court unless assigned guardian by the court; therefore in order to sue an infant, one must move the court to assign him a guardian. But an infant may *sue by prochein amy*, though his prochein amy cannot answer for him. Per Roll Ch. J. Pasch. 1653. B. R. Sti. 369. Anon.

Ever since the statute of West. 2. the common rule is held, that an infant shall sue 2 Inst. 261.

by prochein amy, and defend by guardian.

2. In an *appeal* of murder there needs no guardian 'till the writ is returnable; for 'till then, there is no body in law, whose writ it is but the infant, and any body may sue out the writ for him, as well as enter upon a disseisor for him; and the use of a guardian is to pursue it when it is before the court. 12 Mod. 374, 375. Pasch. 12 W. 3. in case of Stout v. Towler.

\* If an infant brings an appeal of murder, it must be by guardian. Br. Garden, pl. 1.

## (N. 6) Assigned or appointed by the Court. Who may be, and in what Cases.

1. **T**HE king by *letters patent* may make a general guardian for an infant, to answer for him in all actions, or two or three guardians jointly or severally, or he may grant that those guardians may make other guardians jointly or severally, to sue or defend in all actions. F. N. B. 27. (L.)

2. An infant was admitted by guardian to sue account against guardian in *foage* for the profits received after his age of fourteen. Cro. J. 219. Hill. 6 Jac. B. R. Anon.

An infant brought her bill by guardian to

stop her father from committing waste. And the court held, that in such a case any person might become guardian to an infant against the father. Pasch. 1657. in Scacc. Hard. 96. Roberts v. Roberts.—Br. Garden, pl. 3.

3. The court will not admit any one as guardian, but such as shall be *responsible* to the infant for any loss he may suffer by his mis-pleading. Mich. 6 Car. B. R. Cro. C. 307. E. of Newport v. Mildmay.—Br. Garden, pl. 15.

\* But if a person appointed guardian according to the statute 12 Car.

4. The D. of Ormond, being appointed guardian was *attainted*, and so becoming incapable, another was *appointed by act of parliament*, it not being to be done by any \* other power; per Cur. Trin. 9 Geo. in Canc. 9 Mod. 42. in case of Reynolds v. Lady Teynham.—cites it as the Duke of Beaufort's case.

2. 24. (as in the case before the Duke of Ormond was,) *dies, or refuses* to take the guardianship upon him, the Lord Chancellor may appoint a guardian. Hill. 1699. Abr. Eq. Case 260. Loyd. v. Carew.

\* The court of wards and livery, with respect to infants and idiots,

5. A guardian may be made by *writ out of chancery*; per Doderidge J. Palm. 252.—cites 9 E. 4. 34. b.—Either *one or more* guardians jointly; per Somers Ch. 3 Chanc. Cases, 136. Hill. 9 W. 3. in case of \* Bertie v. Falkland.

were taken out of the court of chancery, and transferred in some measure to that; but by the dissolution of that court *returned to chancery* again. 3 Ch. Cases, 136. S. C.—S. C. cited Hill 12 Geo. 2. B. R. in case of the King v. Bennet (alias Ld. Ossulston) & al.—The court of chancery has an original jurisdiction of the right of guardianship; per Gilbert Ld Commissioner. Hill. 1722. 2 Wms's Rep. 123. in case of Eyre v. Lady Shaftsbury.—At the common law, *before the statute* 32 H. 8. (by which the court of wards and liveries were erected,) the Ld. Chancellor was the sole judge of † wardships, unless where they were lucrative to the crown; for there the lord treasurer had a concurrent jurisdiction with him; but where they were only for the benefit of the ward, the Chancellor alone had the disposition and management. Therefore since that court is abolished, and all the old tenures are turned into free and common socage, all wardships, which are beneficial for the wards, must return to this court as their original fountain; per West Chancellor in Ireland. Pasch. 11 Geo. in Canc. 9 Mod. 139. Morgan v. Dillon.—The right of wardship is determinable in the court of chancery. Pasch. 8 Geo. 1. G. Equ. R. 172, 173. E. of Shaftsbury v. Shaftsbury.

† [176]

\* The father being not thought fit, the ancientest six clerk was ordered to be guardian. 3 Ch. R. 92. 1647. Offley v.

6. Upon a sequestration against an *infant lord* for non appearance, it was moved, that a messenger might be sent to bring him in, and then the court may assign a \* *six clerk* as a guardian to appear and answer, &c. But per North K. how will that look in the lords house, that an infant peer shall put the defence of all his estate in a six clerk, who knows nothing, and cannot be informed by the infant of his estate? The infant is not bound to answer till full age. Yet the contrary is done in chancery. 2 Ch. Cases, 163. 164. Trin. 36 Car. 2 Anon.

Jenney and Baker.—As well the guardian as the *prochein amy* are allowed by the judges to be some of the *officers of the court*; and in respect of their place and skill, are the best *prochein amyes* for the furtherance of the infant's cause. 2 Inst. 261.—And this is agreeable to an old case, where in assise, one person answered as guardian, and another as *prochein amy* of an infant, it was questioned which plea should be taken and it was said by Fish, that the plea of him should be taken who pleaded most or best for the infant's advantage. Br. Garden, &c. pl. 9. cites 28 Ass. 22.—F. N. B. 27. (H)—But the court will *never* permit any other person to be admitted to sue for the infant, *where the father has appointed one, or where there is one ex provisione legis*, viz. guardian in socage, unless he *misbehaves* himself; per Keeling Ch. J. Sid. 424. Anon.

\* The ordinary may appoint a *curator*, in

7. The \* *ecclesiastical court* cannot intermeddle with the *body* though the parents have made no disposition thereof. Agreed by two justices. Mich. 29 Car. 2. B. R. 3 Keb. 834. Banes v. Lowder.

Lowder.——Nor can they prove a *will* concerning the guardianship of a child. Pasch. 24 Car. 2. B. R. Vent. 207. Lady Chester's case. case of personal estate, but not of lands. Per

Hale, Ch. J. Hill. 27 & 28 Car. 2. B. R. 2 Lev. 163. Bishop of Carlisle v. Wells.——29 & 30 Car. 2. B. R. 2 Lev. 217. Louny v. Reines.——The course of the spiritual court is, if the infant be under seven years of age, then *they chuse*, but if he is seven, he chuses. Per Lee J. Gibb. 164. Mich. 4 Geo. 2. B. R. in case of the King v. Dr. Bettefworth.——That court cannot appoint guardians in any case but *ad litem* for carrying on suits there in behalf of the infant. 20 March, 1740. in Canc. Hughes v. Science & al.

## (N. 7.) Assigned or admitted. *How.*

1. **T**HE court said, they would *not* appoint a guardian to the heir for his appearance in a writ of dower brought by the widow in C. B. *unless the infant be in court*; and accordingly he was appointed to be brought into court. Mich. 32 Eliz. C. B. 2 Le. 189. Bostwick v. Bostwick.——The court seldom admits a guardian, unless the infant be there in person; but they may do it, and it has been done. Per Holt Ch. J. Trin. 7 W. 3. B. R. Comb. 330. Read v. Waldron.——Upon a motion, though he was not present in court, nor any affidavit made. Comb. 256. Pasch. 6 W. & M. B. R. Anon. In waste against a guardian, a prochein amy was admitted to sue, though the infant came not in person, upon a suggestion that he was effoined.

2 Inst. 261. 390.——So where an infant had brought a writ of error to reverse a fine levied by him, the court admitted a new guardian, though the infant was not in court, upon suggestion of an effoinment; for the use of his appearing is, that the court may be satisfied that he is within age; But as that already appears of record, that he was an infant when he brought the writ of error, there shall be no averment now against it. 27 Aff. 53.——Br. Garden, pl. 8. S. C.——A guardian cannot be otherwise appointed, than by bringing the infant into court, or his praying a *commission* to have a guardian assigned him. Hill. 1699. Abr. Equ. Cases, 260. Loyd v. Carew.——By the course of C. B. a man may have a *dedimus potestatem pro guardians admittendo*, where the infant is sick and feeble. Noy. 24. Anon.

2. One cannot answer for an infant as guardian in chancery, or any other court, unless he is assigned guardian *by the court*. Per Roll. Ch. J. Sti. 369. Pasch. 1653. B. R. Anon. One may sue as prochein amy without a warrant; for the statute is a sufficient warrant for him. Br. Garden, pl. 25.——But one can not answer as guardian, without a warrant. F. N. R. 27. (7)——that is, not without admission by the court. Br. Garden, pl. 11.——for the admission is his warrant, Br. Garden, pl. 17.

3. A guardian is always admitted *before a judge*, and that admission carried to *the clerk* of the rules, who *enters the rule*; but the court usually examines a prochein amy. Per Asty. Trin. 7 W. 3. B. R. Cumb. 331. Read v. Waldron. \*[177] A guardian was admitted before a judge, and an entry made

thereof in the *plea roll*, but there was no entry in the *procurator's roll*, (as is usual) *quod concessum est per Cur. &c.* but only (*quod admittus per Cur. obtulit se, &c.*) and this being assigned for error, the court ordered it to be amended; for the admittance is the act of the court, and the omission of it ought not to prejudice the party. Mich. 3 Car. C. B. Cro. C. 86. Young v. Young.——Palm. 518. S. C.——Hett. 52. S. C.——Hutt. 92. S. C. and that in B. R. the practice is not to enter the admission, but only to recite it in the count.——Many precedents being shewn, where the admission was only recited, and some few only where an entry was made of it, the court held it well. Mich. 29 & 30 Eliz. B. R. 4 Rep. 53. b. Rawlins's case.——Such entry is sufficient; for if in fact the guardian was not admitted by the court, a writ of error lies. Mich. 4 W. & M. B. R. Carth. 256. Huckle v. Wye.——It was moved in arrest of judgment, that the defendant appeared by guardian, and it did not appear that he was under the age of 21, nor is the guardian said to be admitted by the court; and the judgment was stayed; but the court said that if the guardian-piece could be found, and it was entered so there, they would amend the declaration by it. Mich. 19 Car. 2. B. R. Lev. 224. Combers v. Watson.——Sid. 342. S. C.



4. Where the custody of an infant heir is committed to a person, the course of the court is, that such committee shall enter into a recognizance with two sureties, conditioned not to permit or suffer the infant to marry without the consent of the court. Wms's Rep. 698.

5. But a committee, being a person of a good estate, the court ordered his own single recognizance to be taken without sureties. Wms's Rep. 698. Pasch. 1721. Dr. Davis's case.

S. C. cited  
per Lord  
Commis-  
sioners. 2  
Wms's  
Rep. 112.  
Hill. 1722.  
in case of  
Eyre v.  
Lady  
Shafts-  
bury.

6. And upon the Dr.'s petition to alter the form of the recognizance, because, as the form is, a guardian without any default in him, and from the rashness of the infant only, might forfeit his recognizance and be undone, Parker C. consented thereto, though he said he should be very tender of altering settled forms of court to satisfy a capricious humour, but that this case differing from the common one, he directed it thus, (viz.) *That the infant shall not be married without leave of the court, by the consent, privity, or connivance of the committee.* Wms's Rep. 698, 699. Pasch. 1721, Dr. Davis's case.

7. And Lord Chancellor said, that he had before made the like alteration in Lacy's case. Ibid.

### (N. 8) Who may be. In Case of Feme Covert Infant Defendant.

1. **A**SSISE against a man and his wife, the baron answered as tenant, and said, that his feme was within age, and was *essoigned*, and did not say by whom, and pleaded in barr for him and his feme, as guardian of his feme; and the opinion of Thorpe was, that he ought to have warrant; by which the assise was awarded, because the default of the feme is the default of the baron and feme; quære, if de rigore juris, and if it be the same law of the baron and feme as of others? Per Ald. *The statute gives, that prochein amy may sue for infant if he be essoigned*, and there is an equal mischief if he be tenant. Br. Garden, pl. 18. cites 29 Ass. 67.

### [178] (O) Guardian in Socage; Who shall be Guardian.

Fol. 40.

\* A. J. P.

[1. 1 H. 1. ordains, that the \* mother, or next of blood, shall be guardian to the land of her children. Matth. Paris. Speed. 435.]  
mother cannot be guardian in socage. Arg. Pasch. 1709. Chanc. Prec. 283. in case of Whitcomb v. Whitcomb.—For affinity without blood is excluded. Co. Litt. 88. a.

Lord Mac-  
clesfield  
said, that  
this maxim  
is not  
grounded  
on reason,  
but pre-

[2. He, who is next of blood to the infant, to whom the inheritance cannot descend, shall be guardian in socage, and not he to whom it may descend; because there may be a \* suspicion of him; as † if the land descends of the part of the father, the next of blood of the part of the mother shall be guardian; and so e contra. 27 E. 3. 79. b.]

valued in har-  
in justice Domes-  
arous times, before the nation was civilized. See 2 Wms's Rep. 264. Mich. 1724  
Domes-  
At common law it was a good objection to remove a guardian in  
socage,



focage, in account of a remainder being limited to him, upon a presumption that such a guardian might destroy the ward; but it is no objection, where a *parent* is guardian; for it would be a monstrous presumption, that a man would destroy his own child to inherit his estate. Per Wett. Chanc. in Ireland. Pasch. 11 Geo. in Canc. 9 Mod. 142. Morgan v. Dillon.

† By the statute 28 E. 1. 1. the wardship of an heir that holds in socage, if the land or inheritance descends of his mother's side, belongs to the next of kin on the father's side, &c. contra. This law was taken up originally as a rule of reason in the court of chancery, and by usage became the law of the land; for according to the civil law, and all the foreign feudalists, the rule is, that he that has the right of succession has the guardianship; and this statute seems to be only an affirmation of the common law. Pasch. 8 Geo. 1. G. Equ, R. 174. E. of Shaftsbury v. Shaftsbury.

[3. With this accords the law of Scotland; Skene Regiam Majestatem, 57. b. vers. 1, 2, 3.]

[4. If a man has issue two sons by several venters, and having land held in socage, in nature of borough english, dies, the youngest being within the age of 14 the eldest of the half blood shall not be guardian in socage of the land; because by \* possibility he may inherit the land; for if the youngest dies without issue, it will descend to the uncle, and from him may descend to the eldest. Co. Litt. 88. b.]

\* The party is excluded, not only where there is an immediate descent, but where there is any possibility of descent. Co. Litt. 88. b.

[5. If any land held in socage descend of the part of the father to the infant, and other land held in socage descend to him of the part of the mother; he \* who first takes shall be guardian. 27 E. 3. 79. b. but quære, This is as to the body; but the land shall be in ward to him, to whom it cannot descend. Co. Litt. 88. c.]

\* For the other cannot take the custody from him, unless he has a better

right; and in æquali jure melior est conditio possidentis. Mich. 7 & 8 Eliz. in the court of wards, Pl. C. 296. b. Carril v. Cuddington.

[6. The \* brother of the half blood shall be guardian in socage. 43 Eliz. Swan's case.]

\* After the death of the mother, the

brother of the half blood claimed the wardship, and it was adjudged that it belonged to him, and not the uncle, Mich. 42 & 43 Eliz. C. B. Mo. 635. Swan v. Gaterland. S. C. Cro. E. 825. S. C. Ow. 128. S. C. But if the mother had been living, (which did not appear by the pleading) some thought the guardianship had belonged to her. 2 And. 171. S. C. Cro. E. 825. reports the mother to be dead, and thereupon the question arose; and there Walmfley and Kingmill J. held, that the brother should be guardian; for that he is nearest of kin, to whom the inheritance cannot descend. Brownl. 40. Anon. Pl. C. 297 Carril v. Cuddington. 2 Jo. 17. no judgment. Sadler v. Draper. Co. Litt. 88. b. Contra, because of the possibility that the elder may inherit by the brother's dying without issue, and so the land descend to the uncle, and from him to the elder brother of the half blood. And if the brother of the half blood had been under 14 years of age, Quære. Mo. 635.

Trespass by a feme, quære N. filiam & hæredem suam rapuit & abduxit; per Catesby, the father of mere right shall have the ward of his son or daughter who is heir, but not the mother. Quære; for none \* answered him. Br. Ravishment de Garde, pl. 23. cites 9 E. 4. 53. This is to be understood, that she shall not have it against the guardian in chivalry. 3 Rep. 38. b. in Ratcliff's case.

\* [179]

[7. If there are three uncles in equal degree, the eldest shall be guardian in socage. Co. Litt. 88. b.]

[8. If land be given in \* frank-marriage, and the donees have issue and die, the issue being within the age of 14; the next of blood of the part of the mother shall have the custody of the body, and not the next of blood of the part of the father, though he first seises him; because the mother was the cause of the gift. Co. Litt. 88. c.]

\* But if lands are given to one in tail, who dies, leaving issue under 14, the

next of kin of the part of the father, (though he be more worthy) shall not be preferred before the next of kin of the part of the mother, but the first that seizes the heir shall have the custody of him.

h m. Co. Litt. 88. a.—22. a.—For the relations on both sides are equal, and no reason appears why either should be preferred; and he that first takes care of the heir shews himself most concerned for his interest. Hawk. Abr. Co. Litt. p. 136.—But not if he be *inheritor to the donor's reversion*. Ibid.—As where upon marriage lands descending on the part of the feme, were settled by fine sur grant and render in tail special, remainder in fee to the right heirs of the feme, and baron and feme died leaving issue under 14, it was resolved, that the grandfather on the part of the father shall have the custody preferable to the grandmother on the part of the mother, (who had got possession) for, though they were in equal degree as to the estate tail, yet as to the inheritance of the fee simple, it could never by any possibility descend to the grandfather on the father's side, or any of his blood, being strangers to the feme, from whom the land moved; but on the other hand, as the land came from the mother, and as she by the fine became a purchaser of the fee simple, those of her blood might inherit, and through them her grandmother might by possibility take, and therefore by law was disabled to have the guardianship. Mich. 7 & 8 Eliz. in the court of wards. Pl. C. 295. a. Carril v. Cuddington.—Cited Ibid. 446. b.—Yet where an infant was seised of an estate tail, with a limitation in remainder to the grandfather on the father's side, it appearing there were divers remainders between him and the infant's estate, the court would not interpose in favour of the grandfather of the mother's side, to whom the land could not descend. Cary's Rep. 137, 138. cites 20 Eliz. Sweetman v. Edge.

\* Though he be not in custody of another. [9. An infant shall not be guardian in socage, because no writ of account lies against an infant. Co. Litt. 88. c.]

Co. Litt. 88. b.—*Minor minorem custodire non debet, alio crim scire presumitur male regere qui se ipsum regere nescit.* Fleta. lib. 1. cap. 11. f. 5.—And for the same reason an idiot, non compos, lunatick, or one blind and dumb, or deaf and dumb, or a leper removed by writ de leproso amovendo, cannot be guardian in socage. Co. Litt. 88. b.

\* But one appointed guardian under 12 C. 1. [10. If A. be guardian in socage of the body and land of B. within the age of 14 years, A. shall be guardian in socage by cause of ward. Co. Litt. 88. d.]

2. 24 (though his ward by nearness of kin be guardian to another infant) shall not be guardian of the second infant by any word of the act; for he is neither an hereditament, or goods or chattels of the first infant; per Vaughan Ch. J. Vaugh. 184. Trin. 16 Car. 2. C. B. in case of Bedel v. Constable.

## (O. 2) Guardian removed.

An infant may have a writ out of chancery, I. A Guardian appointed by the court was removed on motion, and another appointed on inspection. Sti. 456. Trin. 1655. B. R. Anon.

directed to the justices, to remove his guardian, and to receive another, and the court at their discretion may remove the guardian and appoint another. F. N. B. 27 (M).—Br. Garden, pl. 21.

2. *Si quis custas fraudem pupillo fecerit, a tutela removendus est.* Jenk. 39. pl. 75.

3. Waste is by law a forfeiture of the father's guardianship. Pasch. 1657. in Scacc. Hard. 96. Roberts v. Roberts.

[180] 4. A guardian married her servant, and he dying, she married again very meanly; upon which the infant's uncle sends him to a protestant school abroad, and upon this a homine replegiando was sued out; per Finch. C. where there is a guardianship by the common law, chancery will intermeddle; but where it is by act of parliament I cannot remove him or her. Mich. 29 Car. 2. 2 Ch. Cases 238. Foster v. Denny.

\* The husband devised his real estate to his 3 daughters, and their heirs, and if they died without heirs, then remainder to his wife, and made her guardian, and died; she was very young, and in six months married again, and the court of chancery in Ireland removed her from

from the guardianship. Pasch. 11 Geo. 9 Mod. 135. Morgan v. Dillon.—But the decree was reversed in parliament. Hill. 2 Geo. 2. 9 Mod. 210. S. C.

5. Since the statute, which took away the court of wards; the jurisdiction of wardship returns to the court of chancery; and it appears by the register, 21. b. 198. that a writ may issue out of this court to remove the guardian of an infant, *and put another in his stead*; per Lords Commissioners. 2 Wms's Rep. 119. Hill. 1722, in case of Eyre v. Lady Shaftsbury.

S. P. 20  
Mar. 1740.  
In Canc. in  
the case of  
Hughes v.  
Science.

## (P) Of what Things there shall be Guardian in Socage.

[1.] If a \* *copyhold* descends to an infant within the age of 14 years, the next friend, to whom the land cannot descend, shall have the custody of it, as well as of a frank-tenement, unless the custom appoints it to any other. H. 41 Eliz. B. R. per curiam, Eggleton's case.]

\* A copyholder in fee of common right, cannot dispose of the guardianship

of his son, though by custom it may be good. Pasch. 6 W. & M. B. R. Cumb. 253. Clench v. Cudmore.—Pasch. 3 W. & M. C. B. 3 Lev. 395. S. C.—The lord of a copyhold manor by common law, and without a particular custom, cannot grant the guardianship of an infant copyholder. Hutt. 16, 17. Anon.—Hill. 15 Jac. Hob. 215. Cocks v. Darson.—S. P. resolved, but that where there is such a custom, it is not taken away by the 12 Car. 2. 24. Pasch. 3 W. & M. 2 Lutw. 1190. Church v. Cudmore.

[2. If a man be seised of *rent-charge, rent-seck, common of pasture*, and such like inheritance, which do not lie in tenure, and dies, his heir within the age of 14, in this case the \* *heir may choose* his guardian; but if he be of such tender years that he cannot make any election, then (if the father has not made any disposition of the custody of the infant) it is most fit that the nearest of blood, to whom the land cannot descend, shall have the custody of him. Co. Litt. 87. b.]

\* But if he holds any lands in socage, in that case the guardian in socage shall take into his custody, as well the

rent-charges, &c. as the socage land, because he has the custody of the heir. Co. Litt. 87. b.

## (P. 2) Guardian in Socage removed.

1. A Bill was brought by the grandfather, and next friend of the infant, for an account of the estate against the defendant; who claimed to be great uncle on the mother's side; the bill suggested, that defendant had *failed in his estate*, and become a *journeyman* to another, and that he was a person *disaffected* to the discipline of the church of England, and endeavoured to instruct the infant in his own courses, to the dislike of that discipline, and therefore was unfit to have the care either of his person or estate; upon demurrer to the bill it was ordered, that defendant should answer as to the account demanded, and where the infant is, and how educated, but without costs or prejudice to the legal interest of defendant, either as to the custody of the person, or the management

† [181]

\* The court of Chancery ought to take care of infants, and their education, and of their estates, and to see the same reserved and secured for them. Per Bridgman K. 3 Ch. R. 58. S. C.

management of the estate. 22 Car. 2. N. Ch. R. 144. Hanbury v. Walker.

2. A guardian in socage is purely for the benefit of the infant, and accountable to him, and removeable by the court of chancery, upon any *misbehaviour*, or obliged to give such security to account as the court thinks proper; per West C. in Ireland. Pasch. 11 Geo. in Canc. 9 Mod. 141. Morgan v. Dillon.

3. As to a guardian's being *in loco parentis*, the solicitor general took a *difference* between a *natural parent* and a *guardian*; for that if the latter was for *marrying a ward under his quality*, it was most usual for chancery to interpose; but not so in case of a father's endeavouring to marry his infant child to one beneath him; but Ld. C. Macclesfield said, that this court would, and had interposed, even in the case of a father. As where the child had an estate, and the *father insolvent*, and of an ill character, *would take the profits*, there the court has appointed a receiver. Trin. 1721. Wms's Rep. 705. where the Chancellor says it was so done in the case of Kiffin v. Kiffin.

### (P. 3) Power of the Guardian over the Estate of the Infant.

Every guardian may assign dower in pais; per Holt Ch. J. 7 Mod. 43. Trin. 1. Annæ, B. R. in case of Smith v. Angel.

1. By 13 E. 1. cap. 7. *A writ of admeasurement of dower shall be granted to a guardian, neither shall the heir, when he cometh to full age, be barred by the suit of the guardian, if he sueth against the tenant in dower feignedly, and by collusion, but that he may admeasure the dower after.*

2. Guardian in socage shall not forfeit the *corn upon the land of the heir* by his attainder, and yet he might have sold it if he had not been attainted. Br. Forfeiture de terres, pl. 120. cites 6 E. 2. It. Ca.

3. In *quare impedit* against guardian, [if] the plaintiff recovers, the heir or tenant of the frank-tenement is not bound; for he is not party to the judgment; per Fulthorp; and so the writ awarded good. Br. Baron and Feme, pl. 28. cites 50 E. 3. 13.

4. Guardian cannot sell the deer; contra of bailiff. Br. Accompt, pl. 94. cites 10 H. 7. 6. per Fineux.

5. The guardian shall forfeit his office if the deer be destroyed, and he shall account of the profits of the park; per Vavisor. Ibid.

6. The guardian recovers in debt upon bond made to an infant, the defendant pays the principal and costs, and prays that the guardian shall be ordered to *acknowledge satisfaction*; the court said that a guardian, or an infant, or an executor, cannot acknowledge satisfaction for more than they receive, and for so much they ordered the guardian to acknowledge satisfaction, and made an order that no execution should ever issue for the residue. Trin. 14 Jac. Mo. 852. White v. Hall.

By this Stat. no new

7. 12 Car. 2. cap. 24. s. 9. Enacts that such person, to whose custody

custody any father shall dispose or devise his child, or children, may take into his custody \* to the use of such child or children, the profits of † all their ‡ lands, tenements, and hereditaments, and also the custody, tuition and management of the goods, chattels, and personal estates of such child or children, till their respective age of 21, or any lesser time according to such disposition, and may bring such action in relation thereto as by law, a guardian in common socage may do.

office is constituted, but the duty and power remains the same as the law had before prescribed of guardian

in socage: and the statute only alters the *modus habendi*; per Vaughan Ch. J. Vaugh. 179. Trin. 16 Car. 2. C. B. Bedel v. Constable.—Pasch. 8 Geo. G. Equ. R. 176. E. of Shaftsbury v. Shaftsbury.

\* § This guardian being made after the model of a socage guardian, and coming in *in loco parentis*, has not a naked authority, but an interest. Ibid.—But it is only an interest ¶ joined with trust (as being necessary in order to the performance of the trust,) but not for himself. Vaugh. 181. 183.—¶ 2 Wms. Rep. 122. Eyre v. Lady Shaftsbury.

† It seems this guardian shall have the custody, not only of lands descended, or left by the father, but of all lands and goods any way acquired, or purchased by the infant, which the guardian in socage had not, which proves that he derives not his interest from the father but from the law; for the father could never give him power or interest of or in that which was never his. Ibid. 185, 186.

‡ A guardian by nurture, being so appointed by the testator's will, can only *lease at will*, and not for any number of years. Trin. 41 Eliz. B. R. Cro. E. 678. 734. Piggot v. Garnish.—For the guardian himself, (except he be guardian in socage) is but *tenant at will*. Arg. Mich. 11 Geo. 8 Mod. 312. in case of Skipwith v. Green.

A guardian, having a considerable sum of money in his hands, laid it out in a purchase of lands for the benefit of the infant, if when he came of age he should agree to it; the infant dying in his minority, it was decreed that the guardian should account for the money to the administrator of the infant, for that he could not, without the direction of the court, convert the personal into real estate. Trin. 1686. 1 Vern. 403. 435. Earl of Winchelsea v. Norcliff.—The guardian ought to apply the estate in his hands to pay the debts of the infant. Hill. 21 & 22 Car. 2. 1 Chan. Cases 157. Dennis v. Badd.—He may pay off the interest of any real incumbrance, and the principal of a mortgage; because 'tis an intermediate charge on the land, but no other real incumbrance. Hill 1700. Chan. Prec. 137. Palmer v. Danby.—Abr. Equ. Cases. 261. S. C.

—Where the mother as guardian received the rents of the estate and paid off specialties, but took assignment, and after the death of the infant brought a bill against the heir for a discovery of assets by descent (she claiming the rents received as administratrix) the court held that the guardian is not compellable to apply the profits of the estate of the infant to pay off the bond debts of the ancestor; per Cur. Hill. 1707. 2 Vern. 606. Waters v. Eb. al.

8. A father indebted to B. grants to him the guardianship of his child, and covenants not to revoke it; \* equity will not restrain the guardian from receiving the rents and profits of the infant's estate, but only from abusing his person. Hill. 1686. Verri. 442. Leone v. Sheires.

\* Nor will equity set aside the deed, unless the debt be paid, or the trust

abused. Ibid. in Marg.

9. An answer in chancery by the guardian cannot be read in evidence against the infant; for there is no reason that what the guardian swears in his answer should affect the infant. Mich. 1 W. & M. C. B. 2 Vent. 72. Leigh v. Ward.

10. 4 W. & M. cap. 3. §. 11. Enacted that guardians or trustees, having the disposal of the money of infants under 12 years, might for the use of such infants, pay 100 l. of the infant's money for the purchase of annuities therein mentioned, and should name the infant to be nominee, and such infant should become a contributor.

11. 6 Geo. 1. c. 4. §. 23. Every proprietor shall have liberty, during such time as the books shall lie open, to subscribe his annuities, or debts in the proper books, at such prices, and upon such conditions, as are in this act prescribed; and all guardians shall have like liberty

This act was for the benefit, quiet and security, of

to



the S. S. Company.  
See 2 Wms's Rep. 86. per Lord C. Maclesfield. Mich. 1722. Powell v. Hankey and Cox. — And see S. C. at tit. S. S. subscriptions. Inf.

*to subscribe for their infants, and shall be indemnified for doing the same: But the shares, which such guardians shall by virtue of such subscriptions be intitled to, in the company's capital stock, shall be liable to the like uses, trusts and purposes, as the same annuities and debts would have been had they not been so taken in.*

12. Though an infant cannot submit to an award, yet his guardian may submit for him, and bind himself that the infant shall perform it. Per Cur. Hill. 6 W. 3. B. R. Cumb. 318. Roberts v. Newbold.

13. If an estate mortgaged comes to an infant, the guardian must keep down the interest, and not let it run on to increase the personal estate, which possibly he may be in expectation of. Pasch. 1725. 2 Wms's Rep. 278, 279. Jennings v. Looks.

### [ 183 ] (P. 4) Power as to the Person, of the Infant; and in what Cases the Court will deliver the Infant to the proper Guardian; and how far restrained by Chancery.

\* The Mother, who was appointed guardian to her son, marrying very meanly, the uncle got

1. 12 Car. 2. cap. 24. §. 8. Enacts that a father may dispose or devise of the tuition of his children to whom he pleases, except, &c. and such person to whom the custody of such children shall be so disposed or devised may maintain an \* action of † ravishment of ward, or trespass against any person who shall wrongfully take away such children, and shall recover damages for the same in the said action for the use or benefit of such children.

possession of him, and sent him abroad, and the court, upon information that the child was effrained, issued a writ of *habeas corpus*, and upon shewing cause, the court said, that being appointed under an act of parliament, she could not be removed, and the uncle was ordered to send for the child home. Mich. 29 Car. 2. 2 Chan. cases 237. Foster v. Denny. — † The guardian under this statute may have ravishment of ward as the guardian by knight's service, or in socage at common law, and the statute extends to Ireland. Mich. 27 Car. 2. B. R. 3 Keb. 528. Lord Anglesey v. Lord Offory.

By the express words of the act, the guardian by will takes place of all other guardians, and his authority by this law is a continuation of the paternal authority; per Lords Commissioners. Hill. 1722. 2 Wms. Rep. 115. in case of Eyre v. Lady Shaftsbury.

2. The law hath appointed remedies both *droitural* and *possessory* to recover the guardianship; first, *droitural*; as the writ *de custodia terræ & hæredis*; and if the ward was married, then by the statute of Merton, c. 6. the plaintiff should recover the value of the marriage. 2dly, *Possessory*; as at common law, *trespass*, in which he could only recover damages, and not the ward itself; but by the statute West. 2. 35. which gives ravishment of ward, he recovered the body of the heir, and not damages only. G. Equ. R. 175. Pasch. 8 Geo. 1. Earl of Shaftsbury v. Shaftsbury.

3. A guardian brought a \* *habeas corpus* to bring up the body of the infant, and, when it was brought up, it was delivered to the guardian; but the guardian not being in court when the motion was

\* Upon a *placit* hab' corp' the party re-



was made, the court for that reason would then make no rule, but upon his coming another day into court, the child was delivered to him without farther argument. 8 Mod. 214, 215. Hill. 10 Geo. the King v. Oland.

turned *ad-  
lam babeo  
talem per-  
sonam in  
custodia  
mea, nec*

*habui die impetrationis hujus brevis, vel unquam postea.* But the return was held ill; for it did not appear, but that he had the infant in his custody die impetrationis of the first writ. Hill. 26 & 27 Car. 2. B. R. 2 Lev. 128. the King v. Sir Robert Viner.

4. A child was left to the care of the defendant by the mother, when about two years old, by whom she had been educated ever since; the father died and left the charge of the child (now about 6 years old) to his own brother, the present guardian, who was intitled to the estate if the child should die without issue, and therefore not a proper person to be guardian; per Cur. The child, who wants discretion to choose a guardian, has therefore no liberty of election, and in such case, when she is brought up by habeas corpus, the court must choose a guardian for her; and this is not the first time, that, upon the return of a habeas corpus, persons have been delivered by this court to them who have a right to receive them; it was done by the Lord Ch. J. Holt, and it was done in Lady HARIOT BERKLEY's case, it being suggested that she was married; and so in the Lady RAWLEIGH's case, who was detained by her husband against her will; both which ladies the court left to their own election, because they were both of discretion. 8 Mod. 214. Hill. 10 Geo. the King v. Oland.

5. The Lord Anglesea devised his estate to his daughter, and appointed who should be her guardian, and expressly declared, that if she lived with her mother, half her estate should be forfeited; yet the court of B. R. would \* not relieve; but she, being brought up by habeas corpus, was left to her own choice, whether she would live with her mother, though by living with her she was to forfeit half her estate. Hill. 10 Geo. 8 Mod. 214. cites it as the Ld. Anglesea's case.

It was ordered that the infant should be taken from the mother, and a sequestration awarded against the D. of Buckingham and the mother for not producing the infant. G. Equ. R. 173. cites Annesley v. Annesley.

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6. Macclesfield C. said, that guardians are only trustees, and the statute gives them no more power than guardians in socage had, and the court may interpose as well in the case of the one as of the other; and in answer to an objection, that the court should not interpose before the guardians had misbehaved, his lordship observed, that preventing injustice was to be preferred to punishing injustice, and that, if any wrong steps had been taken, as induced the least suspicion of prejudice to the infant, though they might not deserve punishment, yet the court would interpose and order the contrary; and that this was grounded upon the general power and jurisdiction which this court has over all trusts; and a guardianship was most plainly a trust. Wms's Rep. 705. Trin. 1721. Duke of Beaufort v. Berty.

The disposition by the father by will is binding, unless some misbehaviour be shewn; in which case, it being a matter of trust, this court has a superintendency over it; per Lord Mac- clesfield.

2 Wms's Rep. 107. Hill. 1722. Eyre v. Countess of Shaftsbury.

If there be only an apprehension that the infant will be married unequally, either by the guardian or by

by his neglect, a court of equity will interpose and send for the infant and commit him to the custody of a proper person or relation, in order to prevent such danger. 2 Wms's Rep. 112, 113. per Lords Commissioners, who said it was so done by Harcourt C. in Lady Cath. Annesley's case. — and by Lord Macclesfield in Mr. VARNON's case of Staffordshire.

7. Where a will appoints guardians of an infant, and recommends to act with the advice of one who is afterwards attainted, this superintendency devolves on the great seal, as the general guardian of all infants; per Macclesfield C. and accordingly he directed application to be made to two others. Wms's Rep. 706. Duke of Beaufort v. Berty.

8. A. devised the guardianship of his child to M. his wife and J. S. but if M. marry again, then M. and J. S. to fix upon another guardian; M. married again, but would not agree with J. S. to choose another guardian. It was resolved by Lord King, that it devolved upon the Court of Chancery to appoint a guardian. Wms's Rep. 703. in a note there cites Trin. 1725. Darcy v. Lord Holdernefs.

9. There were three guardians made by will of an infant daughter; one of the guardians took her from a boarding-school and married her to his own son, who had no estate, she being then 9 years and 3 months old, and the son an apprentice to a peruke-maker; King C. ordered that guardian to bring the infant into court, and that he and his son attend, which they did, and then his lordship said, that she having never been under the care of the court, nor committed by the court to that guardian's custody, he thought it was not an immediate contempt to the court, but that it was punishable by information, and would have him bound over with sureties to be taken by the master to appear and answer to an information to be exhibited by the Attorney General against him; and that the child be delivered over to the other guardian (the third being dead); but he not being present, directed that she be delivered to the plaintiff's clerk in court that afternoon, in order to deliver her to the said other guardian, and upon refusal by the offending guardian, he was to stand committed. 2 Wms's Rep. 561, 562. Mich. 1729. Goodall v. Harris.

Fol. 41.

### (Q.) [In Socage.] His Power.

Because he has the custody of the heir. Ibid.

[1.] IF the ward in socage has *rent-charge, or seck, or such like things*, which are not held of any person, yet the guardian in socage shall take into his custody, as well those as the land in socage. Co. Litt. 88.]

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Co. Litt. 17. b.—Doul. of Advowsons 22 —

[2. A guardian in socage shall not present to a church, which becomes void during the minority of the heir; because it is not such thing of which he can make an account. 27 E. 3. 89. b. per Thorpe.]

So of guardian by nurture. Cro. J. 98, 99.—The heir himself shall present in such case. Co. Litt. 89.—Of what age soever he be. 3 Inst. 156.—But the guardian may present where the heir is not of years of discretion, per Daniel J. Mich. 3 Jac. B. R. Cro. J. 99. Shopland v. Rider — Trin. 1 Jac. C. B. Ow. 115. S. C.—The presentation ought to be in the name of the heir. F. N. B. 33. (T) in notis.

[3. Guardian

[3. Guardian in socage may grant a copyhold in reversion, according to the custom of the manor, and it shall be good, \* though it does not come into possession during the nonage of the ward; for he was dominus pro tempore. Dubitatur. H. 2 Ja. B. 6. between Shapland and Ridler. M. 3 Ja. B. 6. same case adjudged.]

Per Lords Commissioners. 2 Wms's Rep. 122. —The guardian in socage ad-

mitted a copyholder in remainder for life in his own name, and adjudged good; because he has a lawful interest. Trin. 1 Jac. C. B. Ow. 115. Shopland als. Sapland v. Rider S. C. —And a copyholder admitted is in by the custom. Cro. J. 99. S. C. —Mich. 1 Jac. C. B. 4 Le. 238. S. C. —Godb. 143. S. C. —1 Roll. 499. pl. 4. S. C. —\* A guardian in socage may grant copyholds in reversion according to the custom of the manor, though they † come into possession during the nonage of the infant. 2 New Abr. 684. cites Mich. 8 W. 3. C. B. Lade v. Barker. —He may grant a copyhold that escheats to the infant. Noy. 85. in case of Delaval v. Clare. —† Quare.

[4. Guardian in socage may make \* lease for years of the land of the ward, and lessee shall have † ejectione firmæ. H. 2 Ja. B. said to be so adjudged M. 5 Ja. B. per curiam agreed between Bridden and Hussey.]

\* Ow. 115. in case of Shopland v. Rider. —Cro. J. 99. S. C. —Te-

nant in socage leased his land for 4 years and died; his heir being within the age of 8 years. The mother being guardian in socage, made another lease to the same lessee for 14 years. Per Cur. This is a surrender of the former lease; but 'tis otherwise of a lease made by a guardian by nurture. Mich. 13 Eliz. C. B. Le. 158. Anon. —Hill. 31 Eliz. 4 Le. 7. S. C. and that the second lease was made in the guardian's name, Willet v. Wilkinson. —Per Anderson Ch. J. it cannot be a surrender; for a guardian has no reversion capable of a surrender, but only an authority to take the profits to the use of the heir, but it may be a determination by consequence and operation of law. Hill. 31 Eliz. C. B. 1 Le. 322. Willis v. Whitewood. S. C. —It is an extinguishment of the former lease. Ow. 45. S. C. —Hutt. 105. S. C. cited as adjudged that it was no surrender, by the name of Mills v. Whitewood.

If a *feme* guardian in socage marries, and then joins with the baron in a lease of the infant's land it shall not bind her after the baron's death. Mich. 7 & 8 Eliz. B. R. PL. C. 293. Osborn v. Carden and Joye.

† A lease by a guardian is sufficient to maintain a declaration in ejectment, though it be void against the infant. Arg. Hard. 330. Wheeler v. Toulson.

5. A guardian cannot change the avowry of the heir. 48 E. 3. 10.

6. Guardian in socage may justify the occupation and governance of the land, and likewise of the body, against the heir himself; per Frowick Ch. J. Mich. 18 H. 7. Kelw. 46. b.

7. If mortgagor dies, his heir being under the age of 14, and the land is held in socage, the guardian in socage may tender the mortgage money in the ward's name; or if it be held by knight's service and the heir is under 21, the guardian in chivalry may do it. Co. Litt. 206. b.

Hill. 28 Eliz. B. R. Mo. 222. Watkins v. Ashwel. —Trin. 28 Eliz. B.

R. Le. 34. S. C. —Ow. 137. S. C. —Cro. E. 132. S. C. —Ow. 34. S. C. cited —So if a bond be upon condition that the obligor or his heirs shall pay 100*l.* and the obligor dies, his heir being under age, payment by the guardian is good; per Wray. Hill. 28 Eliz. Ow. 137. Watkins v. Astwick.

8. Guardian by nurture or in socage may \* enter in the name of the infant, who has right of entry, and this shall vest the estate in the infant, without any command or assent, for the privity that is between them. 9 Rep. 106. Podger's case.

\* The entry and possession of the guardian is the entry and possession

of the infant heir, so as to make a *possessio fratris*. Co. Litt. 13. 2. —3 Rep. 42. in Ratcliff's case. —In the case of a copyhold. Co. Copyholder, 3. 41. —Dal. 110. Anon. S. P. —3 Le. 70. Anon. S. P. —In the case of bastard signs, and mulier puisne, an entry

entry by the guardian is good to prevent a descent. Co. Litt. 245. a. — He may enter for condition broken. Le. 323. in case of Willis v. Whitewood. — Co. Litt. 215. b. S. P. — A guardian may enter to avoid voidable leases made by the infant, but not to bar the heir of his election at his full age. Mich. 28 & 29 Eliz. 7 Rep. 7. b. Earl of Bedford's case. — Guardian enters claiming the freehold to the use of the heir, this is a disseisin and settles the freehold in the heir. 27 Ass. 68. Thorpe.

[186] 9. The court ought not to be kept in the name of the heir, but of the guardian in socage. Cro. J. 99. Shopland v. Rider. Ow. 115. S. C.

\* He is not a servant within the stat. West. 2. 11. But is in loco parentis. 2 Inst. 380. 10. Guardian in socage is rather a \* servant than a guardian. Co. Litt. 89. a. — And differs only in name from a bailiff; per Walmfley J. Mich. 3 Jac. B. R. Cro. J. 99. Shopland v. Roydler. — But per 3 judges, he has an interest ex provisione legis, and in his own right, though it be not forfeitable nor transmissible to executors. Ibid.

— He has an interest joined with a trust for the ward, without which interest he could not execute his trust; but it is not an interest for himself. Trin. 16 Car. 2. C. B. Vaugh 183. Bevel v. Constable. — All the interest of the guardian is to the use of the infant, and not of the guardian. Mich. 7 & 8 Eliz. B. R. Pl. C. 293. b. Osborn v. Carden and Joye. — The guardianship must be reckoned an interest, as the law has appointed remedies both droitual and possessory, to recover it. And though a guardian in socage has not any interest of profit, so as to be assignable; yet is not a naked authority, but an interest of honour, which a man may as well have as an interest of profit. Pasch. 8 Geo. Equ. G. R. 175, &c. Earl of Shaftsbury v. Shaftsbury.

11. A guardian may take but not give seisin; per Coke Ch. J. Trin. 44 Eliz. B. R. Cro. J. 142. in case of Brediman v. Bromley.

## (Q. 2) Power of the Infant as to the Guardian.

If a guardian be made by writ out of chancery, or by direction of the court, the infant can't revoke either of them; per Doderidge. Mich. 19 Jac. B. R. Palm. 252. in case of Darcy v. Jackson. — In a suit against baron and feme, baron can't disavow the guardian, which the court has assigned for the feme; per Hale Ch. J. Hill. 23 & 24 Car. 2. B. R. Vent. 185. Freeman v. Boddington. 1. INFANT sued an appeal of murder by prochein amy, and 'twas insisted, that he may disavow his guardian; but per Holt Ch. J. the suit is subject only to the direction of the guardian. But if an infant comes in and disavows the suit, the court may discharge the guardian; and yet that is strange; for to enter a retraxit is error. Pasch. 12 W. 3. B. R. 1 Salk. 176. in Toller's case.

\* An infant brought an assise by guardian, and afterwards came in person, and would have disavowed the suit; but the court doubted; for it would be a retraxit, which would be a bar and a prejudice to the infant, and it may be he disavows by duress. Br. Garden, pl. 10. cites 33 Ass. 3. — Br. Coverture, pl. 39. S. C. — Br. Garden, pl. 11. — An infant shall not remove his guardian, nor disavow an action sued for him by prochein amy. F. N. B. 27. (K) — An appeal being brought by an infant, he came into court, and said he would relinquish the suit, and thereby it was discontinued against the will of the guardians assigned by the court. See Attorney (D) Tr. 43 El. B. R. Slanyng v. Fitts. — and cites the case of Sacheverel v. Blackwel. S. P.

2. The court, if they see occasion, may suffer the infant to discharge his guardian and disavow the action; but that must be in court, and the court may refuse to do it, if they see good reason in their discretion. Pasch. 12 W. 3. B. R. 12 Mod. 374. in case of Stout v. Towler.

(Q. 3)

(Q. 3) \* Allowances to Guardian.

\* See  
(Q. 7)

1. UPON account he shall have allowance of all *reasonable costs and expences* in all things. Litt. S. 123.

If he re-  
ceive the  
rents and

profits, and he *acted without his default or negligence*, he shall be discharged thereof. Co. Litt. 89 a. — Guardian to a legatee of 1000 l. which was to go over to the guardian and another in case of death, *spent the whole legacy in law suits*, yet after the infant's death he was decreed to account to the other for a moiety. P. 28 Car. 2. Fin. R. 250. Corbett v. Franklin.

A guardian chose by the infant having taking the profits of the real estate, which was jointured on the mother in law, subject to a prior mortgage, was ordered to account for the rents and profits since his entry, allowing for *interest money, repairs, taxes and expences*, towards *maintenance of the children*, and the remainder to be applied towards discharge of the mortgages, and the remainder to be paid, one third by the jointress, and two thirds by the infant. Mich. 32 Car. 2. Fin. R. 475. Paine v. Bromfall.

2. Guardian *purchases in a debt* due by the infant for rent; the guardian shall not take the advantage of the bargain which he purchased in with the infant's money. Tr. 30 Car. 2. 2 Chan. Case 245. Sir Robert Henly v. . . .

[ 187 ]  
Fin. R. 450.  
Tr. 32 Car.  
2. SIR RO-  
BERT

HENLY v. ZOUEH, MORGAN & al. S. C. but says, 'twas on purchase of *annuity charged on infant's estate*.

3. The *mother* was decreed to have the custody of the heir's person and estate, and the master to take *account* of the profits, and direct the putting it out for the benefit of the infant; that she be enjoined from committing *wast*, and to be *allowed* her charges, and convenient maintenance for the heir out of the profits of the estate. Mich. 31 Car. 2. Fin. R. 433. Dormer v. Dormer.

4. A guardian at the request of J. S. who was going to marry the ward, *gave in an account of the estate to the intended husband*, and secured the balance by three several bonds to J. S. who gave a *bond to the guardian to release all accounts* to him after the marriage: the marriage was had; the guardian paid the balance, but J. S. gave no release, but sued for an account and relief against the bond; and the guardian was ordered to answer the bill; for the account was made when J. S. had no title; no release was given, and the pursuit is fresh. Mich. 35 Car. 2. 2 Chan. cases 157. Osborn v. Chapman.

Wherever  
a father,  
mother, or  
guardian,  
insists upon  
*private gain*  
or security  
for it, and  
obtains it  
of the in-  
tended hus-  
band, it  
shall be set  
aside. Per

Cowper Ld. Chanc. 20 May, 9 Annæ. 1 Salk. 158. Duke Hamilton v. Ld. Mohun. — Arg. S. C. cited 10 Mod. 447 — 2 Vern. 652. S. C.

5. An infant's *estate was mortgaged*, and J. S. the defendant as guardian to the infant *paid off the mortgage and took an assignment*. The infant died at 16, and gave all her personal estate to J. S. a bill is exhibited by A. who is both heir at law to the infant, and to whom also the estate was devised by the infant's father, in case of her dying before 21, as it fell out she did, and the bill prayed that the personal estate should be applied to pay off the mortgage, and discharge the real estate. But though the mortgagee had never entered, yet Lord Keeper was of opinion, that as to the *profits received out of the mortgaged lands*, the defendant should be taken to be

Mother as  
guardian  
paid off a  
mortgage out  
of the perso-  
nal estate;  
the infant  
died; the  
land de-  
scends to a  
remote  
heir; she  
shall not  
have the



money  
back again  
as admini-

strator; for she might have been compelled to apply the personal estate in case of the real.  
2 Vern. 193. Mich. 1690. cited in the case of AUDLEY and AUDLEY as the case of Zouch  
v. Loyd.

be in possession as mortgagee, and not as guardian. (The Editor adds  
a Q.) Mich. 1704. 2 Vern. 471. Bishop v. Sharpe.

6. Guardian borrows money of A. to discharge incumbrance on the infant's estate, and promises to give security, but dies before 'twas done. Though the incumbrance was discharged with A.'s money, yet no satisfaction for the money can be decreed to A. out of the infant's estate. But the guardian having disbursed more than received, decreed account to be taken, and what was due to the guardian to be raised out of the infant's estate, and to be applied as assets to satisfy A.'s debt. Hill. 1704. 2 Vern. 480. Hooper v. Eyles and Rideout.

### (Q. 4) Guardian charged or favoured.

1. IF an infant brings assise against his guardian, where it is found that the guardian took feoffment of the infant within age, he shall be imprisoned. Br. Imprisonment, pl. 98. cites Fitzh. Assise 395. anno 8 E. 2. Itin. Canc.

S. P. But the  
infant shall  
not recover  
damages,  
because the  
value of  
the ward-

2. Note, if the guardian does waste in the land or tenements of the heir to the value of 20s. the guardian shall lose the ward [though it be] to the \* value of 20 l. for so is the statute intended to lose all; by the opinion of Hank. Quære. Br. Garde, pl. 76. cites 12 H. 4. 4.

ship is greater than the waste. Si quis custos pupillo fraudem fecerit a tutela removendus est. Jenk. 39. pl. 75.

\*[188]

3. Guardian in socage is bound by law that the heir be well brought up, and that his evidences be safely kept. Co. Litt. S. 123. Pag. 89. b.

4. Infant brings action against guardian and recovers, and guardian brings the money into court, and there deposits it; 'tis a good discharge against the infant, and he shall not answer the suit again in an account. Mich. 11 Jac. C. B. Godb. 214 Hughe's case.

5. The plaintiffs being the servants to the late Earl of N. for their services to the family had pensions (specified in the bill) allowed them for their lives, which were constantly paid to them by the steward, but were discontinued since the death of the last Earl, the guardian not thinking herself secure against any account the infant might demand for the payment of the pensions, (there being no writing or will for them) unless indemnified by a decree of the court against the infant; And therefore, a bill being exhibited for this purpose, it was decreed accordingly. Mich. 26 Car. 2. Finch. 149. Dr. Mapletost v. Countess of Northumberland, &c.

6. B. Guardian in socage takes the profits of the infant's estate, and dies, and makes A. executor; infant dies, C. the heir of infant pays 200 l. on a judgment of the ancestors. A. took administration



stration to the infant; per Lord Keeper, the profits taken by the guardian are liable to make satisfaction to C. but the personal estate in the hands of the administrator of the ancestor was liable in the first place, to which the administrator de bobis non is liable in case of C. Tr. 36 Car. 2. 2 Chan. Cases 197. Bressenden v. Decrets.

7. Where a guardian *by answer confesses assets in his hands*, whatever after becomes of the infant or of his estate, (as in this case the infant died two days before the decree inrolled,) yet by a decree for payment of a debt, the guardian is liable; for the decree has fixed the payment on the guardian. Tr. 26 Car. 2. 2 Chan. Cases 199. Tyas v. Talbot.

8. Guardian *takes bond in his own name* for arrears of rent, he makes it his own debt. 26 Car. 2. 2 Ch. R. 97. Wall v. Buckley.

9. Guardian of an infant was *bound in his own estate* by covenant of the infant; the guardian being party to the indenture. Mich. 26 Car. 2. 2 Chan. Cases 211. Strickland v. Coker.

10. Guardian *purchased land with the infant's money*, this shall go to the next of kin, in case of infant's death, and not to the heir; and if next of kin will not take to the land, the guardian must answer the money. Hill. 1697. Arg. 2 Vern. 353. cites Dennis's case.

Vern. 436.  
cites S. C.  
as decreed.

11. A *receiver or manager of the infant's estate* appointed by the guardians or trustees, with a salary for his so doing, is a servant to the guardians only; and as they had sufficient authority to employ him, so they had to discharge and allow his accounts, and having *accounted with them shall not be inforced to account again with the infant*. But the infant was at liberty to require a full account of the guardians, and they must answer to him for any embezzlement by the receiver. Trin. 1720. Ch. Prec. 535. Clavering's case.

(Q. 5) *Security.* In what Cases to be given by [ 189 ] him, and to whom.

1. **N**ORTH Ch. J. said he knew where there was some *doubt of the sufficiency* of the guardian in socage, that the court of chancery made him give *good security*. Hill. 28 & 29 Car. 2. C. B. 2 Mod. 177. in case of Quadring v. Downs.

A guar-  
dian in  
socage to  
an infant  
of 300 l.  
per ann.

*estate, though but in mean circumstances shall not be obliged to give security to account till a default be found in him, but the court ordered him to account yearly.* 22 Car. 2. 3 Ch. R. 59. Hanbury v. Walker.——N. Ch. R. 144. S. C.

2. Guardian was decreed to *give security* to pay a *legacy* of 40 l. with interest to the infants, according to their father's will. Mich. 25 Car. 2. Finch's R. 2. Hall v. Yates.

3. Guardian, being sued in chancery for a legacy bequeathed to the infant, was decreed on the payment thereof to give security, that the *infant when of age should give a release, &c.* Mich. 26 Car. 2. Fin. R. 136. Maplet v. Pocock.

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4. The

4. The daughter, being 13 years of age, was, at the death of her mother left in the possession of the *father in law*, who had no right to detain her, having an aunt who was guardian by law; upon which an habeas corpus was granted; and it being suggested that he intended to marry her to some great person, (though it was said she was already married to another in her mother's life time;) she was brought into court, and, being asked, chose to stay with her father-in-law rather than with her aunt, or pretended husband; upon which the court would not remove her out of his hands, he entering into a recognizance of 40000 l. *not to suffer her to be married* so long as she was in his hands, and to permit her aunt and friends to visit her, Hill. 26 & 27 Car. 2. B. R. 2 Lev. 128. the King v. Sir Robert Viner.

5. Debt by a *bishop and his commissary* upon a bond to them conditioned that, whereas the defendant was by the spiritual court appointed guardian to an infant, if he safely guard his estate, and render him a just account of all his goods and lands, &c. then the bond to be void; the defendant pleaded, that the bond was taken extorsive colore officii, &c. And upon demurrer, Hale, Ch. J. held, that though the ordinary hath power to appoint a curator or guardian to an infant, it must be only *as to his personal estate*; but here it is both of goods and lands, which makes it void; and if he might take a bond to himself, yet it must not be to his commissary too; but the other judges inclined that the bond was good. Hill. 27 & 28 Car. 2. B. R. 2 Lev. 162. Bishop of Carlisle v. Wells.

### (Q. 6) Who chargeable as Guardian.

But where there is a verdict against the infant's title, he can have no account till he has recovered at law. Hill. 1684. Vern. 295. Newburgh v. Bickerstaff.——Account lies against him that occupies the land as guardian, though he be not of the blood. Co. Litt. 89. a.——And it will be no plea for him to say, he is not prochein amy. Co. Litt. 89. b.——But it does not lie against him who enters into the lands of an infant not tenant in socage. F. N. B. 117. (A) the notes there.——The infant may either have trespass against him or charge him as guardian. Mich. 40 & 41 Eliz. B. R. Cro. E. 631. in case of Ireland v. Coulter.——If one enters claiming as guardian in socage, or by nurture, where he is not, he may either bring an *assise* against him as a disseisor, \* or charge him in account as guardian. Pasch. 9 Car. B. R. Cro. C. 303. 306. in case of Blunden v. Baugh.——If guardian grants the wardship of the land bona fide, and after the heir is disparaged, the grantee shall not forfeit his interest; for the statute is *dominus amittat custodiam*. Co. Litt. 80. b.——Two jointenants, one disparages the heir, both shall lose the wardship. Ibid.

\*[190]

### (Q. 7) Guardian De son Tort. Allowances.

1. I F one enters as guardian who is not guardian he shall have allowance for all reasonable acts, as a lawful guardian should; per two justices. Arg. Mich. 40 & 41 Eliz. B. R. Cro. E. 631. in

in case of Ireland v. Coulter.——Per the other two justices, the infant in such case may have trespass against him, or charge him as guardian; and if he charge him as guardian, it is reason he should then have allowance as guardian. Ibid.

(R) \* *Right of Ward*, who shall have it, [*and what shall be recovered.*]

- [ 1. **A** *Guardian in socage* shall have it. 25 E. 3. 52. b. 27 E. 3. 79. b. adjudged of body and land. Contra Fitzh. Nat. 139. H. Contra Old Nat. Bre. 95. b. but Quære. ]

\* It was said for law, that in right of ward, nor in ravishment of ward, the seisin is not traversable;

but the tenure; and yet per Darby it is hard to have action of it, if there be no seisin after the limitation. But 6 E. 6. in C. R. it was agreed for law; that if the lord has not been seised of the homage within time of memory, but has been seised of the rent; this suffices to have writ of ward, and to count that he died in his homage; for there is seisin of something, though it be not of the intire services; and for this cause, and also inasmuch as the seisin is not traversable, but the tenure, therefore the action lies without seisin of the homage. Br. Garde, pl. 122. cites 5 E. 4. 62. and 6 E. 6.

- [ 2. And he shall *recover damages* in this writ. 27 E. 3. 79. b. ]

3. Though all trespasses die with the person, yet in the case of ward as well as ravishment, the action is continued with the heir or executor. Trin. 7 Jac. Hob. 95. in case of Moor v. Hussey.

(S) *Against whom it lies*, [*and of what.*]

- [ 1. **G**UARDIAN in *chivalry* may have right of ward against the mother, who seises the ward as guardian in nurture; for it cannot be brought against any other, because there is no other guardian. 12 H. 4. 19. ]

[ 2. But if a guardian in chivalry commits a ward to be nourished to another, or to go to school with another, writ of ward does not lie against him, but against the lord, in as much as the right of the ward, and of the chattel, remains in his person. 12 H. 4. 19. ]

- [ 3. If a man abates in the land, and takes the body of the ward by tort, a right of ward of the body lies against him. 12 H. 4. 19. ]

It lies not for the land, but only for the body;

per Walmfley J. Ow. 115.——S. P. Br. Garde, pl. 8. cites 40 E. 3. 6.—S. P. per Walmfley J. Cro. J. 99. cites F. N. B. 139.

4. In an action to recover the ward, whereof the baron was possessed in right of his wife, it shall be against both. Br. Ravishment de Garde, pl. 5. cites 48 E. 3. 20.

5. It lies against the heir or executor. Trin. 7 Jac. Hob. 95. [ 191 ] in case of Moor v. Hussey,

(T) *Ejection of Ward; At what Time it lies.*

\*See (R)  
notes on  
pl. 1.

- [ 1. **A** Writ of ejection of ward lies *before seisin*; for \* the seisin is not traversable. 14 H. 4. 24. ]

(U) *Who shall have it.*

One may  
have an  
ejection

- [ 1. **A** *Guardian in socage* shall have it. 25 E. 3. 52. 26 E. 3. 65. ]

of ward, *against the heir* himself. F. N. B. 141. (D) in notis.——If the heir himself enters, and ousts his guardian of the land, ejection of ward lies not, but intrusion of ward. Br. Eject. Custod. pl. 11.

(W) *Ravishment of Ward. What is; And in what Cases it lies.*

1. **T**HERE are *two sorts* of ravishment of wards, that is to say, *ravishment in deed, and ravishment in law.* 2 Inst. 440.

2. Ravishment *in deed*, as when one *takes and carries away* a ward. Ibid.

3. Ravishment *in law*, as if the *ward enters into religion*, this is a ravishment in law, for which the sovereign shall answer; for that his admission of him is a ravishment in law. Ibid.

4. So if a *man or woman marry a ward to his or her daughter, or to any other*, this is a ravishment in law. Ibid.

5. So if a man *procures a ward to go from his guardian.* Ibid.

6. If *one ravishes a ward, or ejects the lord to the use of a stranger*, without his privity, yet if the *stranger agrees* thereunto, he is the ravisher or ejector. Ibid.

S. P. 20.  
March  
1740, in  
case of  
Hughes v.  
Science &  
al.

7. *Marriage* of the ward, *without consent of the guardian*, is a ravishment of the ward; per Lords Commissioners. 2 Wms's Rep. 110. Hill. 1722. Eyre v. Countess of Shaftsbury.——and cites 2 Inst. 440. and it is aggravated in this respect, that after such ravishment by marriage, the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher. Ibid.

8. Ravishment of ward lies *without actual seisin* of the heir, for it is transitory. Br. Ravishment de Garde, pl. 12. cites 11 H. 4. 54.

9. But it is said elsewhere, that the *heir never shall have the ward fallen in the time of the ancestor, unless the ancestor took a writ of right of ward in his life*; for this is a real action, which may descend, and the ancestor was out of possession. Br. Ravishment de Garde, pl. 12. cites 11 H. 4. 54.

(X) Ravishment

\*(X) Ravishment of Ward ; *Who* shall have it.

Fol. 41.

[ 1. GUARDIAN by service of *chivalry* shall have ravishment of ward, without doubt, at common law. 29 Aff. 35. admitted. ]

time. By the Stat. 12 Car. 2. 24. the person to whom the custody and tuition is appointed by the father by deed or will, may maintain an action of ravishment of ward or trespass against any person who shall unlawfully take away the child, and shall recover damages for the same, in the said action, for the use and benefit of such child.

[ 2. Guardian in *locage* shall have ravishment of ward. 17 E. 3. 42. b. 25 E. 3. 52. 26 E. 3. 65. 1 E. 3. 20. b. adjudged; for he shall account for the damages recovered. ]

3. The husband alone brought ravishment of ward for a ward he had in right of his wife, and the writ was held good; but the surest way is to have both join. Ow. 83. cites 43 E. 1. Statham.

4. Ravishment of ward; the defendant said, that the father of the infant did not die tenant of the plaintiff, and a good issue, per tot Cur. and yet he does not make to himself any title, but if the plaintiff has no title, then it suffices; for a man cannot have ravishment of ward who was never in possession. Br. Ravishment de Gard, pl. 1. cites 9 H. 6. 10.

5. The father shall have a writ of ravishment of ward, *quare filium & heredem suum rapuit & abduxit*. Br. Gard. pl. 6. cites 33 H. 6. 55. — against the lord of whom the land is held in chivalry. 3 Rep. 38. b.

daughter, &c. But it lies not for the mother. Quære. Br. Gard. pl. 55. cites 37 H. 6. 1. — It lies for her against a deforcor, but not against the lord in chivalry. F. N. B. 143 (G: in notis. — 3 Rep. 38. b. in RATCLIFF's case. cites 9 E. 4. 53. a. — Co. Litt. 84. b. — And so it lay for the mother at the common law. Resolved. 3 Rep. 38. b. ut sup.

6. The committee of an orphan appointed by the mayor, aldermen, and chamberlain of the city of London, may have a writ of ravishment of ward against him that takes the ward out of his possession. F. N. B. 142, (H.)

7. Every ancestor male or female, shall have writ of ravishment of ward against any stranger, who de son tort ravishes the heir apparent of any person, be the heir male or female; and it is not material of what age the heir apparent is in such case. Resolved, 3 Rep. 38. b. Hill. 34 Eliz. B. R. in Ratcliff's case.

for taking away and marrying the heir, so also might the guardian for taking away and marrying the ward. Hill. 1722, in case of Eyre v. Lady Shaftsbury.

8. A legal guardian had the same remedy as the father, and might have writ of ravishment of ward. Hill. 12 Geo. 2. B. R. the King v. Bennet, (alias Lord Ossulston,) & al.

\* This in  
Roll. is (S)  
again by  
mistake.

\*(Y) [*Who shall have it, and*] against whom it  
lies.

[ 1. *HE who has not any right to be guardian in socage, if he has seisin of the ward, shall have ravishment of ward against a stranger. 17 E. 3. 42. b. ]*

[ 2. *The father, if he has nothing which may descend to his son and heir, yet he shall have this writ against the grandfather if he takes him, though he be heir to him also; for his custody belongs to him, and not to the grandfather, during his life. 30 E. 3. 17. ]*

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[ 3. *If the father be dead, the mother (if she has no land which may descend to her son and heir) shall not have ravishment of ward against the grandfather, who has land to descend, to take from him; because the grandfather is guardian in nurture, and not to the feme during his life, he being his heir also. Contra 30 E. 3. 16. b. 17. ]*

[ 4. *The same law shall be, though the mother has land which may descend to her son and heir; for this notwithstanding, the custody belongs to the grandfather. Contra 30 E. 3. 17. Issue thereupon. ]*

S. C. cited  
by Lords  
Commis-  
sioners 2.

5. He who knows a ward to have been ravished, and marries him to another, though he was not privy to the taking or ravishing, is equally guilty with the ravishers. 8 E. 3. 52. per Herle.

Wms's Rep. 115. in case of Eyre v. Lady Shaftsbury.

It lies  
against  
guardian in  
fact. Br.  
Precipe  
quod red-  
dat, pl. 35.  
cites Nat.  
Brev.

6. Ravishment of ward does not lie against the guardian in chivalry by any ancestor, but only for the father; and for him the action lies against the lord of whom the land is held by knight's service, where his son and heir apparent is ravished by him. Resolved 3 Rep. 38. b. Hill. 34 Eliz. Ratcliff's case.——Cites Littleton, and 18 E. 3. 25. 30 E. 3. 17. 29 E. 3. 7. and 19.

At com-  
mon law,  
but not  
upon the

7. Ravishment of ward lies against a feme covert, as well at common law, as upon the stat. Westm. 2. 35. Per tot. Cur. Trin. 7 Jac. Hob. 93. Moor v. Hussey.

Stat. By two judges against two. Trin. 9 Jac. 9 Rep. 71. b. S. C.——Hill. 8 Jac. C. B. 2 Brownl. 59, 91. S. C.——Judgment reversed on another point. Hill. 14 Jac. B. R. 1 Roll. R. 445. S. C.——Trin. 14 Jac. B. R. Cro. J. 413. S. C.——3 Bull. 275. S. C.

\* This is  
(T) in  
Roll, there-  
fore a mis-  
take. The  
count in  
the ravish-  
ment of  
ward upon the Stat. must not be by vi & armis. 2 Inst. 440.

\*(Z) How it shall be brought.

[ 1. ] If guardian by service of chivalry brings ravishment of ward at common law, and not upon the statute, the writ shall not be quod rapuit, but quod cepit & abduxit. 29 Ass. 35. agreed. ]

But it was  
awarded  
that is an

2. Ravishment of ward was brought by a man, and counted that he was thereof possessed in right of his wife, and the defendant ravished,



ed, &c. and yet well brought by the husband alone; for it was a *chattel vested*; and there it was said, that *this action is not only to recover damages, for the plaintiff shall re-have the infant by the words of the writ; so that he shall recover the thing itself.* Br. Ravishment de Garde, pl. 5. cites 48 E. 3. 20.

*action to recover the ward it shall be against both, as a writ of*

ward, and therefore it seems that it shall be brought by both; which Finch agreed, by reason of the voucher. Br. Ravishment de Garde, pl. 5. cites 48 E. 3. 20.—Ow. 83, cites 43 E. 4. Statiam, that if the husband alone brings it, it is not good.

## (Z. 2) Pleadings in Ravishment of Ward.

1. **I**N ravishment of ward of an heir female, the *defendant said*, that where the plaintiff supposed that he held of him, he did not hold of him, and *that he hath espoused the cousin of the infant, and that the infant hath purchased other land, wherefore he ought to have her in nurture; and because the plaintiff would not find sustenance for the infant she came to him at 18 years of age to have sustenance.* Judgment as to the tort; for at 18 years the heir female is out of ward. And per Finch. it is no plea in this action to traverse the tenure, without making title to the ward in the defendant, and so he has done here by *cause of nurture.* Br. Ravishment de Garde, pl. 16. cites 38 E. 3. 21.

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2. And it is a good plea in this action, to say, *that the infant held not of the plaintiff, but of J. K. who bailed to him the infant, till, &c.* Judgment. Quære, Br. Ravishment de Garde, pl. 16. cites 38 E. 3. 21. per Thorpe.

3. In ravishment of ward, and counted, *that his ancestor gave to J. and K. his feme in tail, to hold by knight's service, and that after their death he was seised of W. their son, and the defendant ravished him; and exception was taken, because he did not shew who survived, nor made the son heir to the survivor of the said baron and feme, & non allocatur in this action, for this is only trespass; but contra in writ of ward; note a diversity.* Br. Ravishment de Garde, pl. 3. cites 41 E. 3. 15.

*Exception was taken to the writ, because a gift in tail was made to the baron and feme, and they died, and this action was*

brought of the heir, and he was heir to his father, where his mother survived, & non allocatur, because the defendant did not make title to the ward. Br. Ravishment de Garde, pl. 9. cites 7 H. 4. 1.

4. Ravishment of ward, &c. because *N. was possessed of a ward, and A. betrothed her, and before marriage N. granted the ward to C. and after A. took her and married her; and the best opinion was, that ravishment of ward lies well, and that the grantee may have the action; for betrothing is not marriage; by which the defendant said, that the ward who was a feme came to him at 18 years of age, and he married her; judgment, &c. and the other said, that she was not of 18 years of age at the time, &c. for then a feme is out of ward.* Br. Ravishment de Garde, pl. 4. cites 43 E. 3. 9.

5. In ravishment of ward, the defendant *traversed the title of the plaintiff, and made to himself a title which was challenged for double, & non allocatur; for it is not lawful for the defendant to take the*

*It was said, that it is no plea, that the ancestor*

of the infant did not hold of the plaintiff or of his predecessor; for whether

he held of him or not it is not lawful for any one to take him out of his possession, without making title to himself. Br. Ravishment de Garde, pl. 7. cites 2 H. 4. 19.

ward of the plaintiff, though the plaintiff has no title, if the defendant hath no title; for then hath the plaintiff good title against them who have no title, therefore he of necessity ought to make title; and with this agree other books. Br. Ravishment de Garde, pl. 6. cites 2 H. 4. 14.

6. Ravishment of ward against three by the Bishop of London; two said, that the ancestor of the infant infeoffed them, so he did not die his tenant; and the third said, that he was grandfather of the infant, and none would find him his living, by which he took him and found him his living; and it was held a good plea. Br. Ravishment de Garde, pl. 7. cites 2 H. 4. 19.

• S. P. The reason seems to be, inas-

7. Neither the \* possession nor the seisin is traversable in Ravishment of ward, nor in ejectment of ward. Br. Ravishment de Garde, pl. 15. cites 14 H. 4. 24. Per Hill and Thirn.

much as a man shall have this action without possession of ward; for the body is transitory. Br. Ravishment de Garde, pl. 20. cites 24 E. 3. 78.

8. An arbitrement, that the defendant shall re-deliver the infant, is a good plea, if he does it accordingly, and this without deed; contra in assise; per Horton, quod Hank. concessit. Ibid.

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9. Ravishment of ward, quare J. son and heir of P. cujus maritagium, &c. rapuit & abduxit; per Fulthorp, judgment of the writ, because it is not said in his custody, & non allocatur; for by the register he shall say, in his custody, &c. in right of ward. but not in ravishment of ward. Br. Ravishment de Garde, pl. 2. cites 9 H. 6. 61.

10. And then he prayed judgment of the count not warranted by the writ; for he hath declared that he was in his custody, & non allocatur. Br. Ibid.

11. And then he said, that the father of the infant infeoffed him, absque hoc that he had nothing after this feoffment, &c. and this is only argument. Br. Ibid.

12. And then he intituled himself as guardian in socage, and pleaded the feoffment of the father; absque hoc that the father held of the plaintiff at the time of his death modo & forma, and others e contra; and it was held there, that a man may plead to the writ in a writ of ward, without intitling himself to the ward; but if he pleads in bar he ought to intitle himself; and so he did supra & concordat. 11 H. 4. Br. Ibid.

In writ of ward, and in ravishment of ward, the tenure shall be traversed,

13. But by 14 H. 4. the traverse of the tenure supra is a good plea in this action, and e contra in a writ of right of ward; for there he ought to traverse quod non obiit in his homage. Br. Ravishment de Garde, pl. 2. cites 9 H. 6. 61.

but not the seisin. Br. Seisin, pl. 29. cites 5 E. 4. 62.

14. In ravishment of ward the plaintiff counted that the ancestor of the infant held him in chivalry, and died, &c. the infant then, and yet, within age; and he seised him, and was possessed till the defendant ravished him; and so note that he shall shew, that the infant

is yet within age. Br. Ravishment de Garde, pl. 24. cites 37 H. 6. 7.

15. Ravishment of ward was brought by A. against B. of the land and heir, and admitted to lie; and the tenant pleaded in bar to the body and another plea to the land, quod mirum; for it seems that ravishment of ward lies not of land, but ejectione custodiæ. Br. Ravishment de Garde, pl. 28. cites 2 E. 4. 27.

16. It is said, that in pleading in this action the defendant ought to acknowledge the possession of the ward in the plaintiff, as in trespass; for it is no plea in this action, that the ancestor held of him by priority, without confessing possession in the plaintiff; contrary in a writ of right of ward. Br. Ravishment de Garde, pl. 29. cites 5 E. 4. 8.

17. In ravishment of ward of a feme the defendant said, that before the ravishment supposed, he retained the feme in housewifry, and the plaintiff took her, and the defendant re-took her, and that then she was of 18 years, and not under 14 years; and it is a good plea, that he did not ravish her within age; and it is good also to say ut supra, absque hoc that he did ravish her within age. Br. Ravishment de Garde, pl. 31. cites 8 E. 4. 22.

And it is a good plea, that at the time of her ancestor's death she was of full age. Br. Ravishment de Garde, pl. 31. cites 8 E. 4. 22

18. In writ of ward of the body; the infant comes to full age pending the writ, and therefore by the opinion the writ abates; nevertheless, per Danby Ch. J. the plaintiff may have ravishment of ward, though he never had possession; for this is not traversable; because the law adjudges the possession immediately; but per the reporter, it is a good plea there, that the infant was of full age at the day of the writ purchased, for then the writ is false; cujus maritagium ad ipsum pertinet. And per Danby, the death of the infant, in a writ of ward of the body, pending the writ is a good plea; contrary in ravishment of ward. Br. Ravishment de Garde, pl. 21. cites 9 E. 4. 50.

19. Ravishment of ward by guardian in socage was brought in C. B. Catesby said, that the plaintiff had another writ of ravishment of the same ward against him in B. R. Judgment of writ; for in a ravishment of ward the writ is, et diligenter inquiras ubi hæres ille est, & eum capias & salvo custodias, ita quod, &c. reddendum cui, &c. and the sheriff cannot have his body here, and also in B. R. &c. Per Littleton J. such words are not in ravishment of ward for a guardian in socage; quod verum est, which see in the new register; A. fecerit te securum, &c. tunc pone, &c. quod sit, &c. ostensurus, quare cum custodia terræ & hæredis M. usque ad legitimam ætatem suam ad ipsum A. pertinet, eo quod predictus C. pater, &c. terram suam tenuit in socagio, & predictus A. propinquior hæres est ipsius C. ac idem A. in plena seisinâ, &c. idem defendens ipsum hæredem cepit & abduxit, & alia enormia, &c. & vide libro intrationum, the plaintiff shall recover damages only in this action, and not the ward itself. Br. Ravishment de Garde, pl. 22. cites 9 E. 4. 51.

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20. In

20. In ravishment of ward, *not guilty* is a good plea; per Moyle Justice, and the same law of *non raptit*. Br. Ravishment de Garde, pl. 27. cites 21 E. 4. 6.

21. The count in ravishment of ward upon the stat. *Westm. 2. cap. 35.* must not be by *vi & armis*. 2 Inst. 440.

(A. a) Action; By and against Guardian, his Heirs, Executors, &c.

1. **T**H E Earl of E. recovered against A. in *quare impedit*, as guardian in right, a presentation by reason of the custody of the heir of J. N. in his ward and died; A brought writ of error and *scire facias* against the heir of the earl, and the heir of him from whose right the earl took his title, and against the incumbent, and all in one writ by several *scire facias*'s; and the other pleaded to the writ, because the earl recovered for the ward, and if he had died, the executors should have had the ward and also the voidance, and therefore the executors ought to have been warned; and yet, because the earl recovered as guardian in right, which is by his inheritance, therefore the writ was awarded good, contra it seems, if he had recovered as guardian in fact. Note a diversity. Br. Error, pl. 72. cites 8 H. 6. 35.

2. Where guardian pleads falsely for the infant, or vouches one who is not sufficient to render in value to the infant, the infant shall have action of *disceit*. Br. Action sur le case, pl. 118. cites 9 E. 4.

But he ought to cause an assise to be brought

3. A guardian in socage shall not punish waste done by a stranger. F. N. B. 59. (G)

against the wrongdoers by the heir, to recover the freehold and damages. 2 Inst. 305. — He may have trespass against a stranger for spoiling the grass in the socage land in his own name, and not in the name of the heir. Br. Trespas, pl. 175. — Br. Garden, pl. 5.

A guardian, in a quare impedit against him may make

4. A guardian in socage of a manor, to which an advowson is appendant, if he be disturbed, shall have a *quare impedit* in his own name, though he cannot make any account of it. 2 Roll. Abr. 376. Presentment (P. b) pl. 2. f. 132. cites temp. E. 1.

Cro. J. 99. S. C. —

But a recovery in trespass is a bar in ravishment of ward; et c contra. Hob. 99. in case of Moore v. Hufsey.

5. A guardian in socage shall have trespass, and ravishment of ward. Ow. 115. in case of Shopland v. Radlen.

F. N. B.

147. (E) in Marg. —

6. Dower lies against guardian in chivalry, but not against guardian in socage. 6 Rep. 57. b. in Brediman's case. So it lies against a guardian in fact, and against the grantee of his interest, but not against his lessee for years. Br. Precipe quod reddat, pl. 35. cites Nat. Brev. — And it lies against the committees of the king. Ibid.

7. W.

7. W. had a debt due to him by bond, wherein the *heir was bound*, but it happened that the heir for three descents was still an infant, and so the parol demurred at law, till the interest much exceeded the penalty of the bond; Mrs. D. was all along guardian to the infants, and received the profits of the estate, without paying any debts, but converted them to her own use, and thereupon W. brought action against the guardian as administratrix to the children; but this policy did not prevail. Cited per Lord North, Trin. 1684, as the case of MR. BARON WESTON v. DANBY. Vern. 174. in case of Creed v. Covile.

8. 6. Ann. cap. 18. §. 5. Any person who as guardian or trustee for any infant, and every person having an estate determinable upon any life or lives who shall hold over after the determination of the particular estate, without consent of the person next intitled, shall be adjudged trespassers, and the person so intitled shall recover in damages against the person so holding over and his executors, the value of the profits received.

### (A. a. 2) Actions, By the Ward against the Guardian, or others in respect of the Guardian.

1. *MARLB. 52 H. 3. 16. If the lord will not render to the heir his land, when he comes to his full age without plea, the heir shall recover his land by assise of Mortdancestor, with the damages that he has sustained by such withholding since the time that he was of full age.* Fleta, lib. 1. cap. 11. — If the guardian holds over after the full age of the heir he is not a tenant at sufferance; because he came in by act in law; but he is an abator, and an assise of mortdancestor lies against him. Co. Litt. 57. b. — 271. a. — 2 Inst. 134. — F. N. B. 196. (F) — He is a disseisor, because he comes in by the law, and the continuance being beyond the time limited and against the trust reposed in him, the law construes it a disseisin to the heir, who was never out of possession, but the guardian was seised in his right. See Disseisin, (C) pl. 14.

2. *West. 2. 13 E. 1. 25. If any holding in \* ward shall alien the same in + fee, and by such alienation the freehold is transferred to the feoffee, the remedy shall be by a writ of novel disseisin, and as well the feoffor as § feoffee shall be deemed disseisors.* Br. Disseisin, pl. 22. — Fleta, lib. 1. cap. 11. — At common law

the heir might have the assise of novel disseisin; and both the feoffor for making, and the feoffee for taking a tortious livery were disseisors. 2 Inst. 412.

\* Not only guardian in chivalry but guardian in socage and by nurture are within this act. 2 Inst. 413.

† Though the statute mentions only an alienation in fee, yet an alienation in tail, or for life, are included, being within the same mischief. 2 Inst. 413. — If a guardian assigns dower to one as the wife of the infant's father, who was not his wife, and she enters; both she and the guardian are disseisors. Br. Disseisin, pl. 7. cites 21 E. 3. 4. 5. — If guardian by nurture makes a lease by indenture to one, being under the title of the infant and rendering rent to himself, which is paid accordingly, yet it is no disseisin to the infant. See Disseisin (C) pl. 13. — If the guardian lease for life, remainder over, and tenant for life dies, and remainder-man enters, he is a disseisor as well as the tenant for life. 2 Inst. 413. — Br. Disseisin, pl. 3. cites 50 E. 3. 22. — For his entry is an agreement to the first livery. Ibid. pl. 86.

‡ One entered claiming as guardian and devised to W. and died, and devisee entered, the infant brought an assise against him and he was adjudged a disseisor as well as the grantor, quod mirum! for he was not the first that entered, but devisee of the disseisor. Br. Disseisin, pl. 85. cites 28. Ass. 11. — So where a father infeoffed his son within age, and afterwards entered to the use of the

the infant as his guardian, and then infeoffed J. S. and died, the infant brought assise against the feoffee and recovered; for the entry of the father being to the use of the infant, the feoffee by his entry was a disseisor. Br. Disseisin, pl. 94. cites 8 E. 3. 4. 32. If a guardian takes a feoffment from his ward, the infant may bring an assise against him as a disseisor. Ibid. pl. 95. cites 8 E. 2. It Canc.

If recovered without title, the heir shall falsify the recovery, Arg.

3. By the stat. *West. 2. 13 E. 1. 4.* if the wife, having no right, brings a writ of dower against the guardian, and *dower is recovered against him*, in prejudice of the heir *by favour, default, or feint plea*, the heir at his full age shall have a writ of *mortdancestor* against the wife, as against any other deforceor. 2 Inst. 352.

per Finch. Br. Faux, Recovery, pl. 47.——The heir in such case shall have an assise at the common law *\* notwithstanding the possession of the guardian.* 2 Inst. 134.——If a guardian assigns dower to *one as wife* of the infant's father, *who in fact was not his wife*, and she enters; *both she and the guardian are disseisors.* Br. Disseisin, pl. 7.——A guardian suffered a dowress to recover at law *by not setting up a term*, which was created in Black Acre to indemnify a purchaser of White Acre; but the infant was relieved. Hill, 1700. Ch. Prec. 151. Wray v. Williams.——Abr. Eq. Cases 219; S. C.

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4. It was said for law that if the son be in ward of his father, and he disseises him, the son shall have assise, or præcipe quod reddat against his father by his *prochein amy*; and so of land which is in ward of another lord, quære hoc. Br. Garden, pl. 3. cites 34 H. 6. 4.

5. And writ of *wast* has been sued by the infant by *prochein amy* against the father of the infant, *tenant by the curtesy.* Br. Garden, pl. 3. cites 34 H. 6. 4.

5 Mod. 209. Pasch. 8 W. 3. Stokes v. Oliver.—

6. An infant may bring action against his guardian, who pleads any thing to his prejudice; but it is not so of an attorney; per Twisden J. Vent. 40. 103. Trin. 21, and Mich. 22 Car. 2. B. R. Foxwith v. Tremaine.

Therefore

an infant shall not defend by attorney, but by guardian, who may answer his mispleading, if there should be occasion. Mich. 15 Jac. B. R. Cro. J. 441. Cotton v. Westcott.——Poph. 130, S. C.—Trin. 20 Jac. B. R. Cro. J. 641. Simpson v. Jackson,——Palm. 352.——If an infant pleads an ill plea by guardian, judgment shall be given against him, but he shall not be hurt by it; for he shall have an *action of disceit* against him at his full age, and recover so much in damages. Br. Garden, pl. 15. cites 9 E. 4. 34.——For this reason infants are bound by recoveries, when guardians are assigned them, because if they suffer any wrong they have an action against the guardian, in whose default it was. Pasch. 22 Car. 2. B. R. Vent. 73. Hesketh v. Lee.——As if he vouches one by *covin*, who is not able to answer the value, or might have pleaded better, disceit lies. Br. Garden, pl. 15. cites 9 E. 4. 34.——And the court will not admit any one as guardian but such as shall be answerable to the infant for his loss if he hath any. Hill. 9 Car. B. R. Cro. C. 307. Earl of Newport v. Mildmay.—Fitzh. Infant, pl. 1.

7. Though the infant himself cannot bring account against his guardian till of age, yet a third person may bring a bill for an account against the guardian even during the minority; per Lords Commissioners. 2 Wms's Rep. 112, 120. in case of Eyre v. Lady Shaftsbury,

### (A. a. 3) Actions of Account.

\* Account lay against guardian in socage at common law. Co.

1. *MARLB. 52 H. 3. 17.* The \*guardian in socage, when the heir comes to his lawful age shall answer to him for the issues of his inheritance by a lawful account, saving to the guardian his reasonable costs.

Litt. 89. a.——Though the stat. speaks only of a rightful guardian, yet account lies against him



that occupies the land as guardian, though not of the blood. Co. Litt. 89. a. — F. N. B. 118. (A) in Marg. — For the occupation charges him. Ibid. in notis. — If there be a *feme covert* guardian in socage, account lies against both baron and feme, for the profits taken before coverture, but for those after against the baron only. F. N. B. 118. (B) in notis. — If the father occupies the land of an infant which he has by purchase, account lies against him as bailiff. F. N. B. 117. (B) — In case of a tenure in socage the father is accountable for the profits, and in order to that shall have the custody of his eldest son as guardian in socage, and not as father, in respect of his natural custody. Co. Litt. 88. b. — It lies not against executors of a guardian, though it has been attempted in parliament. Co. Litt. 90. b. — But by the 4 Ann. 16. s. 27. *Actions of account shall and may be brought and maintained against the executors and administrators of every guardian.*

† It lie not against guardian in socage till 21. F. N. B. 118. (B) — Adjudged that it lies at 14. Co. Litt. 89. a. — For that is the lawful age of the heir of a tenant in socage. 2 Inst. 135. — An infant may, by his prochein amy, call his guardian to an account even during his minority, per Lord Chancellor. Hill. 1697. 2 Vern. 342. in case of Lord Faulkland v. Bertie. — G. Equ. R. 177. — It lies against him as bailiff, who takes the profits, at any time during nonage of the heir, whether rightful guardian, or not. F. N. B. 118. (B) — If the guardian occupies after the heir attains the age of 14 years, he may be charged as bailiff. 2 Inst. 380. — Co. Litt. 90. a. — For one cannot be guardian for socage lands longer than till 14. F. N. B. 118. (B) — It lies against the guardian after the infant takes baron, if he continues to occupy after, though his power is gone by the marriage. F. N. B. 118. (B) in notis.

‡ No account lay for the executors of the heir at common law, but it is given to them by the statute West. 2. 23. To the executors of executors by the 25 Ed. 3. 5. and to the administrators by the 31 Ed. 3. 11. Co. Litt. 89. b. — Though the heir dies before 14, the executors shall have an account presently; yet the heir himself could not have it till 14. 2 Inst. 404. — Keilw. 131. pl. 106. Qu.

§ The account of guardian in socage is only for the issues of the land; for if he receive other monies, he shall be charged as receiver. F. N. B. 118. (B) in notis.

‡ An account against one as bailiff and receiver, defendant pleads that he was guardian in socage and not bailiff, and good. F. N. B. 118. (A) in Marg. — But the party ought to plead this, otherwise he will have no allowance made him as guardian upon the account. Palm. 512. Briggs v. Wilson.

The statute Marl. 52 H. 3. 23. which gives *capias* in account extends to guardian in socage, 2 Inst. 144. — But no *exigent* lies against him by the statute Westm. 2. 11. 2 Inst. 144. 380. — Neither *capias* nor *exigent*. Co. Litt. 89. a. — Yet notwithstanding if the defendant comes in by *capias*, he shall be put to answer; for it is only a *miscontinuance*. F. N. B. 118. (A) in notis.

In an action of account against guardian in socage, the defendant cannot waive his law. Co. Litt. 90. b.

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2. Though the statute 12 Car. 2. 24. only gives remedy for the new guardian, but gives none against him; yet as no new office is created by that statute, but it continues the same both in duty and power, the ward has the same remedy against the new guardian as he had before against the guardian in socage, per Vaughan Ch. J. Trin. 16 Car. 2. C. B. Vaugh. 169. in case of Bedell v. Constable.

### (A. a. 4) Actions of Waste.

1. **M**AGNA Charta 9 H. 3. 4. No waste shall be made by the guardian in the ward's lands.

2. Magna charta, 9 H. 3. 5. The guardian of the ward's lands shall with the issues thereof uphold his houses, parks, warrens, ponds, mills, and other things pertaining to the said lands, and shall deliver unto him at his full age his lands stored with ploughs and other things (at the least) as he received them.

3. Marl. 52 H. 3. 17. Guardians in socage shall make no waste, sale or destruction of the heir's inheritance, but safely keep the same to the use of the heir. At common law both a prohibition of waste, and an action of waste lay against the guardian in chivalry and guardian in socage; but

but they shall not be chargeable, but for *voluntary or permissive waste*, and not for the waste done by a stranger. 2 Inst. 305.—Because it is so penal to him. Co. Litt. 54. a.—But if there be two joint-tenants of a ward, and one does waste, this is the waste of both; for he is no stranger. 2 Inst. 305.—Yet if there be two executors of a ward and one does waste, action lies against him only. 2 Inst. 302.—If a guardian suffers a stranger to do waste and does not endeavour to prevent it, it shall be taken in law for his consent. And if waste be done without his knowledge, or by such a number as he could not withstand, he ought to bring an assise against the wrong doer, wherein he shall recover the freehold and damages. 2 Inst. 305.

4. West. 1. 3 E. 1. cap. 21. Guardians shall keep the lands of wards without destruction, according to magna charta.

5. Stat. Gloucest. 6 E. 1. 5. For waste done in time of wardship it shall be done as is directed by magna charta cap. 4. and whereas it is directed there, that he, that hath done waste during his custody, shall lose the \* wardship it is agreed that † he shall recompence to the heir his damages for the ‡ waste, if so be the wardship lost do not amount to the ¶ value of the damages before the heir's full age.

Fleta, lib. 1. cap. 12. —\* He shall lose the whole wardship and not locum vastat-

tum only, and shall pay single damages; and if the wardship be not sufficient to answer the damages for the waste, he shall render damages to the value over and above the loss of the wardship. 2 Inst. 305.—F. N. B. 59. (A) —But if the heir brings a writ of waste at full age against him who was guardian, he shall recover treble damages; for the wardship cannot now be lost. F. N. B. 60. (T) —2 Inst. 306.—Co. Litt. 54. a.—If a guardian does waste to the value of 20s. he shall lose the ward to the value of 20l. Br. Gard, pl. 76.—Br. Waste, pl. 68.—S. P. By the advice of all the justices; but the infant shall not recover damages; because the value of the wardship is greater than the waste. Jenk. 39. pl. 75.—If guardian of a copyholder does waste, he shall forfeit the wardship only, not the inheritance of the copyhold. Co. Copyholder, sect. 59.

† If an infant by guardian in chivalry and does waste, an action of waste lies against him. 2 Inst. 306.—So if a feme covert has a ward, and the baron does waste and dies, an action of waste lies against the wife. Ibid.—If guardian in chivalry commits waste, the heir shall have an action of waste as well at full age as within age. F. N. B. 59. (A) —Against guardian in socage. 2 Inst. 305. 135.—F. N. B. 59. (E) —Waste lies not against guardian in socage, but account or trespass. F. N. B. 59. (A) (E) the notes there.—Co. Litt. 54. a.

If a guardian does waste, and grants over the estate, action lies against the guardian and not against the § grantee. F. N. B. 56. a.—2 Inst. 305.—It lies in such case against the assignee. Co. Litt. 54. a.—If the guardian grants over his estate, and the grantee does waste, the action shall be brought against the grantee, and not against the guardian. F. N. B. 56. (A) —2 Inst. 300.—It lies against the executors of the guardian. F. N. B. 56. (B)

If one claiming as guardian, but having no right, enters and does waste, action of waste lies against him, but if he claims to his own use without colour of authority, trespass lies, but not waste. Bro. Waste, pl. 135.—Ibid. 142.

‡ If a guardian abates a house newly built, and which was not covered, it is not waste. F. N. B. 60. (Q) in Marg. cites 40 Ast. 22. Waste. 24. per Knevet.

¶ Waste done by a guardian to the value of 20d. was adjudged waste, and the plaintiff recovered. F. N. B. 60. (P) cites H. 34. E. 3.

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\* See Waste.

## (B. a). \* Count and Pleadings.

S. P. Br. Affise, pl. 415. cites M. 12 E. 3.

1. If an infant is plaintiff by guardian, defendant cannot say, that the plaintiff is of full age, and pray that he may be viewed without pleading a plea; but upon a plea pleaded, he may allege it, notwithstanding the writ of chancery records him to be within age; for the form of chancery shall not oust one of his plea. Br. Garden, pl. 16.

2. If there be two guardians of an infant who plead two several pleas, the best plea for the infant shall be taken. Br. Affise, pl. 413. cites P. 20 E. 3.

\* S. P. S. of joint-tenants

3. In ward of the body \* nontenure of the body generally is a good

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good plea; but to say, that he has nothing but for cause of nurture, or at will of M. &c. is no plea; for he has possession, and therefore the plaintiff recovered by award. Br. Nontenure, pl. 24. cites 24 E. 3. 31. 69. cy and several tenancy. Br. Garde, pl. 99. cites 12 E. 3.

4. Guardian entered claiming the frank-tenement to the heir within age, where the entry was not lawful; and yet because the infant was not named in the assise, the writ was abated, and therefore it seems; that the frank-tenement is in him till he refuses. Br. Entre Cong. pl. 37. cites 24 E. 3. 42. per Thorpe.

5. The defendant said that he could not have the body of the ward there for peril of death and of water; this is not answerable, nor could the plaintiff have answer to it; therefore where he pleaded that he was ready to have him delivered to whom the court awarded, except for this cause, this was not allowed, and the plaintiff recovered the body. Br. Traverse, per, &c. pl. 119. cites 24 E. 3. 66. Br. Gard. pl. 49. cites S. C.

6. If rescous be brought by J. N. guardian of the land, and heir of W. B. He need not shew whether he be guardian in chivalry or socage; for it shall be intended that he is guardian in chivalry. Br. Nofme, pl. 28. cites 39 E. 3. 35. The action shall be in the name of the heir. Br. Garden, pl. 6. cites S. C.

7. Ward of land, the defendant said, that the ancestor of the infant infeoffed J. who leased to the defendant for term of life; judgment si actio; and the other said that he held of him the day of his death, and no replication; for he may hold by a mesne; and it seems that the defendant ought to say, and travers, that the ancestor did not die in his homage. And 'tis said there that where a feoffment is pleaded, the plaintiff shall answer to it, or shall avoid it by collusion. Br. Garde, pl. 17. cites 46 E. 3. 31.

8. The guardian can not change the avowry of the heir. Br. Avowry, pl. 31. cites 48 E. 3. 8.

9. In dower against guardian he shall be named guardian, and otherwise it is a good plea to the writ, that he has nothing but in ward; by which the demandant was compelled to answer to it, if he was guardian or seised jure proprio. Br. Brief, pl. 428. cites 9 H. 5. 4. Dower against guardian who said that he was not guardian, judgment of the writ and admitted for a good plea to the action of the writ, and so it seems that he who pleads to the action of the writ shall conclude to the writ. Ibid. pl. 490. cites 9 E. 4. 31.

10. A guardian may plead misnolmer of his ward as well as the ward himself. Fitzh. Attorney, pl. 75. [ 201 ]

otherwise of an attorney, for it is contrary to his warrant, but the warrant of the guardian is by the court and shall not prejudice the party. Br. Garden, pl. 23. S. C. ——— 3 H. 6. 17. But 'tis

11. Guardian in socage may avow in his own name and right. Cro. J. 98. in case of Shoplane v. Ryder. Ow. 115. S. C. — Kelw. 48. b. — Dy. 302. b. pl. 46. in Marg.

12. Guardian cannot plead non sum informatus. Cro. J. 442. in case of Cotton v. Wescot. ——— Cites 8 Rep. 58. b. Beecher's case.

13. Writ

13. Writ of account was brought, and the defendant was charged as bailiff, who pleaded that he is guardian in socage to the plaintiff, he being within the age of 14, and shewed that the father of the plaintiff was seised of such land in fee, and so he as guardian, &c. and concluded judgment *si actio*; the plaintiff replied, that his father died seised of a copyhold in fee, which is the same land, &c. Per Germey, the plea in bar is not good; for he has not shewn that it was socage land, nor of whom it is held, as he ought, as is 22 E. 4. 5. and therefore it is not good, *quod fuit concessum per Coke. Roll. R. 104. Mich. 12 Jac. B. R. Anon.*

• Orig. (litera.)

† Orig. (Narr')

14. And per Germey the plaintiff has charged him as bailiff, and the defendant pleaded that he is guardian in socage, and concluded judgment *si actio*, where the plea is to the writ, and he ought to have concluded, judgment of the writ, and so is 46 E. 3. 9. 10. which was agreed by Coke, who said, that the \* letter is, that when he is within age, he shall be charged as guardian, and after as bailiff, and cites 10 E. 2. Account, [that where] guardian in socage takes baron the writ of account shall be against the baron alone, for all things after the † marriage, and against the baron and feme for all before. But it seems here that the replication is not good; for the defendant has pleaded in bar a seisin in fee, in the father of the plaintiff, the which ought to be intended a seisin in fee at common law, and not of a copyhold; and as to the objection in the replication, that he was seised in fee of a copyhold, this is not any answer to the other plea; and therefore, and inasmuch as he has not made any traverse, the plea is not good. *Cur. advisare vult. Ibid.*

15. If a guardian commits waste and grants his ward over, the ward shall have waste during the infancy in the tenet against the first guardian for the said waste. 2 Inst. 305.

16. Cognizance as bailiff in replevin must be as bailiff to the guardian, and not as bailiff to the infants, if they are under 14. Arg. 2. Lutw. 1189.

17. If guardian brings writ of *ravishment of ward*, the count must be *ad damnum of the plaintiff*, (the guardian) though the damages when recovered shall by the statute go towards the benefit of the ward; per *Ld. Macclesfield. 2 Wms's Rep. 108. Hill 1722. Eyre v. Countess of Shaftsbury.*

(B. a. 2) Actions. *Proceedings in Actions or Suits by or against Infant suing or defending by Guardian, &c.*

1. WHERE an infant is defendant, the affidavit of service to bear judgment must be, that the guardian was served, and not the infant, and this, (as it seems) though the infant be above 14, or wants ever so little of 21. And the serving of the infant is not good; for non constat, but the infant might be in his cradle; or should it appear by the bill that he is near 21, yet, not being

being able to defend himself, the *service must be on the person appointed by the court to defend him.* 2 Wms's Rep. (643). Mich. 1731. Taylor v. Atwood.

(C. a) Restrained and *punished in Equity.*

1. INFANT by guardian, exhibited a *bill to stop* her father, (who was tenant by the curtesy of lands, of which remainder in tail was in herself) from *committing wast*, and felling timber, which timber the defendants had contracted for, in the life of the plaintiff's mother, who was tenant in tail of the soil; per Cur. In such case any person may become guardian to an infant against her father, and *wast* is by law a *forfeiture of the father's guardianship*, and that the contract made nothing in the case. Whereupon the injunction was continued to stay wast. Hard. 96. Pasch. 1657. Roberts an infant; per Hutchinson her guardian v. J. R. and Sir J. R. her father and grandfather.

2. Three persons being made guardians, by the father's will, of a young woman, one of them gets her and *marries her, being 9 years old, to his own son* who was 17. 'Twas moved for a *hominie replegiando* against the father and son, that they should stand committed, and for an *injunction to their receiving the rents* of her estate. King C. thought every part of the motion reasonable, but as to the first part ordered a speedier way, by bringing the body into court, by a time certain, by an order to be made on the defendants for that purpose. Mich. 3 Geo. 2. Gibb. 106. Anon.

(D. a) *Offences by Strangers, with Regard to the Ward.* How *punished*, and in what Cases.

1. *BR 4 & 5 Ph. & M. cap. 8. s. 2, 3. None shall take or convey, or cause to be taken or conveyed away, any maid, or woman child unmarried, being within the age of 16 years, out of the custody, and against the will of the father or mother of such child, or of the person to whom the father of such child, by his last will, or other act in his life-time, hath appointed the governance of such child, (except such taking shall be by, or for such person, as (without fraud) is master or mistress of such child, or her guardian in socage or chivalry), on pain of two years imprisonment without bail, or else to pay such fine as shall be assessed by the queen's council in the Star-chamber.*

(grandfather of the children) and died, M. married R. R. and then the grandfather died. The grandmother was seised of lands in fee held in socage, and, by will in writing, devised them to B. in tail, remainder to C. and D. and to the heirs of their two bodies begotten equally to be divided; remainder to M. the daughter and heir apparent of the testatrix, and died. B. died, and D. being under 16, but above 14, and living with R. R. went, by his consent, voluntarily, and of her own accord to H. where she married W. R. It was adjudged that M. at the time of the contract of marriage of D. had the custody of her within this statute, as guardian by nature, which was inseparable from her person, and that D.'s going from the house 6 hours before the marriage, as found by the special verdict, made no alteration in judgment of law, as to the mother's having

A. and M. had B. a son, and C. and D. daughters, and A. by his will devised the order, custody, education, &c. of B. C. and D. to M.'s father and mother,



having the custody of her at the time of the contract; and that the consent of R. R. the mother's husband, was not material. 3 Rep. 37, 38. b. 39. b. Hill. 34 Eliz. B. R. Ratcliff's case.

A. being a freeman of London, by will devised the custody of B. his daughter an infant to C. and died, C. got a warrant from the mayor of London to take the infant, who was taken thereupon but rescued again; and after he got a warrant from the Chief Justice, and she was again taken, having been before such taking married to J. S. one of the defendants in the indictment, and who was son of the other defendant. They were acquitted of the indictment upon this evidence, but the court required sureties of them; and the court held, that the defendants could not be found guilty upon this indictment, because B. was not in the possession of C. as the indictment supposed; because A. being a freeman of London, the devise, as to the disposition of the body, was void, and the infant remained in the custody of the mayor and aldermen of London, and the indictment ought to have been for taking the infant, out of their custody. 2dly, That upon this penal law, the body ought to be in the actual custody of him, or those to whom the indictment supposes the right. 3dly, That he, out of whose possession the infant is supposed to be taken, ought to have the mere right, because the statute says, (from the possession of such as shall, by any lawful ways and means, have the custody, &c.) or otherwise it shall be no offence within this penal statute. And there may be other indictments for taking out of the possession of the right guardian. Sid. 362. Pasch. 20 Car. 2. B. R. The King v. Bastian and Bastian.

In an information for seducing and marrying an heiress, the evidence was, that the defendant T. a remote kinsman, and of small fortune, being frequently entertained at the father's house, made love to the daughter, but there was no proof of any seducements, but common compliments among young people; and it was offered in evidence, that the encouragement proceeded from the daughter, whom the father intended to marry to another kinsman of his own name of a very considerable estate, whom she did not love so well; and that she, by agreement with the defendants, went from her father's house to a place appointed, and there met the defendants and was married to T. whereupon the court directed the jury, that the daughter being of tender years, viz. about 16 and a great fortune, this was an offence in the defendant within the information, and that they ought to find them guilty, which they did, but hesitatingly, as it seemed. And afterwards, before any fine imposed the parties agreed. 1 Lev. 257. Mich. 20 Car. 2 B. R. The King v. Twisleton.——Sid. 387. S. C. and says, all agreed, that it was an offence punishable by fine and imprisonment at common law.——But *Ld. Ch. J. Holt* said, that to convey a maid from her parents under the age of 16 is no offence at common law. 4 Mod. 145. Trin. 4 W. 3. Obiter.

In the case of *CALTHROP v. AXTELL*. Hill 3 Jac. 2. B. R. it was \* said, that there must be a continued refusal of the mother; for if she once agree, though afterwards she disassents, yet it is an assent within the statute. And that there must likewise be proof of the stealing away. 3 Mod. 169.——\* 3 Nelf. Abr. 564. pl. 7. says, it was held; but in the report the word is (said) only; and as to the case itself nothing appears there to be resolved.

An information was moved for against the defendant for procuring the marriage of an heiress, (between the age of 15 and 16, and intitled to a considerable fortune) with a person of no estate, by hiring a coach to carry her away, giving money to a parson to marry them without a licence, and being present at the marriage as a father to give her away; and for that this, though done with her own consent, yet was without the consent of her guardian appointed by the court of Chancery. Upon shewing cause, the court held clearly, that this was an offence at common-law, notwithstanding *Ld. Holt's* opinion, as reported in 4 Mod. 145. to the contrary; and that it was so resolved in \* *TWISLETON's* case. They likewise held, that it is within the statute of the 4 & 5 Ph. & M. 8. Sect. 3, 4. For though defendant did not take her away, yet he conveyed her away. Nor will her consent alter the case; for the act does not require force; but in the preamble mentions fraud likewise. It seems to have been made to prevent her consent; and accordingly in Sect. 6. punishes her for consenting. And *TWISLETON's* case is in point; for there according to 1 Lev. 257. (who seems to have reported it best) no force at all was used. That the act mentions guardians as well as parents: a legal guardian had the same power as a father, and the same remedy; he might have an action, or writ of ravishment of ward. And as to a guardian appointed by the court of Chancery, he certainly has the custody of the infant by lawful ways and means; for, according to *Ld. Sommers*, in 3 Chan. Cases 136. *BERTIE v. FALKLAND*, the appointment of guardians originally belonged to the Chancery, and ever since the dissolution of the court of wards, has been vested in that court. Accordingly the information was granted against the defendant, as likewise against the husband, the parson, and several servants concerned in carrying her off. Hill. 12 Geo. 2. B. R. The KING v. BENNET, (ALS. *LD. OSSULSTON*) & al.——And in Hilary term following, they received judgment, viz. *Ld. O.* and the husband were fined 500*l.* each; and the other defendants fined 1 mark, and imprisoned.——\* Sid. 386. Lev. 257.

A. possessed of a considerable personal estate, died intestate, leaving M. his wife, and B. a daughter, an infant, his only child. M. the mother died, leaving J. S. her executor, and trustee for B. her infant daughter, who at M.'s death was under the care of J. S. his wife, who kept a boarding-school. The wife of J. S. died, and afterwards a bill by H. an uncle of B. was filed against J. S. for an account of B.'s estate, suggesting that he had wasted it, but J. S. not putting in his answer



swer an attachment issued. And then J. S. and W. R. who was his counsel, and a justice of peace, went to Doctors Commons, where W. R. procured himself to be *admitted guardian to consent to the marriage of B. to J. S. and a licence was granted, and a marriage bnd.* B. being 16 years old, and J. S. 60.—H. petitioned the court against J. S. for marrying B. *after suit commenced in this court, without leave of the court,* and against W. R. as party, and that they stand committed. And an exception being taken that here was no lis pendens, no answer being put in, the same was overruled; and held that an infant is always considered under the care of the court, if a suit be depending; and that after such bill filed, 'tis a contempt to marry an infant without the consent of this court; and in this case there was not only a bill filed, but an attachment also for want of an answer. It was ordered that J. S. and W. R. stand committed to the Fleet, and not to have the benefit of the rules; and that W. R. be removed from being justice of peace; and (to the end that the estate of the infant be secured, in order to make a settlement on, or a provision for her) that J. S. be *restrained from aliening, transferring, or transposing any part of the real or personal estate of the infant, or from receiving any part thereof,* without leave of the court 'till further order, and that the defendant J. S. do bring before the court all mortgages, bonds and other securities, belonging to the estate of the infant upon oath, subject to the further order of the court. 20 March, 1740. In Canc. Hughes v. Science, Mitchel, & al.

S. 4. *None shall take away and deflower any such child, or shall, against the will of her father, if he be living, or of her mother, (having the custody of her, if the father be dead), contract matrimony with any such child, (except \* by the title of wardship) on pain to suffer five years imprisonment, or else to pay such fine as shall be assessed by the said council in the Star-chamber.*

This breach extends only to the custody of the father, and to the mother having custody of her, viz. if the father had not disposed the custody of her to others. And this extends to any damsel, though she was not heir or heir apparent, and though she departed with her assent, after the age of 12 years, in which case the common law gave no remedy. 3 Rep. 39. in a note of the reporter in Ratcliff's case.

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*The said fines shall be divided between the king and the queen's majesties and the party grieved.*

S. 5. *The said council of the Star-chamber, and justices of assise, by inquisition or indictment have power to hear and determine these offences.*

This is an offence punishable at common law

being malum in se. But admitting it was an offence created by the statute, there being no negative words to prohibit, this court of B. R. hath a jurisdiction to punish this offence, if the Star-chamber had not been taken away. For the party had his election to proceed upon the prohibitory clause, and the *justices of assise must be intended justices of eyer and terminer;* per Cur'. and cited Mo. 564. Whereupon the defendant was fined 500l. and bound to his good behaviour for a year. 2 Mod. 130. Mich. 28 Car. 2. B. R. The King v. Moor.

An indictment for an offence within this statute, was *before the judges of B. R. in Middlesex.* Exception was taken, that this indictment was coram non judice, the statute directing that the council in the Star-chamber, and the justices of assise shall determine the offence. And the question was, whether this may extend to justices of B. R. to give them authority to inquire, or only to justices of assise, and whether justices of B. R. are not justices of assise? But the court doubted, because there are *no justices of assise for the county of Middlesex.* Cro. C. Trin. 12 Car. B. R. Mary Smith's case.—Holt Ch. J. said, that this does not exclude B. R. and that so it has been constant'y held since the making of the law. Trin. 4 W. & M. B. R. 4 Mod. 145. The King v. Marriot.

S. 6. *If any woman-child or maiden, being above the age of twelve years, and under the age of sixteen, consent to such person, that so shall make any contract of matrimony, the next of kin of the same woman-child or maid, to whom the inheritance should descend or come after the decease of the same woman-child, shall have all such lands as the same woman-child had in possession, reversion or remainder, at the time of such consent during the life of such persons that shall so contract matrimony; and after the decease of such person contracting matrimony, the said lands shall descend and come to such persons as they*

M. the wife of A. has two daughters D. and E. tenants in common of lands in tail, reversion to M. and her heirs.—E. being above 14, and

under 16, *they should have done in case this act had never been, other than to without the consent of M. him that so shall contract matrimony.*

to whom the custody, education, &c. of the daughters, was appointed by their father's will, married J. S. The question was, if the forfeiture should accrue to M. and resolved, that it should not, and also that, as this case is, the one daughter shall not take benefit of the forfeiture of the other. For the statute gives the forfeiture to the next of kin, to whom the inheritance should descend or come after her decease, &c. during the life of such person that so shall contract matrimony. So that first he ought to be of the blood, and secondly, next of the blood, to whom the inheritance shall descend or come, &c. and though D. the daughter be of the blood, yet in this case by the death of E. the land if she has issue, shall descend to her issue, and if she has no issue it shall revert to M. the mother. 3 Rep. 39. b. Hill. 34 Eliz. B. R. Ratcliff's case.

A. seised in fee of lands of 700 l. a year had issue B. a son, and four daughters. B. had issue J. a daughter and died, leaving A.—M. the widow of B. and mother of J. fearing that J. might be stolen from her, entreated Lady G. to take J. into her house, which she did, and having a son in France, sent for him, and married him to J. then under 16, without M.'s consent, who was her guardian. The question was, if this was a forfeiture of J.'s estate, during her life? It was proved at the trial, that M. had made a bargain with the lessor of the plaintiff, that if he recovered, she should have 1000 l. and the thirds of the estate, and therefore was not admitted to be a witness. The plaintiff could not prove any thing to make a forfeiture, and therefore was nonsuited. The Chief Justice said that, the statute was made to prevent children being seduced from their parents or guardians, by flattering or enticing words, promises, or gifts, and married in a secret way to their disparagement. But that no such thing appeared in this case; for that Dr. Hascard proved the marriage to be at St. Clement's Church, in a canonical hour, and that many people were present, and the church doors open all the time. 3 Mod. 84. Mich. 1 Jac. 2. B. R. Hicks v. Gore.—This clause refers only to the third branch, and not to the first or second. 3 Rep. 39. in a note of the reporters in Ratcliff's case.

See the case of the King v. Bastian supra.

S. 7. *Provided that this act shall not be prejudicial to any custom or authority concerning orphans in London, or any other city, borough or town.*

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[It seems that this was a ward, under care of the court.]

2. A person, having married an infant (ward,) was committed, and that commitment was followed by an act of parliament to dissolve the marriage. 2 Wms's Rep. 112. Hill. 1722. cited per Lords Commissioners, as so done in Lord Sommers's time in case of Goodwin and Mrs. Knight.

—And though an order of Chancery has no words prohibiting the marrying an infant without consent of the guardian; yet such prohibition is implied; and so is also, that no person shall take away, or ravish this ward from the guardian; and such negative words are never inserted in the order; per Lords Commissioners. 2 Wms's Rep. 113. Hill. 1722. Eyre v. Lady Shaftsbury.

S. C. cited by Ld. C. Talbot. Mich. 1734. Equ. cases in Ld. Talbot's time. 50. in Lord Raymond's case.—

3. So where an infant was taken from a guardian appointed by the father, and not assigned by the court, and married to W. both W. and the parson and the agents were all committed by the Master of the Rolls, and the order confirmed by Ld. Harcourt. 2 Wm's Rep. 112. cited per Lds. Commissioners, ut sup.—and in Marg. it is cited as 22 May, 12 Annæ, Hannes v. Waugh, als. Willis's case.

\* And the same would have been done in the case of HUGHES v. SCIENCE, & al. Hill. Vac. 1740. but that it did not appear in that cause, that Williams the clergyman, who married the infant to Science, was at all a party to the contrivance, and so had not incurred the censure of the court; whereas had he been privy thereto, the licence would not have protected him.

Vid. (P. 4)

4. So if there be only an apprehension, that the infant will be married unequally, either by the guardian, or by his neglect, equity will interpose; per Lord Commissioners. 2 Wms's Rep. 112.

—Sowhere an infant heir was but 17 years old and was about to contract matrimony; though there appeared no inequality of fortune or family, yet upon application to the Chancery, the court assisted the testamentary guardian

guardian to prevent the marriage as improper, by reason of the age. Cases in Equ. in Ld. C. Talbot's time. 58. Mich. 1734. Ld. Raymond's case.

5. *And though a marriage be to one of equal degree and fortune, yet it being without consent of the guardian, constitutes the offence, and can at most but tend to extenuate; per Lds. Commissioners. 2 Wms's Rep. 114. Eyre v. Lady Shaftsbury.*

S. C. cited by Ld. C. Talbot. Mich. 1734. Cases in Equ. in Ld.

C. Talbot's time. 59. in Ld. Raymond's case.——S. C. cited by the court, and the marriage being by contrivance of the mother of the infant, pending a suit in Chancery, the court committed the parties to the contrivance, and ordered a *sequestration against the Lady Shaftsbury*, 20 March, 1740, in case of Hughes v. Science & al.

6. The mother took away the infant from two, who, supposing that they were guardians, complained thereof to the court of chancery, and their complaint was received. And the court would have proceeded against the mother, but the guardians could not make out their right of guardianship, by reason of some defect in the instrument under which they claimed; cited per Lords Commissioners. 2 Wms's Rep. 115. cites Ld. Selkirk and Orkney v. Dutchess of Hamilton.

## (A) Guernsey, Jersey, and the Isle of Man.

1. GUERNSEY, Jersey, and the Isle of Man, are governed by their proper laws. If an erroneous judgment be given there, a writ of error lies not here. Jenk. 199. pl. 15.

2. The Isle of Man is governed by it's own laws made there, and not by laws here in England, unless by act of parliament, which ordains a law expressly for them. 2 And. 116. in the E. of Derby's case.

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S. P. 4 Inst. 287.

3. In the Isle of Man no one has any inheritance there, besides the Ld. Derby and the Bishop. 2 And. 116. in the E. of Derby's case.

4. Albeit the king's writ runneth not into the Isle of Man, yet the king's commission extendeth thither for redress of injustice and wrong; but the commissioners must proceed according to law and justice of the Isle. 4 Inst. 285.

So as to the isles of Guernsey and Jersey. 4 Inst. 286.

5. They have peculiar laws or customs, viz. If a man steal an horse or an ox, it is no felony; for the offender cannot hide them; but if he steal a capon or a pig, he shall be hanged, &c. Ibid.

6. The king has right to a manor in the Isle of Guernsey, which A. holds; a commission issues out of the Chancery to enquire of this. If it be so found, the king shall be put in possession of it without any original writ. Judgment affirmed in error. Jenk. 8. pl. 14.

## Gun.

## (A) Who may not keep Guns, and the Punishment of Offenders, and by whom.

J. S. being constituted special bailiff to serve an execution in debt on a

1. 33 H. 8. ENACTS that none shall shoot in, or use to keep in his house, a hand-gun, crossbow, bagbut, or demibake, unless his lands are of the value of 100l. a year, in pain to forfeit 10l. for every such offence.

judgment, and fearing a rescous, carried with him a dagg; whereupon the defendant, being a justice of P. made one of his servants go and search him, and finding him armed brought him before his master, being the next J. of P. who by colour thereof committed him to gaol, 'till he paid 10l. But on a hab. corp. it was held no offence for a sheriff or his ministers in execution of their office to carry such a hand-gun, and that it was lawful, and that a dagg was a hand gun within this statute. Cro. E. 821. Gardener's case.—5 Rep. 71. b. Trin. 34 Eliz. Saintjohn's case, als. Gardiner v. St. John's. S. C.

S. 2, &c. Howbeit the followers of lords spiritual or temporal, knights, esquires, gentlemen, and the inhabitants of cities, boroughs, or market towns, may keep in their houses, and use to shoot (but at a dead mark only) with any hand gun of the length of one yard, or bagbut, or demibake of 3 quarters of a yard; so may the owner of a ship, for the defence of his ship, and also he that dwells two furlongs distant from a town, or within five miles from the sea-coast. And this last may shoot at any wild beast or fowl, save only deer, heron, shoulard, partridge, wild swan, or wild elke.

S. 5. None may licence his servant to shoot, except his game-keeper, on pain of 10l.

All former laws against shooting repealed.

S. 12. 13. Gunsmiths or merchants, may keep guns by them, observing the lengths abovesaid.

S. 14. Proclamation to issue before an offender can be punished.

S. 15. Owner of the gun to forfeit, and not the master of the house.

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The defendant, not having 100l. a year, did shoot in a

S. 16. It shall be lawful for any person, to convey the person offending against this act before the next justice of peace; who, upon due examination and proof, shall have power to commit him to prison, there to remain 'till he has satisfied the penalty, which in this case shall be divided between the king and the party that so takes the offender.

gun in Feb. and in March following was carried before a J. of P. and by him convicted of this offence. It was moved, to quash this conviction, because it was before a single justice, who had not power by the statute to proceed in a summary way, unless the party is brought before him instantly upon view of the offence committed, which was not done in this case, and therefore was ordered to shew cause why it should not be quashed. 4 Mod. 147, 148. Trin. 4 W. & M. The King v. Bullock.—1 Show. 367. Trin. 4 W. & M. S. P. The King v. Litten.

An indictment will lie on this statute before the sessions,

S. 19. Justices of peace in their sessions, and stewards of leets, have power to hear and determine these offences.

though this hath been formerly doubted; because, though the justices have power

power by the general words of their commission to punish offence against the peace, yet *shooting* is not such an offence; for it is only a defect of the qualification of the person who shoots in a gun. Dalton's Just. cap. 47. pag. 143.

S. 20. Penalty of 20 s. apiece on juries concealing offenders.

S. 22. Forfeitures arising by this act shall be sued for within one year by the king, and within six months by a common person, otherwise they shall be lost.

S. 24. Saving for servants carrying guns by their masters orders.

2. S. was convicted of shooting in a gun contrary to this statute, and committed to gaol; and upon hab. corp. exceptions were taken to the return.—1st. That the caption is taken before J. S. and J. N. *ad pacem conservandam*, without saying, (justices) and so by what appears there may be constables.—2dly, That it appears to be conviction by oath where the statute says (proof and examination) which must be intended by jury.—3dly, That it does not appear, that it was before the next justices as it ought to be.—4thly, Nor that the statute had been proclaimed in the same county, whereas there is an express provision in the statute, that none shall be punished before it is proclaimed, which Twisden J. said, ought to appear in the return, (though the statute perhaps was proclaimed 100 years since.) 1 Sid. 419. no judgment. Trin. 21 Car. 2. B. R. The King v. Saunders.

1 Saund. 263. S. C. says, that it was quashed for the exception, that the conviction was said to be coram T. B. & G. B. A. duobus Justic. domini regis ad pacem in com. prædicto conservand. But

that the word \* (assign) was omitted. For it ought to have been conservand. assignatis. And so it does not appear, whether the said justices were assigned to keep the peace or not.—The reporter adds a nota, that the conviction was before two justices of P. but the statute gives authority to one justice alone, being the next justice of the county where the offence is committed, to commit the offender for the forfeiture, but that here it does not appear whether either of the said 2 justices was the next justice or not, which was another exception intended to be moved, but the conviction being quashed for the exception aforesaid, this exception was not moved, and that he was of counsel with the defendant.—\* Vent. 39. S. C. and P.

Vent. 33. Anon. but S. C. reports, that as to the words (upon due examination and proof before a justice of P.) it was resolved, that that was not intended by a jury but by witnesses, and that no writ of error lies upon such conviction.

And that an exception was taken, because it was coram J. S. justice of the peace, without adding nec non ad diversas felonias transgressionem, &c. audiend. assignat. and that the court agreed it ought so to be in returns upon certioraries to remove indictments taken at sessions, but otherwise of convictions of this nature; for it is known to the court that the statute gives them authority in this case. Vent. 33. Trin. 21 Car. 2. Anon.

3. A person being brought before the next justice of peace, in the county where, &c. for shooting with hail shot in a hand-gun, who, upon examination, finding it true made a record thereof, and committed the party to prison, 'till he should pay 10 l. viz. 5 l. to the informer, and 5 l. to the king. This record being certified upon an habeas corpus, it was held by the whole court, that if the justice of peace does not observe the form prescribed by the statute, it is void & coram non judice, and needs no writ of error; but if he acts according to the statute, then neither B. R. nor justices of peace, can redress it, or set the party at large. Jo. 170. Hill. 3 Car. B. R. Cole's case.

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4. The judgment on an indictment upon this statute was, that the defendant solvet dicto domino regi, &c. decem librarum, &c. where the words should have been solvat instead of solvet, and libras instead of librarum, and for those and other reasons the judgment was reversed. Raym. 378. Trin. 32 Car. 2. B. R. The King v. Allop.



5. The *conviction* was for having a gun in his house, and this being excepted to, because the *statute* is, (*use to keep in his or her house*) and perhaps it might be lent him, and the words of the statute ought to be pursued, so the conviction was quashed. 1 Show. 48. Trin. 1 W. & M. The King v. Lewellin.

So where the indictment was *non habens terras, &c.* Exception was taken, that it referred to the time of the indictment, and not to the shooting; the judgment for that and other reasons was reversed. Raym. 378. Trin. 32 Car. 2. B. R. the King v. Alsop.—\* Vid. 4 Mod. 51. in case of the King v. Alsop.

6. The conviction was *non habuisset 100 l. per annum*, and did not say *when*; and this was excepted to, because it may be, that he had 100 l. a year at the time when he kept a gun, but not when he was convicted; to which it was answered, that those words were as much as to say, *nunquam habuit*, and the conclusion being \* *contra formam statuti*, must explain such words which seem to be doubtful. But per Cur. this being a conviction before a justice of peace, the time when the offence was committed should be certainly alleged, viz. that the defendant *prædict' die & anno* had not 100 l. *per annum*, and for that reason it was quashed. 3 Mod. 280. Pasch. 2 W. & M. The King v. Silcot.

This statute is repealed by 6 & 7 W. 3. cap. 13.

7. 2 & 3 E. 6. cap. 14. *Prohibited shooting with hail shot.*

Show. 339. S. C. but reports the word of the judgment to have been *forisfecit*, instead of *forisfaciat*.

8. In an indictment on the statute of 2 & 3 E. 6. 14. of shooting with hail shot, the judgment was, *quod forisfaceat, &c.* where it should be *forisfaciat, &c.* But the court would not quash the conviction upon this exception. 4 Mod. 49. Mich. 3 & 4 W. & M. B. R. The King v. Alsop.

Show. 339. S. C. and says, that the judgment was reversed.—But according to 4 Mod. 51. S. C. the reasons of the reversal were given by Holt Ch. J. because the conviction was before justices of the peace, whereas, upon this act of 2 and 3 E. 6. 14. the peace is in no wise concerned; because the offence thereby created is for want of due qualification of the person to shoot, which is not an offence against the peace. And this cannot be an indictment upon the statute of 33 H. 8. because they do not set forth the length of the gun, which by that law ought to be a yard long; and therefore the general conclusion, *contra formam statuti*, will not help it; and for these reasons the indictment was quashed. But it was agreed, that the party might be indicted for this offence before the justices of oyer and terminer, but not before justices of peace for want of jurisdiction.

9. Another exception was taken, that the indictment was, that the defendant *did shoot conies in Colden Wood, but it doth not appear where he stood when he shot, which may be in several vills*, and that the shooting being the offence, it must be certainly laid, so that upon this indictment there can be no issue. But the court would not quash the indictment upon this exception, nor upon this and the former exception. 4 Mod. 49, 50. Mich. 3 W. & M. B. R. The King v. Alsop.

10. Another exception was taken that there was no *vi & armis*, sed *non allocatur*; for it is needless. Show. 339. S. C.

11. 3 Jac. 1. cap. 13. §. 5. Enacts that persons using guns, &c. to kill deer, or conies, not having 40 l. per annum, or 200 l. &c. may have them taken from them by any one having 100 l. per ann.

12. By 22 & 23 Car. 2. cap. 25. §. 3. Persons not having 100 l. per ann. for life, or 150 l. per ann. for a term of 99 years, are disabled to keep guns, dogs, or nets.

S. 9. Persons



S. 9. *Persons aggrieved by any judgment, by virtue of this act, may appeal to the next quarter sessions, whose order shall be final, if no title to any land, royalty or fishery be therein concerned.*

## Habeas Corpus.

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(A) Habeas Corpus cum Causa *ad Subjiciendum.* Fol. 69.

\* *To whom it may be directed, and by whom.*

\* Vid.  
(E. 2)

[ 1. ] It seems that the king has supreme power over all courts, within the dominions of the king, delegated by the king, and therefore if any man be imprisoned by any, a corpus cum causa may be granted to them who imprisoned him; for the \* king ought to have an account given to him of the liberty of his subjects, and of the restraint of it. P. 3 Ja. B. R. Resolved per Curiam between *Wetherly* and *Wetherly*. . . . Tr. 5 Ja. B. R. Resolved per Curiam, in case of *Omer v. Manfel.* ]

This writ is a prerogative writ, which concerns the king's justice to be administered to his subjects, and it is

agreeable to all persons and places, and no answer can satisfy it but to return the cause with *paratum habeo corpus*, &c. Cro. J. 543. in *Bourn's* case. — \* Cro. J. 543. in *Bourn's* case.

[ 2. If a man be imprisoned by the counsel of the marches of *Wales*, B. R. may award a corpus cum causa to remove him, and this ought to be obeyed. P. 3 Jac. B. R. between *Wetherley* and *Wetherley*, adjudged upon great controversy between the said courts, and upon award of the king himself accordingly. ]

3. It shall always be directed to him that has the custody of the body. Godb. 44. Pl. 52. Anon. — It lies to any person, as well as to the gaoler; per Holt Ch. J. 5 Mod. 21. in case of the King v. *Bethell*.

4. 31 Car. 2. cap. 2. s. 11. *Writs of habeas corpus shall run into any liberties, and into the counties palatine, the cinque ports, Wales, Berwick, Guernsey and Jersey.*

So it was to *Berwick*, though it was pre-

tended that the king's writ ran not there, as being part of Scotland and not of England, and an exempted jurisdiction after it was annexed to the crown of England, cited Cro. J. 543. as 43 Eliz. *Browley's* case.

So a hab. corp. was directed to the Governour of *Jersey*, to bring hither the body of O. who had been prisoner there several years. Sid. 186. The King v. *Overton*.

It has been awarded to *Calais*, and all other places within the kingdom. Cro. J. 543. in *Bourn's* case.

One was imprisoned at *Dover* by the lord warden of the cinque ports, because he took anchor and cable as wreck, in the liberty of the rape of *Hastings* which the lord warden pretended to be within the liberty of the rape of *Hastings*, and to appertain to him, because he hath the jurisdiction of the admiralty there, and he being for 23 weeks imprisoned there, a hab. corp. was granted, to remove the body cum causa. And because the lord warden refused to obey it, a habeas corpus, with a great \* penalty, was awarded returnable at another day. M. 17 Jac. B. R. Cro. J. 543. Rd. *Bourn's* case. — \* See (E. 2) *Jobson's* case.

So one was brought up by hab. corp. out of the cinque ports, upon an information for breaking prison where he was in upon an execution for debt, and it was allowed. Mich. 21 Car. 2. 1 Mod. 20. pl. 52. Anon.

It lies to the cinque ports, *ad faciendum & subjiciendum*, but not *ad faciendum & recipiendum*. Sid. 431. pl. 21. Mich. 21 Car. 2. B. R. Anon.

5. Habeas corpus was granted to the *County Palatine* of Chester, but afterwards superseded on motion, two precedents being cited. 1 Salk. 354. Mich. 4 Annæ, Anon.

(B) Habeas Corpus cum Causa, *ad faciendum & Recipiendum*. [In what Cases] and to what Courts.

† Orig. (que est la ley de cest lieu)—

\* Cro. C. 486. S. C. by the name of Bower, and Ux. v. Cooper.—A procedendo was denied by the whole court; for such custom to maintain action for such brawling words is against law. 4 Rep. 18. a. pl. 13. Oxford v. Cross.

So where the words

were, that she was an *arrant whore*, and went from chamber to chamber playing the whore, a procedendo was denied. Hill. 9 Car. 1. Cro. C. 350. Hart's case.

But notwithstanding Oxford's case. 4 Rep. 18. a. a procedendo was granted, and there it was said and agreed by the Ch. J. and Mallet J. that of late times there had many procedendos been granted in the like case in B. R. Mar. 107. Trin. 17 Car. Anon.—So it was allowed. Carth. 75. Mich. 1 W. & M. B. R. Watson v. Clerk.

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[ 1. ] If an action be brought in London for these words, *thou art a whore, and my husband's whore*, this ought not to be removed by habeas corpus. For at common law, no action lies for those † words, but in London action lies, (as is pretended) by the custom of the city, for the same words, because they use by the custom of the city to cart whores, and for such words, a suit may be in the ecclesiastical court, and no prohibition lies, and therefore this may be a good custom in London, and convenient for them, † that it is the law of the place. But if he be *dubious whether it be a good custom*, it is better not to remove it; for if it be removed, it is final, and no writ of error nor appeal lies upon it, but the party is without further remedy. But if they proceed upon this in London, and a judgment is given upon it, a writ of error lies in the hustings by commission, and so the party may have a legal remedy. Trin. 1650. between Penton and Harrison, per Curiam adjudged, and a procedendo granted accordingly. M. 13 Car. B. R. between \* Barvoize and his wife plaintiffs, and Cooper defendant. A procedendo granted per Curiam, except Barkley, where the words were, *Thou art a whore, and will play the whore for two pence*. And another judgment was vouched Trin. 8 Car. B. R. between Bond and Watson. Contra. 4 Rep. Oxford. ]

2. 21 Jac. 1. cap. 23. §. 4. When the thing in demand exceeds not 5l. the suit shall not be removed by any writ, save only by writs of error or attain.

The privilege of the cinque

3. Habeas corpus ad faciendum & recipiendum lies to the Cinque Ports. Sid. 431. pl. 21. Anon.

ports, that the king's writ runs not there, is to be intended between party and party. Cro. J. 543. in Bourn's case.—A corpus cum causa to remove the plaintiff out of the cinque ports, Toth. 216. cites Pasch. 4 & 5 El. Blackley v. Laneston.

(B. 2) The several Sorts.

1. A N habeas corpus *ad respondendum* is when any one is imprisoned at the suit of another, upon a legal process in the Fleet or any other prison except the King's Bench prison, and a third person

person would sue that prisoner in the court of B. R. and cannot, because he is not in custody of the marshal of this court. There he may have an habeas corpus to remove the prisoner out of the prison, where he is, into this court, returnable at a day certain, to answer unto this action here; and for that cause *it is called* habeas corpus ad respondendum, *because he is to answer the party's action*; also, where a person is in custody in an inferior jurisdiction, the plaintiff may bring his habeas corpus ad respondendum returnable in this court; and then the defendant cannot non-suit the plaintiff, nor be bailed, but only by the court of B. R. or be committed to the custody of the marshal. 2 L. P. R. 4.

2. There are *three sorts* of habeas corpus's in C. B. 1. A habeas corpus *ad respondendum*, and that is, when a man hath a cause of suit against one that is in prison, he may bring him up hither by habeas corpus, and charge him with a declaration at his own suit. 2. There is a habeas corpus *ad faciendum & recipiendum*, and this defendants may have that are sued in courts below, to remove their causes before us. Both these habeas corpus's are with relation to the suits properly belonging to the court of C. B. So if an inferior court will proceed against the law, in a thing of which C. B. has cognizance, and commit a man, C. B. may discharge him upon habeas corpus. 3. A third sort of habeas corpus is *for privileged persons*. But a habeas corpus *ad subjiciendum* is not warranted by any precedents that I have seen; per North. Hill. 28 & 29 Car. 2. in C. B. 1 Mod. 235. pl. 23. Anon.

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3. 2. L. P. R. 2. takes notice of a habeas corpus *ad satisfaciendum*. See (F)

(B. 3) Good or not. And Quashed for what.

1. **A** Habeas corpus, being *directed to the sheriff or gaoler* in the *disjunctive*, was held to be wrong, and that all the precedents were otherwise, and therefore the writ was quashed. 1 Salk. 350. The King v. Fowler.

(C) \* *What it is, and how granted, and † by whom.* See \* (B. 2) — † (A.)

1. 1 & 2 P. & M. cap. 13. §. 7. *Habeas corpus must be signed by a judge.*

2. This is a *prerogative writ* which concerns the king's justice to be administered to his subjects; for he ought to have account why any of his subjects are imprisoned, and it is agreeable to all persons and places, per Montague Ch. J. Cro. J. 543. in Bourn's case.

3. All habeas corpus's in C. B. are *ad faciendum & recipiendum*, and they *issue of course and without motion*. But otherwise in B. R. for they are *ad subjiciendum*, which are in criminal causes, and not to be granted without motion; per the Ch. J. Pasch. 30 Car. 2. C. B. 2 Mod. 306. Penrice and Wynn's case.

4. Where

4. Where the party is committed for a *crime*, there must be a *motion* for the habeas corpus; but for the bringing in the body of a *feme covert arrested*, and committed with her baron in order to discharge the feme, it may be had without motion. Lev. 1. Mich. 12 Car. 2. B. R. Slater v. Slater & Ux.

And it is now the most usual remedy by

5. Habeas Corpus is a writ which lies to bring the body of the person into court, who is committed to any gaol either in civil or criminal causes. 2 L. P. R. 1.

which a man is restored again to his liberty, if he has been against law deprived of it. Vaugh. 136. in Bushell's case.——An habeas corpus and *certiorari* is a writ of right, the highest writ the party can bring, and is in the nature of a writ of error; per Hale Ch. J. 1 Mod. 119. Anon.——But seems to be the case of Hammond v. Howell.

6. A habeas may be granted by the court of B. R. or by a single judge at his chamber, to any private person, who keeps another in his house, or elsewhere, in custody against his will, by virtue of the habeas corpus act. 2 L. P. R. 2.

7. By Newdigate justice, Trin. 1659. If a habeas corpus be granted, to give liberty to a prisoner that lies in prison upon an execution *longer than for one day*; this is not according to law. 2 L. P. R. 3.

8. The court *useth not to put the reason* into a habeas corpus, why they send for the prisoner; for it may be for treason or great conspiracy. By Catline J. 2 L. P. R. 3.

### (C. 2) By what Court granted.

Contra by him, if he be impleaded by plaintiff; Brook makes a

*quare* if this \* [212]

C. B. may grant habeas corpus for persons

not within the privilege of the court; per 3 Justices contra Vaughan Ch. J. 2 Jo. 13. Bushell's case.

1. **I**F a man be impleaded in C. B. and be imprisoned in the Marshalsea, upon suit in B. R.—C. B. shall send for him to the marshal, and he shall bring him, and when he has made answer he shall be remanded; and this \* where he is impleaded by writ, Br. Imprisonment, pl. 28. cites 38 H. 6. 30. per Prisot.

suit by writ or plaintiff shall be intended of the suit in B. R. or of the suit in C. B. Ibid.

2. A man may have an habeas corpus out of B. R. or chancery though there be no privilege, &c. or in the court of C. B. or the exchequer for any officer or privileged person there. 2 Inst. 55.

3. Habeas corpus is *not an original writ*, and if it be in the nature of a judicial writ, there must be a cause for it. C. B. may grant an habeas corpus, but it is more natural for B. R. to do it, not in point of right, but consequence; for if we send one, and it be a criminal cause we can proceed no farther, but remand it. But B. R. may try it, if it be returned for felony, &c. per Vaughan Ch. J. to which Wild J. said, that in Q. Elizabeth's time, one court granted it as well as the other, and thought that in the principal case they could not deny it, salvo juramento; but Vaughan answered, that they would find none in C. B. more ancient than Q. Elizabeth's time. The other three justices however granted the habeas corpus, which was for one imprisoned for contumacy, for not

not paying tithes, upon a certificate by the bishop, according to 27 H. 8. 20. Cart. 221. Pasch. 23 Car. 2. Anon.

4. The court of C. B. said, that they had often directed that no habeas corpus should be moved for in that court, except it concerned a *civil cause*. Because, when the party is brought in, and the cause shewn, C. B. cannot proceed upon it, and therefore the proper place for them is B. R. but they permitted it in the principal case, (though it was a *commitment for abetting, &c. his majesty's subjects to the disobedience of his laws, and abetting, &c. such as meet in seditious, &c. conventicles, contrary to the form of the statute, &c.*) because the party was an attorney of that court. 2 Vent. 22. 24. Trin. 22 Car. 2. C. B. Rudyard's case.

(D) In what Cases.

1. **H A B E A S** corpus lies of *plea*, which is in court of record. Br. Privilege, pl. 5. cites 9 H. 6. 58.

2. A *sheriff* was committed to the Fleet by the Barons of the Exchequer for an *amercement*, put upon him of 40*l.* for a *false return*, and the king pardoned him and he had special writ out of chancery into B. R. in nature of aud. quer. and therefore the justices of B. R. sent for him by writ of habeas corpus. Quod Nota. Br. Privilege, pl. 27. cites 36 H. 6. 21.

3. One was arrested by warrant of the peace by a justice of peace of Middlesex, and sent to Newgate, (which is the prison for London, and also for Middlesex,) and *plaint* was affirmed against him in London for debt, to which he answered, and after brought corpus cum causa, alleging that suit was by covin; and by the Chancellor, Needham, Choke and all the court, the prisoner shall be dismissed, because he was imprisoned for Middlesex, and not for London, and therefore, though this prison serves as well for London as Middlesex, yet when he is imprisoned in Middlesex, *plaint* cannot be taken against him in London; for if a sheriff of London arrests a man in London by *capias* directed to the sheriffs of Middlesex, writ of false imprisonment lies against him. Br. Privilege, pl. 44. cites 16 E. 4. 5.

Br. Imprisonment, pl. 104. cites 16 E. 4. 6.—Br. Plaint, pl. 24. cites S.C.

4. A *prohibition* was granted to the admiralty and delivered by one G. to the judge of that court when he was hearing of a cause, who commanded him to call a register, which G. refusing to do, the judge again commanded him to do it, and G. said that he would not, because he was not so commanded to do by the writ; therefore the judge committed the said G. to prison. G. made affidavit thereof, and prayed an habeas corpus, which was granted. Coke thought it was not sufficient cause to imprison him for refusal and so the prisoner was delivered. Roll. R. 315. 316. Hill. 13 Jac. B. R. Bruistone v. Baker.

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5. It is not the usage of the court of B. R. to deliver one committed by the decree of one of the courts of justice, and therefore the prisoner was remanded. Cro. C. 168. Mich. 5 Car. B. R. in Chambers's case.

Cro. C. 579. S. P. Anon.

6. A prisoner *attainted for felony*, (viz. for horse-stealing) was brought to the bar of B. R. from St. Albans by habeas corpus and certiorari. And it was demanded of him, what he could say why execution should not be done upon the indictment; and because he could not shew good cause to stay the execution, he was committed to the marshall, who was commanded to do execution. And he was hanged the next day. Cro. C. 176. Mich. 5 Car. B. R. R. C.'s case.

7. If the sheriff arrests a man upon process, and lets him to bail, and after returns a *cepi corpus*, and then a habeas corpus comes to the sheriff to remove the body, the sheriff cannot justify the retaking of him upon this writ, after he had let him to bail before; but he ought to aid himself upon the bail. Mich. 10 Car. B. R. between LAY and STRUT, per Curiam in an action of false imprisonment upon such retaking. See Trespas (C. a) pl. 1.

8. It was granted to the prisoners in the King's Bench and Fleet, in regard to the pestilence increasing in London, and the places adjacent. Hill. 11 Car. B. R. Cro. C. 466.

9. A habeas corpus was granted to bring up a person arrested by a *latitat* out of B. R. and who was carried to a town in the same county, where the arrest was, and there arrested by a *serjeant of the town*, by a writ out of the corporation, where the plaintiff proceeded against him upon that writ, and not upon the *latitat*; and this being a contempt, an attachment also was granted. Sti. 239. Mich. 1650. B. R. Brian v. Stone.

It was granted, but to be at

10. A habeas corpus was denied for a prisoner to have him for a witness at the assizes; by the court. Trin. 1657. 2 L. P. R. 3. the peril and charge of the party. Sti. 230. Trin. 1650. B. R. Treton v. Squire.—It was denied to bring up one in execution to be a witness, because it seems to be an escape. Comb. 17. Pasch. 2 Jac. 2. B. R. Anon.—A habeas corpus ad testificandum is grantable for one in prison on *mesne process*, but not if he be in execution. Comb. 48. Pasch. 3 Jac. 2. B. R. Anon.

11. At common law if the sheriff had arrested any man by the king's writ, he could not be delivered but by a *homine replegiando*. 2 Saund. 60. Hill. 21 & 22 Car. 2. B. R. in case of Postern v. Hanson.

12. J. S. a parson libels for tithes against J. D. he is certified *contumax*; the bishop, according to 27 H. 8. cap. 20. certifies to two justices to imprison him without bail or mainprise. They do so. It was moved for an habeas corpus in C. B. and it was granted by three justices, but the Ch. Justice was against it; because it was more properly grantable by the King's Bench. Cart. 221. Pasch. 23 Car. 2. C. B. Anon.

13. The 12 Car. 2. 23. of excise, prohibits the bringing a certiorari, but not a habeas corpus. 1 Mod. 102, 103. pl. 10. Mich. 25 Car. 2. B. R. Anon.

14. Two persons were committed to the Poultry Compter by commissioners of bankrupts for refusing to be examined and sworn touching their knowledge of the bankrupt's estate. The process against them in C. B. was an attachment of privilege, which was a civil plea; and on a motion for a habeas corpus, the Ch. J. said, that it might



might be granted without motion; because all the habeas corpus's in that court were *ad faciendum & recipiendum*, and they issue of course. 2 Mod. 306. Pasch. 30 Car. 2. C. B. Penrice and Wynn's case.

15. Habeas corpus was denied, on *suggestion* that the party was *detained by a private person*. Cumb. 35. Mich. 2 Jac. 2. B. R. Anon. [ 214 ]

16. Habeas corpus was denied for one committed to *Bridewell for lewdness*. Cumb. 74. Hill. 3 & 4 Jac. 2. B. R. Anon.

17. None ought to take out a habeas corpus for a prisoner *without his consent*. Trin. 23 Car. B. R. unless it be *to turn him over to the King's Bench, or charge him with an action* in court. 2 L. P. R. 2.

18. Before Bushell's case no man was ever delivered by habeas corpus, *without writ of error* delivered, from a *commitment of a court of oyer and terminer*; per Cur. 1 Salk. 348. Trin. 7 W. 3. B. R. in Bethel's case.

19. Whether commitment by either house of parliament be within the habeas corpus act. See 12 Mod. 606. Mich. 13 W. 3. B. R. Paulhill v. Powell.

20. A person was committed by the *Admiralty* in execution upon a sentence, and a habeas corpus issued to bring him into B. R. *ad respondendum* to an action to be brought against him; it was moved upon the return to commit the defendant here, because there was no other way to sue him; for that he was not chargeable in the admiralty, and that there was no other way to sue him, and so there would be a failure of justice; to which Holt Ch. J. said, that this was new, and that though the proceeding in the admiralty was by the civil law, yet it was supported by the custom of the realm, and this court must not elude their process; and enquiring into the action, and thinking it only a pretence, he said, there being *no action pending in B. R.* they ought not to commit him, and the plaintiff could not declare against him till in custody; otherwise, if an action had been depending, and so the defendant was remanded. 1 Salk. 351. Trin. 1 Annæ, B. R. Keach's case.

21. The *defendant was out on bail* in an action in B. R. and *was taken on an extent at the queen's suit*; the bail brought him upon a habeas corpus, and prayed he might be committed to the marshal in discharge of his bail; and notwithstanding great opposition was made by the attorney general, he was turned over, because the action here was precedent to the queen's extent. 1 Salk. 353. Mich. 3 Annæ, B. R. French's case.

22. The *defendant pending an action against him in B. R. was taken upon a warrant in a criminal matter*, and committed to the Compter, and afterwards was there *charged with an extent for the queen*; and he was brought up by habeas corpus at the suit of the plaintiff in the action, in order to be declared against in custody of the marshal, and Mr. Attorney General opposed it; because the custody of the marshal was precarious, and he would let him escape as he did French; and this case differed from that, because by the late

late act of parliament the plaintiff might declare against him in custodia vicecomitis, whereas the bail had been without remedy if French had not been committed; and as to the defendant's being arrested on criminal process, that was nothing; for though one so arrested cannot be charged at the suit of a subject in any action, without leave of the court, yet the queen may charge him. And the defendant was remanded. 1 Salk. 353, 354. Mich. 4 Annæ B. R. Crackall v. Thomson.

23. Though a habeas corpus be a writ of right, yet where it is to *abate a rightful suit*, the court may *refuse* it. 1 Salk. 8. Mich. 6 Annæ, B. R. Hetherington v. Reynolds.

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24. *Husband and wife* agreed to *live separate*, and he being willing afterwards to be reconciled to her, she refused; whereupon *he and an assistant* forced her into a coach as she was coming from church on a Sunday, and *carried her into the Mint*. She being brought into court by habeas corpus, it was moved that the court would not interpose between husband and wife, &c. But the court discharged her out of her husband's custody, upon her desiring to be so, and held, that the agreement to live separate, shall bind both till they both agree to cohabit again. 8 Mod. 22. Mich. 7 Geo. Lister's case. — alias Lady Rawleigh's case.

25. If a person appear to be *imprisoned for an excommunication* in a cause of which the spiritual court hath no consueance, he may be delivered either upon a habeas corpus, or by quashing or superseding the writ of excommunicato capiendo. 2 Hawk. Pl. C. 98. cap. 15. l. 40.

See (C. 2)  
Rudyard's  
case.

### (D. 2) In what Cases; *In respect of Privilege.*

1. *A commission* being granted to *examine the right of the office of exigenter of London*, which belonged to the Chief Justice, and by him was granted to Scroggs; and a bill thereupon exhibited against him before the commissioners, Scroggs *demurred upon their jurisdiction*, and would not answer, for which they committed him to the Fleet; but in that case the justices of the Common Pleas granted him a habeas corpus, because he was a necessary minister to the court. Hughe's Abr. 473. pl. 2. cites Mich. 2 Eliz. D. 175. Scroggs v. Colehill.

2. The defendant coming to *execute a commission* was arrested, and had a corpus cum causa, and set him at liberty. Toth. 218. cites Trin. 23 Eliz. Jackson v. Vaughan.

3. *So* the plaintiff, having a writ of privilege, was taken in execution, and ordered to go abroad by habeas corpus, and the party that arrested him to be committed. Toth. 219. cites Hill. 17 or 18 Jac. Morgan v. Richardson.

2 Keb. 50.  
& 54. S. C.  
City of  
London v.  
Swallow.

4. S. was *elected alderman* of London, and being summoned by the court of *aldermen* into court, he there *refused to take the oath*, wherefore they committed him to gaol, and upon habeas corpus they returned the custom of London, &c. But he was discharged by the privilege of being *mint-master*. Sid. 287. Trin. 18 Car. 2. B. R. Swallow v. the City of London.

(D. 3) Directed

(D. 3) *Directed to whom, ad Faciendum, &c.*

1. **T**HE habeas corpus shall always be directed *to him who hath the custody of the body.* Godb. 44. pl. 52. Mich. 28 & 29 Eliz. B. R. Anon.

2. *Therefore* where it was directed *to the mayor, bailiffs, and burgeses*, an exception was taken, because the pleas were holden before the mayor, bailiffs and steward; but the exception was disallowed; but otherwise it is in a writ of error, for that shall be directed to those before whom the judgment was given. Godb. 44. pl. 52. cites Wickham's case.

3. *And in London* it shall be directed *majori & vicecomitibus London*, because they have the custody, and not the whole corporation. Godb. 44. pl. 52.——But the reporter says, he conceives that the course is, that the writ be directed *majori, aldermanis, & vicecomitibus, &c.* Ibid.

(E) *At what Time granted and allowed.*

1. **H**A B E A S corpus was allowed *after the body was in execution*, but he was not dismissed, but was *sent to the Fleet and had aud. quer.* Quod nota. B. R. Privilege, pl. 49. cites 22 H. 6.

2. By 43 El. cap. 5. *No writ of habeas corpus, or \* other writ to remove a cause out of an inferior court shall be allowed, except the same be delivered to the judge of the court, before the jury who are to try the cause have appeared, and one of the jury be sworn.*

3. By 21 Jac. 1. cap. 23. *No writ, to remove a suit commenced in an inferior court of record, shall be obeyed, unless delivered to the steward of the court before issue or demurrer joined, so as the said issue or demurrer be not joined within six weeks after the arrest or appearance of the defendant.*

thing complained of there is not that the writs were used, when in truth they did not lie, but that an abuse was made of them, viz. that they were brought after trial; and therefore it provides, that no certiorari or habeas corpus shall be brought or allowed, unless it be delivered before the jury sworn. And again, the stat of 21 Jac. 1. cap. 23. takes notice of certiorari, and only complains of the oppressive manner of using them, viz. after the party had proceeded a considerable way below, and likewise where the certiorari or habeas corpus is not delivered before issue joined, so that it be not joined in six weeks after, &c. both which statutes shew this writ was lawful, but abused, and the abuses are only cured; and if the writ were not legal, the parliament would have condemned it as well as the abuse of it; per Holt Ch. J. in delivering the opinion of the court. Hill. 13 W. 3. 12 Mod. 645. in case of Cross v. Smith.

4. *Judgment was entered against B. and afterwards the bail of B. brought habeas corpus to the Marshalsea, where B. was prisoner, to have his body before the judges of C. B. to be committed in execution in discharge of the bail; but before the return of the habeas corpus, B. brought a writ of error returnable the day following; and when he came to be committed, the court doubted that their hands were*

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See Inferior Courts (G) \* This statute means *certiorari*, by the words (other writs,) and it is remarkable, that the

sted up by the writ of error, because he could not be committed upon the judgment, and yet they would have discharged the bail if they could tell which way; therefore quære. Brownl. 61. Pasch. 14 Jac. Whickstead v. Bradshaw.

5. A judge of the court of B. R. will *not* grant a habeas corpus *in the vacation* for a prisoner *to follow his suits*; but the court may grant a special habeas corpus for a prisoner *to be at his trial* in the vacation time. P. 1650. 24 May, B. R. For this may concern him more than the other can. 2 L. P. R. 3.

6. The court will grant a habeas corpus to one to have a prisoner who is *not in execution*, out of prison, *to be a witness for him at the trial*, but at the charge of him that desires the habeas corpus, and at his peril, to take care that the prisoner do not make an escape. 2 L. P. R. 3. cites 29 June 1640. Trin. B. R.

7. If a prisoner doth not *make his prayer* the first term, when the *law is open*, he cannot do it afterwards on the habeas corpus act; but where the *act is suspended*, it must be understood, that he must do it the first term after the suspension determined. Per Cur. Cumb. 421. 9 W. 3. B. R. the King v. the Earl of Aylsbury.

8. One *removed into B. R.* by habeas corpus *ad respondendum* shall not be removed into any other court till he has answered the cause in B. R. and shall not compel the plaintiff to follow a profling defendant, and so *vice versa* of C. B. so that each court, in which he is first attached, shall retain the defendant; and after he has answered there, you may carry him where you will. 1 Salk. 350. Mich. 11 W. 3. B. R. Anon.—And said, that this was fit to be the settled course, if there be any difference between the two courts. Ibid.

So [though the party was living,] the court thought it too late to grant an habeas corpus after such judgment, and

9. *After an interlocutory judgment, and before final judgment in an inferior court*, a habeas corpus was brought, but *before the return of the writ, the defendant died*, and a procedendo was awarded; because by the 8 & 9 W. 3. 11. the plaintiff may sue a sci. fa. against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable. 1 Salk. 352. Hill. 1 Annæ, B. R. Anon.

made a rule for a procedendo absolute. Notes of Cases in C. B. Trin. 7 & 8 Geo. 2. Wyatt v. Markham.

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(E. 2) To what Place.

\* See (A) Bourn's case.

1. A Habeas corpus was directed *to the bishop of Durham*, to bring a prisoner into B. R. and he making no return, another writ was moved for, with a \* penalty in it, and one of the clerks of the crown said, that certioraries had been frequently returned from Durham; but before the bishop would make a return on this writ, he insisted to have his privileges recited in the writ. But Dodderidge and the court said, that they would not change the ancient course, and forms, and usages. Lat. 160. Jobson's case.

2. Habeas

2. Habeas corpus's have gone *beyond sea*; Dr. Prujean was to cure a madman, Sir R. Carr's brother; Common Pleas sent a habeas corpus for him beyond sea. Per Wild J. Cart. 222. Pasch. 23 Car. 2. C. B. Anon

3. In error on a judgment in *Ireland*, it was suggested that the plaintiff was in execution upon the judgment in Ireland. And the court seemed to be of opinion, that a habeas corpus might be sent thither to remove him as writs mandatory had been awarded to *Calais*, and now to *Guernsey and Jersey, &c.* Mich. 33 Car. 2. B. R. 1 Vent. 357. Anon.

A habeas corpus was returned from *Bordeaux*; per Noy. Arg. who cited 43 E. 3. J. 533. per

—This writ hath been awarded to *Calais* out of B. R. Pasch. 17 Jac. B. R. Cro. Mountague Ch. J.

## (F) Returns. How, and what, In General.

1. **WHERE** one is committed by one of the *privy council*, the *cause of commitment* ought to be set down in the return, but not where the commitment is by the whole privy council. Le. 71. Mich. 29 & 30 El. C. B. Howell's case.

2. If on a corpus cum causa the *cause returned be sufficient, but false*, the court must *remand* the prisoner, and he is at no mischief; for if they have not authority, or the cause be false, he may have a writ of *false imprisonment*, and where the party is only removed, and a false return is made, the party grieved may have *special action on his case*. 11 Rep. 99. b. Trin. 13 Jac. B. R. Bagg's case.

3. It was *returned* upon an habeas corpus, *that there is a custom in London, that if any freeman devise any legacy to an orphan, that the executor shall be constrained to find sufficient sureties to pay the legacy, or be imprisoned*. Roll. R. 316. Hill. 13 Jac. B. R. Spencer's case.

4. No answer can satisfy it, but to return *the cause with a corpus paratum habeo, &c.* per Mountague Ch. J. Cro. J. 543. Mich. 17 Jac. B. R. in Bourne's case.

Le. 70. 3. P. Howel's case.

5. Habeas corpus's *are always* returned *in the preterperfect tense*. Sid. 273. Trin. 17 Car. 2. B. R. the King v. Wagstaff & al.

6. Where a writ of habeas corpus *ad satisfaciendum* issues out of B. R. the attorney for the plaintiff must *endorse the number roll of the judgment* on the back of the habeas corpus. And in the case of one SADLER, Mich. 21 Car. 2. the court granted a *pluries habeas corpus*, with penalty of 100 l. returnable immediate. 2 L. P. R. 2.

7. The writ commands the day, and the *cause of the caption and detaining* of the prisoner, to be certified upon the return, which if not done, the court cannot possibly judge whether the cause of the commitment and detainer be according to law, or against it. Therefore the cause of the imprisonment ought by the return to appear *as specially and certainly* to the judges of the return, as it did appear to the court or person authorized to commit, otherwise the return is insufficient. Vaugh. 137. about 22 Car. 2. in Bushell's case.

The gaoler must return by whom he was committed, and the cause of his imprisonment.

2. Inst. 55.

8. Where the *cause* is returned without the body, yet that is supplied by the *defendant's appearance* and bail entered here; per Holt. Cumb. 332. Trin. 7 W. 3. B. R. Coxall v. Manuaptors of Colecroft.

[ 218 ] 9. *Consuance of pleas or exempt jurisdiction*, were never returned to a habeas corpus; for then they might return a falsity to support their jurisdiction, which would not be traversable, and so a subject would be ousted of the privilege of suing, or being sued in the king's superior court, without any opportunity of controverting the matter; and the case of BISHOP v. PERCIVAL in Hard. was quoted per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. B. R. Taylor v. Reignolds.

10. If one be in custody upon a *criminal and also upon a civil matter*, and he would move himself by habeas corpus, there ought to be but one habeas corpus either of the crown side or of the plea side, and both causes ought to be returned. 6 Mod. 133. per Cur. Pasch. 3 Annæ, B. R. Anon.

(F. 2) Return thereof. Good or not; and *Exceptions* to Returns of Commitments.

By the King,  
Lords of the  
Council, &c.

1. A Habeas corpus issued out of C. B. to the steward and marshal of the house, &c. for W. S. which was returned thus, viz. *Quod domina regina per literas patentes suas suscepit in protectionem suam J. M. and his sureties, et ex uberiori gratia voluit, that if any person should arrest or cause to be arrested the said John Mabb, or any of the sureties, then the marshal of her house, &c. might arrest every such person, and detain them in prison, until such person should answer before the privy council for the contempt; and that W. S. caused one J. P. a surety of the said J. M. to be arrested, &c.* And upon this return W. S. was discharged. And because, after such discharge, the parties caused W. S. to be again arrested for the same cause, viz. by colour of the said protection, an attachment was granted against them. Le. 71. Mich. 29 & 30 Eliz. pl. 93. Search's case.

\* S. P. by  
Coke Ch. J.  
who said,  
that the sta-  
tute of  
Westmin-  
ster 1. is,  
that a man  
committed  
by com-  
mand of the  
king is not  
bailable.  
Roll. R.  
134. in the  
brewer's  
case.

2. Pasch. 34 Eliz. All the judges and barons delivered their opinions in writing, and signed by them; that if any person be committed by her *\* majesty's commandment from her person*, or by order from † the council-board, or if any † one or two of her council commit one for high-treason, such persons, so in the case before committed, may not be delivered by any of her courts, without due trial by the law and judgment of acquittal had. Nevertheless the judges may award the queen's writ to bring the bodies of such persons before them; and if, upon return thereof, the causes of their commitment be certified to the judges as it ought to be, then the judges in the cases before ought not to deliver him, but to remand the prisoner to the place from whence he came, which cannot be conveniently done unless notice in generality or else specially be given



to the keeper, or gaoler, that shall have the custody of such prisoner. ‡ Upon an habeas corpus of one  
1 And. 297, 298. pl. 305.

P. the return was that he was imprisoned by virtue of a warrant from the council, and it was held by all the justices, that he was notailable, though two of the council only committed him. 1 Roll. R. 134. cited by Coke, as 33 H. 6. 28. b. Poynes's case.—And. 18 El. such question was, and Coke said, that 6 Jac. his brother Haughton was assigned to be the council for a prisoner, who was committed by the council of the king, and he came there in court, (viz. in Banco) and said that he could not maintain that he wasailable, because the book of 33 H. 6. stopped his mouth. Ibid. cites it as one Hacket's case.—† S. P. and C. cited per Holt Ch. J. 5 Mod. 81. in case of Roe and Kendal, & al.

3. One having a suit pending in B. R. and coming to London was committed to Newgate, and on a habeas corpus to the gaoler of Newgate, he returned that the party was committed to his custody by warrant from the Lord Chancellor of England for certain matters concerning the king, there to remain until the Lord Chancellor delivered him; and for that cause he could not have his body here. And Hutton moved that the return was not good, because † it is too general: for it shews not for what \* causes he was committed; for it might be for a cause which would not hinder him of his privilege. Here also the return is, that he ought to remain there until he were delivered by the Lord Chancellor; therefore he said it was ill. And the court thereto said, it was the first time that such exceptions had been taken. Therefore they would consider of the case. And 9 H. 6. 44. was cited, and 33 H. 6. 28 & 29. and 4 E. 4. 15 and 16. Cro. J. 219. Hill. 6 Jac. B. R. Addis's case.

\* So where one was committed by the College of Physicians for practising physick in London, but in the return, no cause being shewn, the return was held insufficient. Mich. 12 Jac. B. R. 2 Bull. 259. Dr. Alphonso v. the

College of Physicians.

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4. Divers brewers were committed to prison by the council, and upon an habeas corpus the cause was returned to be by force of a warrant importing, that they were committed per concilium regis, pro quibusdam causis regem & servicium suum tangentibus. Exception was taken, because it is per concilium regis, and does not shew what council it was, whether council of state or counsel at law, and so uncertain. But it was answered, that it shall be intended the council of state. And Coke Ch. J. said, that the statute of W. 1. is, that a man committed by command of the king is notailable, and that Stamf. expounds command to be per concilium regis; for the council is incorporate in the king. cites 33 H. 6. 28. b. Hill, 12 Jac. B. R. 1 Roll. R. 134. the Brewer's case.

5. R. was brought to the bar by habeas corpus; the cause returned was two warrants; 1. because he was committed by the Lord Conway secretary of state, and there no cause shewn. 2. There was another warrant from the same secretary, which recited the first warrant, and said that now upon further examination, he commanded the gaoler to keep him for suspicion of high treason. And it was said, that this second warrant is no cause to detain, because it is with reference to the first warrant, which is no warrant; and there is no special cause of suspicion alleged, as that false gold was found with him, or the like; nor is it shewn what treason; and he who is

*taken upon suspicion* shall be let to bail. Palm. 558. Trin. 4 Car. B. R. Melvine's case.

He was afterwards bailed. Cro. C. 168. Mich. 5 Car. B. R. S. C.

6. A. was committed to the Marshalsea of the household for words. Upon an habeas corpus, the return was, that he was committed by the lords of the council; and the warrant was *that he was committed for insolent behaviour and words spoken at the council table*, which was subscribed by the lord keeper, and 12 others of the council; and because it did *not mention what the words were*, so as the court might judge of them, the return was held insufficient, and the marshal advised to amend them. Cro. C. 133. Mich. 4 Car. B. R. Chambers's case.

\* S. P. on a commitment by the lords of the council to remain till further order given. Cro. C. 507.

Barkham's case.—Ibid. Lawson's

case.—So where the commitment was by a secretary of state. Le. 175. Hellyard's case.—S. P. and a distinction was taken between a commitment by one or by all the council. Le. 70, 71. Howell's case.—S. C. cited Arg. 5 Mod. 83.—Where the return was that he was committed by the lords of the privy council for divers causes and misdemeanors, until they give orders to the contrary. It was held not good. Pasch. 16 Car. Cro. C. 579. Freeman's case.

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8. The steward of Windsor-court, who was *surveyor* [also] of the castle was committed by the Lord M. lieutenant of the said castle, and after three habeas corpus's, Lord M. made return that he was committed by the immediate warrant of the king, because he refused to deliver certain rooms in the timber yard there, when the king commanded them. And it was moved that he ought to continue committed. But per Cur. he was discharged; for though the detainer of the king's castles be treason, yet quarrels among his servants concerning their rights, does not make any offence against the publick. Sid. 278. Pasch. 18 Car. 2. B. R. the King v. Taylor.

9. The return was that the defendants were committed by Sir W. T. secretary of state, for high treason, for aiding Sir Ja. Montgomery to escape, who was committed to the custody of a messenger for suspicion of high treason. The court held, 1st. That the commitment by a secretary of state was good. 2. That the commitment to a messenger was good; for they would intend it only in order to carry him to gaol. 3. That Sir James Montgomery's treason ought to have been inserted in the warrant with an allegation, that Sir James did the fact, because the defendants by breaking the prison are guilty of the same specifick treason and offence; and therefore they were bailed. 1 Salk. 347. Tr. 7 W. 3. The King v. Kendall and Roe.—5 Mod. 78. S. C.

Orders of courts

10. The return upon a habeas corpus was, that the party was committed for a contempt for not performing a decree made in the court of requests, and no other cause appeared in the return. The court were of opinion, that they could not deliver him, because no cause

cause appeared in the return to warrant their delivery of him. And they said, that if the *return be false*, yet they cannot deliver the party, but the party may have his action of *false imprisonment*, if the imprisonment be not lawful. Godb. 198. Tr. 10 Jac. C. B. *Lea v. Lea*.

11. A. was committed to the Fleet for disobeying a decree in Chancery upon a bill exhibited there after a judgment of the same matter in bank, and affirmed in this court; and upon an habeas corpus the return was such, *certifico quod A. commissus fuit 28 Novembris 1608, propter contemptum extra curiam cancellariæ eidem curiæ commissum & per mandatum domini cancellarii*; it was moved that the return is not good; because it is *propter contemptum extra curiam cancellariæ*, which is *utterly uncertain*, which was agreed per Coke and Cur. and because it is that he was committed per *mandatum domini cancellarii*, which is *too general*. 1 Roll. Rep. 192. Pasch. 13 Jac. B. R. Apsey's case.

1 Roll. R. 218. Trin. 13 Jac. B. R. S. C. where Coke delivered the resolutions of the judges that the return was insufficient according to ASTR.

WEEKS's case, 9 El. which is all one with this; wherefore they awarded that the warden of the Fleet be discharged of the prisoner and that he be committed to the marshal, & quod tradatur in ballium.——So where the return was that G. was committed 7 May 1615, 13 Jac. per *mandatum Thomæ Ellesmere cancellarii Angliæ*, and no cause of the commitment returned, and so is all one with a president in 19 El. one MITCHELL's case. Where the return was that he was committed 16 February, per *Nich. Bacon, custodem magni sigilli*, & traditur in ballium. 1 Roll. Rep. 219. Trin. 13 Jac. B. R. Glanville's case.

12. C. was brought in upon a habeas corpus, and the return was that he was committed *by the high commission*, and the warrant of the commitment was, that he was committed *because he had used diverse reproachful words against the proceedings of the high commission, and this being drawn into form of law in diverse articles, he refused to answer*. It was moved that the return is insufficient, because it is *too general*. Per Coke, the return is not good, because it is not shewn what the articles were; for peradventure, they were articles concerning matters at the common law; also it is too general, that he was committed for divers reproachful words, &c. 22 E. 4. *propter multiplicem contumaciam* is not good; besides *no time* is alleged when the words were spoken, and perhaps they are pardoned by some act of parliament, if the time had appeared. The court held the return not good, and so he was bailed. 1 Roll. R. 245. Mich. 13 Jac. B. R. Codde's case.

13. The return to an habeas corpus was, *that he was committed by order of the exchequer, 9 Car. for not paying a fine imposed upon him by the ecclesiastical commissioners*; and although it was not shewn for what the fine was imposed; yet because the commitment was by a judicial court, this court would neither bail nor discharge him. Cro. C. 579. Pasch. 16 Car. B. R. Anon.

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14. A. was imprisoned by the court of admiralty, and prayed a habeas corpus, upon which was this return, viz. First, the *custom of the admiralty* is set forth, which is *to attach goods in causa civili & maritimo, in the hands of a third person; and that upon four defaults made, the goods so attached should be delivered to the plaintiff, upon caution put to restore them, if the debt or other cause of action be disproved within the year; and after four defaults made, if the party*

By court of admiralty, and marshals of Wales.

*in whose hands the goods were attached refuse to deliver them, that the custom is to imprison him until, &c.* Then is set forth how that one Kent was indebted to J. S. in such a sum upon agreement made *super altum mare*, and that Kent died, and that afterwards J. S. attached certain goods of Kent's in the hands of the said A. for the said debt; and that after, upon summons, four defaults were made, and that J. S. did tender caution for re-delivery of the goods so attached and condemned, if the debt were disproved within the year; and that notwithstanding the said A. would not deliver the goods; for which he was imprisoned by the court of admiralty until, &c. Bramston Ch. J. asked the proctor of the admiralty, then present, this question; whether by their law the death of the party did not abate the action, and he said it did; then said the Ch. J. it is clear that an attachment cannot be against the goods, the party being dead; wherefore by the whole court, the custom to attach goods after the death of the party is no good custom, therefore they gave judgment that the prisoner should be discharged. Mar. 204. Pasch. 18 Car. B. R. Heaman's case.

• S. P. cited to be held good in Chancellor Egerton's time, where the commitment was for contempt of a decree, but where a return was *virtute mandati* of the Chancellor, the parties were discharged. 2 Roll. R. 307. per Haughton and Chamberlaine J. in Hancock's case.

15. The return was that the party was convicted of publishing a false petition, supposed to be delivered to the king with a subscription that the king was content to discharge the fine of J. S. who was sued in the court of the Marches, made in *deceptionem curiæ*, & in *defraudationem regis de debito suo*, and that he, being present in court, was committed to the gaoler till he paid 100l. to the king, and 40l. to the attorney of the court for costs; and that he was detained also *virtute ordinis decreti curiæ*, &c. And this was held to be good without shewing the proceedings, and that *virtute ordinis*, &c. was sufficient. And that though two causes of imprisonment and detainment were alleged, and though in the second he shewed no imprisonment, but only that he was detained *virtute decreti*, &c. yet Sir James Ley Ch. J. held it good; for it was shewn before that he was committed, and that he being before imprisoned for cause, &c. was also detained; but that if it had been in justification in trespass, it had not been good. 2 Roll. R. 307. 21 Jac. B. R. Hancock's case.

Max. 52. pl. 80. S. C. by name of SHIELDS's case. Reports that the woman was a servant maid, and that the parties were remanded, because it appeared that they had not paid the fines, and that

16 Upon a habeas corpus directed to the keepers of the porter's lodge, (being the prison for the council of the Marches of Wales) it being returned, that they were committed to him by virtue of a decree of the said council, upon information against them, that the one of them inveigled the son and heir of J. S. being of the age of 17 years, in the night, and when he was drunk, to marry the sister of another of the defendants, whereupon they were every of them severally fined to the king; some of them 100 marks, some 40l. and 100 marks damages to the father who was the prosecutor) and committed to prison for a year, and until the said fines paid and the said 100 marks damages satisfied to the said J. S. and until they entered into a recognizance for their good behaviour, and until the said court took further order; and it was returned also, that they were committed by virtue of an order from

from the lords of the council. And this return was held utterly insufficient for the last part; because it was *not mentioned what was the order of the council.* † It was moved by Grimston that the return was ill, *to award to prison, to remain there \* until further order taken,* which is utterly incertain. It was doubted whether the Marches of Wales might meddle with a *clandestine marriage* to punish it, being a meer spiritual act. As also about the *sentence for damages* to the party, although it be within the exprefs words of the instructions, &c. Whereupon day was given until octabis Michaelis. And in the interim the parties were bailed. Cro. C. 557. Trin. 15 Car. B. R. Seele's case.

nothing was said of the matter of the return. —\* S. P. Pasch. 16 Car. Cro. C. 579. Freeman's case.—See Brice's case, and the notes there.

17. The return to a habeas corpus, directed to the mayor of St. Albans, was that *he was committed to the goal by the justices of the peace of the said liberty, at the sessions of the peace holden 11 Julii 1639, till he should obey an order for taking the office of constable upon him; for that he being an inhabitant within the hundred of Cashe, within the liberty of St. Albans, had refused to execute the said office:* and because it was informed on the part of the prisoner, that he *denied he was within the liberty of St. Albans, but affirmed he was within the county of Hertford out of the said liberty,* all the court held, that he was unjustly committed; because they ought not to have committed him, when he denied to be constable, especially pretending he was not within the liberty, but should have caused him to be indicted upon this refusal; and if he were found to be within the liberty should have assessed a good fine, and then have committed him for that cause. See 8 Rep. 38. GREISLEY'S CASE. But as it is now returned, the imprisonment was not lawful; wherefore he, by the opinion of the whole court, was absolutely discharged without any bail. Cro. C. 567. Hill. 15 Car. B. R. Crawley's case.

For not obeying orders of inferior courts.

18. One was committed for not taking upon him the office of a livery-man, being chosen thereto, &c. Upon a habeas corpus to the keeper of Newgate, he did *not* in his return *set forth his warrant in hæc verba,* but only that *per quoddam warrantum in scriptis secundum consuetudinem, &c.* the defendant was committed. The court said, that the warrant is always set forth at large *upon an extrajudicial commitment.* But when a man is committed by a court of record, there is no warrant at all, and therefore the court of aldermen (who committed the person) cannot be intended to *proceed judicially,* because the commitment is *per warrantum in scriptis;* that they are the proper judges of an excuse, why defendant will not take upon him the livery, and if they adjudge it insufficient, and appoint him to accept it, and he refuses, it is a contempt of their authority; and they may commit him. 5 Mod. 156. to 162. Hill. 7 W. 3. B. R. Vintner's Company v. Clerk.

Where a commitment is in court to a proper officer there present, there is no warrant of commitment, and in such case he cannot return a warrant in hæc verba, but he must return the truth of the whole matter under peril of an action. But if he be committed

to one that is not an officer, as in the principal case, there must be a warrant in writing, and where there is one it must be returned; for otherwise the gaoler may alter the case of the prisoner, and make it either better or worse than it is upon the warrant. 1 Salk. 349. Hill. 8 W. 3. B. R. p. C. by the name of King v. Clerk.



9 Salk. 349.  
S. C. by  
name of  
King v.  
Clerk. —  
12 Mod.  
113, 114.  
S. C.

19. In the case above, another exception was taken; that in the return a *custom was laid* for the mayor to commit the offender to the custody of the sheriffs of London or other officer; and the keeper of Newgate, who was the gaoler had returned, that he was committed *custodiæ meæ*, when it doth not appear that he was either sheriff or officer at that time. And the court held, that though the keeper of Newgate may be an officer of the city, yet he may not be one attending the court of aldermen; so that it does not appear that he is a proper officer of that court to receive the prisoner; neither did it appear that Newgate was in London, but if it did, he ought to be committed to the sheriffs, and not to the keeper of Newgate, though they might have taken him for their officer. 5 Mod. 156. to 162. Vintner's Company v. Clerk.

20. If a cause be returned out of the city courts by habeas corpus, the custom must be returned, or no procedendo can ever be granted. 10 Mod. 440. Trin. 5 Geo. 1. B. R. in case of Aſgill v. Hunt.

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By justices  
of peace,  
mayors, &c.

21. Upon the return of an habeas corpus, it was certified that the mayor of L. imprisoned one H. (*quia se male gessit*) and for using of *undecent speeches* to him, and that in his hall with a spit, *insultum fecit*, & *conatus fuit eum vulnerare*; this he certifies for the cause of his imprisonment by way of justification; and upon exception taken to the certificate of the mayor, it was held by Haughton, Dodderidge and Croke J. that the return is insufficient, because it ought to have showed the certain cause of his being imprisoned by him, and also to have expressed, for *how long time, and what sort of imprisonment* it was; wherefore by rule of the whole court, H. was absolutely discharged of his imprisonment. 2 Bull. 139, 140, 141. Mich. 11 Jac. Hodges v. Humkin the mayor of Liskerret.

• S. P. Hill.  
23 Car.  
B. R. Sty.  
90. Smith's  
case.

22. The return was that the prisoners were committed by R. a justice of peace of the said county by force of the statute of 5 R. 2. 7. upon complaint of J. S. that he claimed common in a meadow of the said J. S. called Monk's Meadow, and that the prisoners entered into the said meadow and kept him out with force and arms from his common, and that he came thither and found them holding the said meadow with force, whereupon he by virtue of the said statute committed them to gaol; and it was held by all the court (absente Brampton) that this commitment was not warranted by the statute; for a man cannot be indicted or committed for entering his own land with force, or holding it with force against a commoner. Cro. C. 486. Mich. 13 Car. B. R. Sydnam and Parr's case.

See Noy.  
156. S. C.  
where the  
exceptions  
and the rea-  
sons are  
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set forth,  
but there is  
nothing  
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23. W. and 7 others were committed by the mayor of London to Newgate, for refusing to enter into a recognizance to appear before the lords of the council; and upon an habeas corpora returned by the mayor and sheriffs, it appeared, that by an order from the council table, they were appointed to come before the mayor and sheriffs to treat concerning foreign matters; and when they appeared being required by the mayor then in commission of oyer and terminer for the city, to perform the order of the lords of the council, and to enter into recognisance in a reasonable sum, they refused, whereupon he committed them. And Peard, Maynard and Keeling, jun., argued,



argued, that this return was not good; 1st. Because it doth *not mention the order, nor shew what the order was*; so as the court might adjudge thereof. 2dly. Because the recognisance is demanded for them to appear before the lords of the council, but *no time nor place is appointed nor cause shewn why it was demanded*; and because the king's counsel prayed time to maintain the return the parties were bailed until the next term. Cro..C. 552. Trin. 15 Car. B. R. Wolnough's case.

by name of  
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c. se of the  
habeas cor-  
pus.

24. P. was committed by the lord mayor of London, for that *contemptuously and unseasonably he served him with a process of subpœna out of this court when he was executing his office as a magistrate, and examining offences of high treason, in derogation of magistracy, and in disturbance of the due execution of justice, till such time as he should find sureties for his good behaviour.* It was moved that he might be set at liberty, because there did not appear (as was alleged) any good cause of commitment. But Hale held that he could not be remanded, because it does *not appear* by the return *that the lord mayor was then a justice of peace*; but because the process was unduly served upon such a person, at such a time, the court would not discharge him; but there was *no* exception taken to the lord mayor's committing a person for an affront done to himself. Hard. 182. Pasch. 13 Car. 2. in Scacc. Prince's case.

25. Upon the return of an habeas corpus it appeared that C. *had forestalled a great number of lobsters*, whereupon the mayor, &c. of London caused him to appear, and he confessed the same, and they ordered him to desist from such forestalling; but he *said obstinately and in contempt of the court, that he would not obey their order*, whereupon they committed him to Newgate until he should signify to the court that he would conform himself, or otherwise be delivered by due course of law. This was moved to be insufficient; to which it was answered, that the imprisonment in this case was not for forestalling, but for the contempt to the court, which, per Twisden, they have power to do; wherefore the court remanded the prisoner, he promising to make submission at the next court, and the sheriff promising he should be discharged thereupon. Vent. 115, 116. Pasch. 23 Car. 2. B. R. City of London v. Coates.

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26. A justice of peace committed a brewer for not paying the duty of excise, and he being brought into court, an exception was taken that it *ought to appear that he was a common brewer*. Hale Ch. J. said that the statute 12 Car. 2. 23. prohibits the bringing a certiorari, but not a habeas corpus; and *want of averment of a matter of fact may be amended in a return in court*; and if it be not true at their peril be it, and so it was amended. 1 Mod. 102, 103. pl. 10. Mich. 25 Car. 2. B. R. Anon.

27. An habeas corpus being brought upon a commitment by the college of physicians, it was excepted against, because it was *pro mala praxi* which is uncertain. 2dly, The conclusion is ill, because it was to remain without bail till discharged by the president and college, or others authorised, or by due course of law; for if a commitment be for a fine it ought to be *quousque be paid the fine*; and

By College of  
Physicians  
and Commis-  
sioners of  
Bankrupts.

and if for a *contempt*, till he had submitted himself. 3dly. The offence is pardoned; for though the king has granted fines to the corporation he might however *pardon the offence*, and the king in this case has pardoned all that he can pardon; and if the commitment had been for a *punishment* it ought to have been a distinct commitment, & *ulterius quod committatur* for 4 months, and the commitment ought to recite the judgment; and per Cur. he was discharged. Skin. 676. Hill. 8 W. 3. B. R. the King v. Bowerbank.

28. The return was, that the parties were committed by a warrant under the hands and seals of the commissioners of bankrupts for refusing to be examined and sworn touching their knowledge of the bankrupt's estate, and an exception was taken to it for not averring their refusal to come and be sworn; for it did not appear that they did refuse, and that it should have been positively averred, viz. That they did refuse and still do; for if they are willing at any time, they ought to be discharged, and so they were; but the process against them being an attachment of privilege they were ordered to put in bail upon the attachment. Pasch. 30 Car. 2. C. B. 2 Mod. 306. Penrice and Wynn's case.

Of ecclesiastical matters.

• The king's letters patents alone are not sufficient to give power to imprison. See 12 Rep. 82, 83. Sir Wm. Chansey's case.

29. A. and four others of the parish of St. Bartholomew were brought to the bar by habeas corpora, and by the return it appeared that they were committed to a messenger for contempt to the ecclesiastical commissioners for not performing of their order in paying the parish clerk his wages, rated by their order at 4d. the quarter for every house in Great St. Bartholomew's, which they refused to pay but according to their custom as they were rated by their church-wardens and vestry. And now Doctor Merrick and Doctor Eccleston moved, that they should be remanded; for they said this order was \*grounded upon the king's letters patents, wherein it is provided, that the clerks should gather and receive their wages as should be ordered by the high commissioners, and pretended that for any contempt they might fine and imprison; but upon this return they were bailed until the first Tuesday next term. Cro. C. 582. Pasch. 16 Car. B. R. Torle's case.

30. Upon a habeas corpus was returned the warrant from the sheriff, for taking the prisoner, which was upon a writ of *excommunicato capiendo* for subtraction of tythes and other ecclesiastical duties; resolved, that this return was uncertain, and the (other duties) might be such matters as were out of their jurisdiction, and they must shew the matter to be within their jurisdiction; and also that the writ of *excom. cap.* itself ought to be returned, and it is not sufficient to return the warrant; because that may be wrong when the writ is right, and though the warrant may be wrong, yet if the writ is right the party is rightfully in custody of the sheriff, and the writ was quashed. 1 Salk. 350. Trin. 12 W. 3. B. R. the King v. Fowler.

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31. The return was, that the parties, being jurors refused to find Gosse and others indicted on the late statute of conformity, guilty contrary to their evidence which was full and pregnant, and upon this the court fined them and ordered them to be imprisoned till they paid

paid the fine; and upon mature consideration they were remanded. <sup>1 Sid. 272.</sup>  
Raym. 138. Tr. 17 Car. 2. B. R. the King v. Wagstaff & al. <sup>S. C.</sup>

32. The return was, that the prisoner, being a juryman among others charged at the sessions court of the Old-Baily to try the issue between the King and Penn and Mead upon an indictment for assembling unlawfully and tumultuously, did contra plenam & manifestam evidenciam openly given in court acquit the prisoner indicted, in contempt of the king, &c. This was held insufficient, because the evidence it self was not exprefs'd so as that the court might judge of it. Vaugh. 135. to 158. about 22 Car. 2. Bushell's case.

33. Where the return was, that upon the party's examination they found just cause to suspect him to be guilty of the said misdemeanors (mentioned before of encouraging conventiclers and stirring up people to disobedience) and that thereupon they did require him to find sureties to be of the good behaviour, which he refused, this was held an insufficient return, neither shewing the cause of suspicion, nor the certainty of the sum in which he and his sureties should be bound. 2 Vent. 22, 23, 24. Trin. 22 Car. 2. C. B. Rudyard's case.

In general.

34. A habeas corpus issued to bring in the body of an heiress being in custody (as was suggested in the writ) of Sir R. V. then lord mayor of London; afterwards a pluries issued, and thereupon he returned nullam habeo talem personam in custodia mea nec habui die impetrationis hujus brevis vel unquam postea. This was adjudged an ill return; for though he had no such person then in his custody at the time of the pluries, yet it might be that he had her at the time of obtaining the first writ. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. the King v. Sir Robert Viner.

35. A return was, that issue was joined before the writ came to him, but did not say that issue was not joined within 6 weeks, &c. as it ought to be by the statute, and therefore ill. Comb. 127. Trin. 1 W. & M. B. R. Anon.

See Inferi-  
our Courts  
(G)

36. And there was another fault, because, it being in an inferior court, it is not returned, that the cause of action arose within the jurisdiction. Comb. 127. Anon.

37. Where an action is founded on the custom of London, and removed by habeas corpus a difference was taken between an action brought on a by-law, and removed here into B. R. and an action brought on the custom of London; for in the case of the by-law, the special matter of such law ought in certain to be returned upon the habeas corpus, &c. otherwise the court cannot take notice of such a private law; but 'tis not so in an action founded on a custom of London, because the court ex officio will take notice of those customs. Carth. 75. Mich. 1 W. & M. B. R. Watson v. Clerk.

### (G) Proceedings.

1. **N**O habeas corpus shall be made out in the vacation time to remove a cause out of an inferior court, other than the courts in London, Middlesex, or the Marshalsea, or other courts within 10 miles

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*miles of London, returnable immediate, but at a day certain in court; and that every such habeas corpus, returnable in Trin. or Hill. term, be not returnable after the second return of the term; per magistr. Livesay and alios, Pasch. 21 Car. 2. 2 L. P. R. 1.*

2. If a cause be removed in the vacation out of London, Middlesex, or the Marshalsea, or other courts within 5 miles of London by habeas corpus returnable immediate, and bail put in by the first return of the next term, if the declaration be delivered 8 days before the end of the term, then the defendant is to plead to enter; and in Mich. term, if it be delivered before the return-day of crastin. Anim. and in Easter term, before the return-day of mens. Pasch. then the defendant is to plead to trial the same term, per magistr. Livesay and alios, Pasch. 21 Car. 2. regis. 2 L. P. R. 1, 2.

3. After the return of a habeas corpus is read and filed in court, it cannot be amended. Trin. 23 Car. B. R. For it is then a record of the court, but before it be filed, it may. 2 L. P. R. 2. — S. P. Gibb. 266. Pasch. 4 Geo. 2. B. R. the King v. Catterall.

The secondary said that in Trin. and Hill. term, they could not compel the party to plead and go to trial the same term, but in Mich. and Easter term they could. Mich. 21 Car. 2. B. R. 2 Mod. 1. pl. 2.

4. Every habeas corpus returnable at a day certain, to remove a cause out of an inferior court, must not be made returnable further than the second return in Hillary and Trinity terms; so that the defendants may plead to issue that term, and the cause may be tried at the assises, and in default of pleading to trial, the plaintiff may take his judgment. 2 L. P. R. 3.

5. Note, Holt Ch. J. made it a rule, that when one is brought up by habeas corpus the return should remain in court and a copy of it only given the marshal, and so of a committitur. 6 Mod. 180. Trin. 3 Annæ, B. R. Anon.

6. Upon a habeas corpus a rule may be made to bring the prisoner up any day in the same term without filing it, but not to bring him up at a day in another term, unless the return thereof be filed. 12 Mod. 441. Hill. 12 W. 3. B. R. the King v. Margason.

7. A prisoner was brought up by habeas corpus returnable at a day certain, and the gaoler did not bring him into court, but carried him back, and brought him in the next day. In this case, the writ being returnable at a day certain, the gaoler could not bring him in at another day by virtue of it; but upon a writ returnable immediate it is otherwise, and the gaoler was ruled to be at the charge of a new writ. 12 Mod. 564. Mich. 13 W. 3. Anon.

8. On a habeas corpus to the sheriffs of London they returned an action on a by-law with a penalty for not weighing at the city beam. Holt. Ch. J. held, that the return in this case may be filed; because the very record below is not returned, and therefore will not be filed, and consequently a procedendo may be granted, because it will not send out any record filed in this court but takes off the suspension they were under by the habeas corpus; and the writ was filed and a procedendo awarded accordingly. 1 Salk. 352. Trin. 3 Annæ, B. R. Fazakerly v. Baldo.

(H) *Effect.* Or what Removed.

1. **A**N habeas corpus cum causa removes the *body* of the party for whom it is granted, *and all the causes which are then depending against him.* 2 L. P. R. 2. cites 21 Car. B. R. and says, that for that reason it is a habeas corpus cum causa, and that the word *causa* is *nomen collectivum*, and implies all causes.

2. If a habeas corpus be directed to an inferiour court, *returnable two days after the end of the term*, yet the *inferiour court cannot proceed* contrary to the writ. 1 Mod. 195. per Cur. Hill. 26 & 27 Car. 2. B. R. Haley's case.

3. It was said that the warden of the Fleet might *detain a prisoner* after a habeas corpus directed to him out of B. R. *for his fees*, but *not for chamber-rent, &c.* Comb. 109. Pasch. 1 W. & M. B. R. the Warden of the Fleet's case. [ 227 ]

4. The *record itself is never removed* by a habeas corpus, as it is on a certiorari, *but remains below*, and the return is *only an account or history of their proceedings* stated and sent up to the superior court to judge and determine the matter there, therefore if a cause be removed hither by habeas corpus, the plaintiff here must begin *de novo*, and declare against the defendant as in custod. Marr. per Holt Ch. J. Trin 3 Ann. B. R. 1 Salk. 352. in case of Fazacharly v. Baldo.

5. The habeas corpus *suspends the power of the court below*, so that if they proceed, the proceeding would be void, & coram non judice; per Holt Ch. J. 1 Salk. 352. in case of Fazacharly v. Baldo.

6. When a person comes to the court of B. R. upon an hab. corp. and this court thinks fit to *turn him over to the marshal*, they commit him for no other matter, than for the cause or *causes returned on the hab. corp.* 11 Mod. 52. pl. 24. Pasch. 4 Annæ, Anon.

(H. 2) *Abuse* thereof. *What* shall be said to be.

1. **I**T was resolved by 10 judges, upon conference with Ld. Keeper, (the other two judges being out of town), that an habeas corpus was an ancient and legal writ; but that *under colour thereof*, the warden of the Fleet and marshal of B. R. ought not to *suffer prisoners to go at large*, and that such permission is an abuse of the said writ, and is an *escape* in the keeper of the prison. Cro. C. 466. Trin. 12 Car. B. R. Anon.

2. A habeas corpus to the town of N. was *delivered to the proper officer in open court, to remove a plaintiff from that court before trial*, notwithstanding which, the court below *went on to trial*. Defendant moved for an attachment against the sheriff of N. for proceeding to trial after the habeas corpus delivered, as aforesaid, and a rule was made to shew cause; but upon shewing cause, it appearing

appearing that *issue was joined* April 27 before the *habeas corpus delivered*; the court below was warranted by the act of parliament to proceed. Notes of Cases in C. B. 146. Mich. 8 Geo. 2. Hornbuckle v. Eaton.

### (I) Obeded. How it must be obeyed.

And the steward of Windsor hardly escaped being com-

mitted for proceeding after a hab. corp. delivered to him, though the value was under 5*l.* and would not make a return of it. cited per North Ch. J. 1 Mod. 195. as Staples's case.

\* And so it was done to the cinque ports. Cio. J. 543. M. 17 Jac. in Bourn's case.

1. **I**F the steward of an *inferiour court* proceeds after an *habeas corpus* delivered, all their proceedings are void, and the court awarded a *supersedeas*. Co. Car. 79. pl. 1. Mich. 3 Car. C. B. Clapham's case.

2. A *habeas corpus* was directed to the *bishop of Durham*, who made no return, whereupon Noy moved for another writ, and to have a \* *penalty contained in it*. The bishop insisted on having his *privileges recited in the writ*, before he would make a return of it. But Doderidge and the court said, they would not change the ancient course and forms and usages. Lat. 160. Jobson's case.

3. If a prisoner will remove himself, he shall *pay the costs of the removal*; but if the plaintiff will remove the prisoner, he shall *pay reasonable charges*. Mar. 89. pl. 143. Pasch. 15 Car. Anon.

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4. On a *habeas corpus*, the *gaoler* is bound to bring the body, though he has not his *charges tendered* him; but he may move the court, and they shall rule, that he shall have his charges first. 2 Show. 172. Mich. 33 Car. 2. B. R. the King v. Greenaway.

5. The sheriffs of *London and Middlesex*, where the writ is *returnable immediate*, must make their return *the same day that the writ is delivered and bring the body immediately*, as the writ requires, and not suffer the prisoner to wander abroad upon pretence thereof. So likewise where a *habeas corpus* is directed to the *Warden of the Fleet*. 2 L. P. R. 2.

6. A rule was made to shew cause, why an *attachment* should not go against a gaoler for denying to return a *habeas corpus*, and *extorting a note* from the prosecutor in his custody, so as *by menaces*, and *duress*, he was forced to comply, and give the note for payment of the money to the gaoler. 8 Mod. 226. Hill. 10 Geo. The King v. Colvin.

### (K) Necessary. In what Cases.

1. **I**F the *Chief Justice of B. R.* commits one to the marshal *by his warrant*, he ought not to be brought to the bar *by rule*, but by *habeas corpus*; per Holt Ch. J. 1 Salk. 349. pl. 4. Hill. 8 W. 3. B. R. Anon.

2. One *committed to the marshal by the court* may be brought up by rule of court; but one *committed by a judge in his chamber* cannot



not be brought up without a habeas corpus, to which a return may be made; per Cur. 12 Mod. 641. Hill. 13 W. 3. B. R. Anon.

## (L) Punishment of *insufficient, or no Returns*, and what is to be done thereupon.

1. **I**N a corpus cum causa to the *Warden of the Fleet*, if he will not bring before the justices of the bank the prisoner condemned, it is a cause to *seise his office*; per Babb. But Paston e contra; for it may be he is escaped, and then the Warden shall pay the condemnation. Br. Refeiser, pl. 41. cites 9 H. 6. 55.

2. W. was committed to the Fleet by the Lord Treasurer of England, and the prisoner was brought to the Common Pleas by habeas corpus, which was returned, and *no cause of the commitment expressed*; and for that cause the prisoner was set at liberty and bailed. 1 Brownl. 44. Mich. 15 Jac. Warter's case.

3. A habeas corpus having been awarded to the cinque ports to remove the body cum causa, and the Lord Warden pretending such writ was not awardable to the cinque ports, or returnable by him, it was held by the whole court, that a habeas corpus *with a great penalty*, should be awarded returnable at another day. Cro. J. 543. Mich. 17 Jac. B. R. Bourn's case.

4. A habeas corpus went to the *Stannary court*, to which an insufficient return was made, and therefore disallowed. And the court said, that the *Warden* of the Stanneries must be *amerced*, and you may go to the coroners, and get it *affeered and estreat* it, (you know my Ld. Bath's amercement is 5 l.) and an *alias habeas corpus* must go for the insufficiency of the return of the first, and *upon that, the body and cause* must be removed up. And if *another excuse* be returned, we will grant an *attachment*. 1 Salk. 350. Trin. 12 W. 3. B. R. Anon.

## (M) Returnable at what Time, and of an \* *Alias* [ 229 ] and *Pluries*.

\* See (L)  
pl. 1.

1. **A** Habeas corpus to all prisons except London and Middlesex, commanding the sheriffs to bring the prisoners, must be returnable *at a day certain* in court. 2 L. P. R. 2.

## (N) In what Cases the Party shall *not* be discharged on Habeas Corpus, but shall be put to bring *Writ of Error*.

1. **O**NE indicted for buying and selling old money, was convicted at the Old Baily, and fined 1000 l. and on a habeas corpus, the return was, that he was committed by order of the sessions court at  
Vol. XIV. T

5 Mod. 19.  
S. C. by  
name of the  
King v.  
Bellet.

*the Old Baily to his custody; tenor cujus ordinis sequitur in hæc verba, viz. W. B. convictus, &c. Ideo consideratum est, that he be fined 1000 l. & quod ibidem, viz. in custodia of the keeper of Newgate in gaola remaneat sub salva custodia, quousque finem persolvat.* The commitment was held naught, because it was *not to the sheriff*, who is the legal and immediate officer to every court of Oyer and Terminer, and because the word (*committitur*) is necessary to the form of a legal commitment. And per Cur. where a *commitment was without cause*, a prisoner may be delivered by habeas corpus; but where there appears to be *good cause*, as in the present case, (which differences it from BUSHELL's case), and a *defect only in the form*, as in this case, he ought not to be discharged. 1 Salk. 348. Trin. 7 W. 3. B. R. Bethell's case.

2. *And though the commitment ought to be to the sheriff*, yet a gaoler is a known officer in the law, and his custody is the custody of the sheriff to many purposes. Therefore the court refused to discharge him on the habeas corpus, and left him to bring his writ of error. 1 Salk. 348. Bethel's case.

3. Before Bushel's case, no man was ever delivered by habeas corpus, without writ of error from a commitment of a *court of Oyer and Terminer*; per Cur. 1 Salk. 348. in Bethel's case.

### (O) The Difference between a Habeas Corpus and a Certiorari. And When, and How Bail is to be put in.

1. **A** *Certiorari removes the record cum omnibus ea tangentibus*, but upon a habeas corpus, the body only is removed, and they shall begin de novo. Arg. Comb. 2. and that it was so at the common law, cites 3 H. 6. 3.

[ 230 ] 2. No bail shall be put in upon a writ of habeas corpus *before the writ be returned*, and every attorney of the court of B. R. who shall put in any special bail, before any judge of the said court, at the time of the putting in of such bail, shall *deposit* into the hands of the judge's clerk of the said court, before whom such bail is put in, *the due fee* for filing of that bail, viz. For every bail upon a writ of habeas corpus 4s. 10d. and for every bail upon a cepi corpus 2s. 6d. and the judges clerks, whose hands the bails are put into, within 6 days after the end of every term, shall give a *note in writing to the secondary* of the said court, of all the bails of the vacation and precedent term so put in, together with the names of the attorneys who put in those bails, and they shall pay to the said secondary the aforesaid fee, by him received for those bails in manner aforesaid; per Cur. Pasch. 29 Car. 2. B. R. L. P. R. 172.

3. Holt Ch. J. said, he *wondered that people did not bring a habeas corpus and not a certiorari*; for the defendant might well say, I will not be sued in this inferior court, but will be sued above, and there I will put you in such bail as the court above will reach, though your process cannot come at them, and that I cannot give you

you such bail as you can reach, and so he may well remove the cause by habeas corpus. And in such case, if he do not *put in such bail above, as the action would require below*, a *procedendo* should be granted; for if by the course below there ought to be special bail, though common bail would do if it had commenced above originally, yet special bail must be given above, or a *procedendo* shall go. And if *one action require special bail, and another not*, and that do not appear to be done fraudulently to hold to special bail, there we will hold it to special bail or grant a *procedendo*; but if *fraud appear* we will retain it. 12 Mod. 646. Hill. 13 W. 2. in case of *Crosse v. Swift*.

4. There is a difference between a habeas corpus and a certiorari, as to the *removing a record*; for upon a habeas corpus we have not the record itself, here in B. R. as we have upon a certiorari; per Holt Ch. J. 6 Mod. 177. Trin. 3 Annæ. B. R. in case of *Fazakerly v. Baldo*.—Therefore, if the cause be to be removed hither by habeas corpus, the plaintiff here must *begin de novo*, and declare against the defendant, as in *custodia mareschalli*. 1 Salk. 352. S. C.

## (P) Pleadings.

1. **T**HE error assigned of a judgment in an inferior court was, because *after an habeas corpus cum causa* sued out of B. R. and delivered to the mayor and principal officer of that court, and acceptance and allowance thereof, *they*, notwithstanding, *proceeded to trial and judgment*. Defendant pleaded in *nullo est erratum*, and it was moved not to be error; because he does not allege the habeas corpus to be upon record, so as the error now assigned is not triable. But it was held, that this proceeding was error & *coram non judice*, which is confessed by the pleading in *nullo est erratum*. And that *if it was not true*, that the habeas corpus was delivered to the mayor, and allowed, *it should have been denied*, and the *delivery or not delivery is triable per pais*. But because it is not denied, it is a manifest error, whereupon the judgment was reversed. Cro. C. 261. Trin. 8 Car. B. R. *Ellis v. Johnson*.

2. So where a habeas corpus issued out of C. B. to the Palace Court, and was delivered to the judges, and *prayed to be allowed*, and yet they proceeded to judgment, and a writ of error being brought thereupon, it was insisted, that the bringing the writ of error had *affirmed the jurisdiction of the court below*; but the court held, that it was manifest error, and the writ well lies. But the Chief Justice said, that it is merely a matter of *favour*, that judgments in inferior courts, in causes not arising within their jurisdiction, are not avoided without writ of error, and that such was the opinion of the court of C. B. and judgment was reversed accordingly. 2 Jo. 209. Pasch. 34 Car. 2. B. R. *Copping v. Fulford*.

3. Upon a habeas corpus returnable in *Mich. term*, if the declaration be delivered before *crastinum animarum*, the defendant must plead to try; but upon a cepi corpus, he is only to plead to enter. So in *Easter term*, if the declaration be delivered before *menſe paſchæ*,  
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the defendant on a habeas corpus must plead to try; but on a *cepi corpus*, to enter only. 2 Salk. 515. Mich. 8 W. 3. B. R. Hall v. Englestone.

(Q) *Return amended, in what Cases.*

Vid. (R) S. C. but D. P. \* Want of averment of a matter of fact may be amended in a return in court; and if it

be *not true*, at their peril be it; per Hale Ch. J. Mod 103. pl. 10. Mich. 25 Car. 2. B. R. Anon.

1. ONE that practised physick in London, being committed by the college of physicians, brought an habeas corpus. In the return *no cause was shewn*, for which reason it was held insufficient. It was moved to amend the return; but per Doderidge J. *matter of form only is amendable, but not \* matter of fact*, which goes in justification of the imprisonment and fine. 2 Bull. 259. Mich. 12 Jac. Dr. Alphonso v. the College of Physicians.

2. The court allowed the officer to amend the return of a habeas corpus, and to *make it special*, because if a *procedendo* should be granted, the action would be lost. Carth. 76. Mich. 1 W. & M. B. R. Watson v. Clerk.

(R) *Remanded, Bail'd, or discharged.* In what Cases the Prisoner shall be,

\* Orig. (al. issue.)

1. AUDITA querela. The party was in Newgate, and removed by habeas corpus into C. B. and the sheriff of London came when the party had pleaded release \* to the issue, and said that he was also condemned in 200l. in writ of account, at the suit of the same conussee, and prayed to have him remanded; and it was said, that when this matter is tried, he shall be remanded. Br. Privilege, pl. 20. cites 24 E. 3. 27.

2. A man was outlawed in debt for 19l. in banco, and after was taken in London at the suit of the same plaintiff, and was condemned for the same debt, and committed to the warden for execution, and after was removed in banco by habeas corpus, and shewed acquittance of the same debt, and prayed to go quit, sed non allocatur, but was remanded to London, and there he may have Sci. fa. upon his acquittance, against the plaintiff; but upon his removal, he had Sci. fa. upon charter of pardon of the outlawry, and the plaintiff warned and did not come, by which the charter was allowed, but he was remanded upon the condemnation. Br. Privilege, pl. 10. cites 48 E. 3. 22.

3. 2 H. 5. Stat. 1. cap. 2. If a corpus cum causa or certiorari be granted out of the chancery to remove one that is in prison upon an execution at another man's suit, he shall be remanded.

\* Orig.

[mesure]

If a man be condemned in London and in execution,

and is impleaded in bank, he shall be brought into bank to answer, and when he has made attorney he shall be remanded into London; but if he be arrested only and not condemned, he shall be dismissed. Note the diversity. Br. Privilege, pl. 29. cites 38 H. 6. 12.

4. If one be impleaded in London before he be impleaded in bank, he shall be \* brought to answer and remanded; but if he be impleaded in bank before he be impleaded in London, he shall be dismissed. Br. Privilege, pl. 53. cites 10 H. 6. 10.

5. Habeas corpus was allowed after the body was in execution, but was not dismissed, but was *sent to the Fleet and to have Aud. Quer. Quod Nota.* And so the practice is at this day, that if a man be condemned in London, and matter is against him in B. R. they will send for him, and if he be condemned there, he shall be sent to the Marshalsea, and there remain for both executions; but the highest court shall have the keeping of him, and so the first plaintiff shall not lose his execution. Br. Privilege, pl. 49. cites 22 H. 6.

6. One in execution upon statute merchant was removed by corpus cum causa, and was awarded to the Fleet and not dismissed, because in execution and cannot plead release there but in chancery. Br. Privilege, pl. 50. cites 22 H. 6. 56.

7. One came into B. R. by cepi corpus cum causa to have the privilege; because a clerk of the bank had bill against him upon obligation, and had attachment of privilege against him; and the prisoner was arrested in London after the attachment awarded, by which the plaintiff prayed to be dismissed in London, and the plaintiff in the attachment shewed to him his obligation, and the defendant could not deny it, and therefore judgment was given, that he recover his debt and damages, and that he be sent back to London as a man condemned, and that he answer to others who have action against him in London; quod nota; quære the reason. Br. Privilege, pl. 46. cites 22 E. 4. 36.

8. A. is condemned in London for debt, and is in execution there; afterwards there is an indictment and verdict against him in the king's bench for trespass; A. is brought there by habeas corpus, and pleads not guilty to the indictment, and afterwards is remanded to London; and after divers processes of distringas issued against the jury, the jury appears; and afterwards he is again removed into the king's bench by habeas corpus; and the jury being sworn, he confesses the indictment, and the jury is discharged. Although this indictment was by his own procurement, and was covinous; yet he was fined and committed to the Marshalsea for the said fine, and for the execution in London; by all the judges of England, volenti non fit injuria. Jenk. 169. pl. 31. cites 1 H. 7. 22,

So where the defendant procured himself by fraud to be indicted of felony to the intent to defraud his creditors of their debts; and procured himself to be removed out of the Fleet by

corpus cum causa directed out of the king's bench to the warden of the Fleet, to be committed to the marshal; and all these causes supra returned into B. R. and the King perceiving, by credible information, the intent of the defendant, and of divers other practisers of such fraud to deceive their creditors by such procurement of indictment of felony, and to be arraigned thereupon, and then to confess the felony, and betake themselves to their clergy to the intent to be out of the temporal laws; and after make their purgations and depart, &c. the king by privy seal, directed to the justices of his bench, commanded them to surcease to proceed to the arraignment till they had commandment from him, and his council to the contrary. D. 245. pl. 65, 66, cites 34 H. 6. Verney als. Joyner's case.

9. If the sheriff returns writ of privilege, that the party is retained for surety of the peace in London taken by J. N. in this case J. N. shall be demanded, and if he comes, the party shall find surety in bank, and if J. N. makes default, the prisoner shall be dismissed without surety; per Bryan. Quod non negatur. Br. Privilege, pl. 52, cites 2 H. 7. 4.

10. When it *appears upon the return that the imprisonment is not lawful*, the court may discharge the prisoner. Resolved, per tot. Cur. 12 Rep. 83. Pasch. 9 Jac. Sir William Chancey's case.

11. Where the return of an *habeas corpus* was held insufficient for not shewing cause of the imprisonment, the party by rule of court was bailed till the next term, then to appear again, the court conceiving it best for him; for if they should discharge him for the insufficiency of the return, then they would presently take him again and commit him, and then would amend their return and make it better; and so by rule of court he *was bailed and not absolutely discharged, for his own good, to prevent his being taken up again if discharged, and then the return amended.* 2 Bull. 259. Mich. 12 Jac. Dr. Alphonso v. the College of Physicians.

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12. On an *habeas corpus*, the return was read and spoken to, and the prisoner ordered to be remanded. Twisden said, the return should have been first filed, and the prisoner committed to the *Marshalsea*; for otherwise the court have no power over him, and he cited 1 H. 7. HUMPHRY STAFFORD'S CASE, who being brought to the bar upon an *habeas corpus*, by the lieutenant of the Tower, was committed to the *Marshalsea*, and afterwards remanded to the Tower; but the other judges differed as to the commitment, and said it was not necessary to *keep the prisoner in the Marshalsea* until the matter was determined, but he might be sent from time to time to the same prison, and brought up by rule of court until he is either bailed, discharged, or remanded; and so they said it was lately done in the Earl of SHAFTSBURY'S CASE, Vent, 330, Trin. 30 Car. 2. B. R. Anon.

13. Where a *commitment is without cause* a prisoner may be delivered by *habeas corpus*, but where there appears to be good cause and a *defect in the form* only of commitment, he ought not to be discharged. 1 Salk. 348. Trin. 7 W. 3. B. R. Bethell's case.

14. Defendant was brought to the bar by *habeas corpus* returnable in one month from the day of St. Michael, to be committed to the Fleet, and the court committed him, though the *day of the return was past*. Notes of cases in C. B. Mich. 8 Geo. 2. Hewit v. Powell.

[See more of this general title upon the statutes of *habeas corpus* under the title *Bail*.]

## Hearing.

### (A) Of setting down a Cause for Hearing.

1. A Term being expired after publication, the plaintiff may of course have the cause set down for hearing before the lord chancellor or before the master of the rolls. P. R. C. 185.
2. The



2. The ordinary way to obtain this is by order upon petition; but it may be had upon motion. P. R. C. 185, 186.

3. The ancient course was to present the cause to be set down at the end of the term, when the Lord Chancellor, &c. appointed hearings for the ensuing term. P. R. C. 186. cites Toth. 31.

4. In order to have a cause heard, the *six clerk* in the cause must be applied to 6 days at least before the end of the term, that he may inform himself of the state of the cause, of the long or short dependance thereof in court, of the antiquity of publication, of the weight or value of the cause, and all other circumstances material to inform the lord keeper or master of the Rolls of at the time of setting down of causes. Ibid. 187. cites Or. Ch. 135.

5. No motion shall be made to hasten a cause to hearing, which is either adversary or by consent, nor any cause entered with the register for hearing, notwithstanding any order, without a certificate first had from the *six clerk*, that the pleadings are duly filed, for which no fee is to be taken. P. R. C. 188. cites Or. Ch. 232.

6. If the plaintiff reply to an answer, and without rejoining, and giving rules for publication, bring the cause to an hearing, the answer shall be taken wholly true as if there had been no replication; for the opportunity which the defendant hath to prove his answer is taken from him. Hill. 31 & 32 Car. 2. 2 Chan. Cases 21. in case of Grosvenor v. Cartwright. [ 234 ]

7. Bill against 3 several executors of 3 joint factors for account of goods; one of them swore he believed and hoped to prove that the plaintiff was satisfied his demands. Plaintiff replied against the other two, and brought the cause on by bill and answer as against the third; it was insisted that the plaintiff could have no decree; for by this bringing on his cause his answer must be taken to be true, and though he does not directly swear the money paid, yet he swears he believes and hopes to prove it paid, but by the plaintiff's not replying he is excluded the benefit of his proof, and the practice was cunning; the master of the Rolls ordered the plaintiff to pay costs and left at liberty to reply to the other defendant. Hill. 1682. Vern. 140. Barker v. Wild & al.

8. The plaintiff set down the cause for hearing without giving rules for publication, and had also amended his bill and had not new served the defendants to answer, so the cause was put off as coming on irregularly. Pasch. 1688. 2 Vern. 46. Niccol v. Wiseman.

9. A bill was brought by a devisee of land to perpetuate the testimony of a will; the master of the Rolls dismissed the bill with costs, declaring that it, being only for perpetuating the testimony, ought not to have been set down for hearing. 2 Wms's Rep. 162. Trin. 1723. Hall v. Hoddesdon.

## (B) Manner of Proceeding to, and at what Time the Hearing may be.

1. WHERE a cause comes to be heard before the master of the rolls, the clerks in court on each side shall attend the hearing

hearing (as they do when before my lord keeper) to the end his honour may be informed, if there be occasion, that the cause is ready for his judgment; and that the parties appear gratis; or that they were regularly served with process, as the case shall require. P. R. C. 189. cites Or. Ch. 210.

And the court will hardly (if at all) order

2. No cause must be presented for hearing the *same term publication passes*, unless by consent of parties. P. R. C. 185. cites Px. Alm. 25.

a cause to be heard the same term publication passes; because it is against the standing course of the court. P. R. C. 185. — But if the *plaintiff does not set down* his cause for hearing in two terms after publication past, it may be set down at the request of the defendant. Ibid. 186. cites Px. Alm. 25.

3. The day a cause is set down for hearing must be *sooner or later, according to the priority of publication* with respect to causes presented for hearing. P. R. C. 186. cites Px. Alm. 8.

But if there be cross causes, and publication is passed in both, and one of the plaintiffs omits to serve subpoenas to hear judgment, his cause shall not come on at the same time with the other; except the other party consents. P. R. C. 188. cites Pr. H. Ch. 21.

4. *Cross causes* ought to be heard together, if the answer in the last commenced cause be come in before the first cause is heard. P. R. C. 188.

5. Where a cause comes to hearing here, which has been formerly decreed in the Exchequer, such decree is first to be read, and then the court proceeds to hear the rest of the evidence on both sides. P. R. C. 190. cites Cary's Rep. 78. 30.

6. While the *regularity of depositions* was depending before a master unexamined; the cause was set down for hearing, neither party having procured a report one way or other, the court could not proceed to hear the cause, and was about to order the party in fault (which I suppose was he that set down the cause) to pay the other the costs of the day. P. R. C. 191. cites Ord. Ch. 16.

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7. A cause was heard *after a decree signed and enrolled*, because it appeared that the plaintiff, who obtained it, procured it to be signed and enrolled after a *caveat entered*, as appeared by the certificate from one of the 6 Clerks. Mich. 26 Car. 2. Fin. R. 123. Parker v. Dec.

### (C) What may be read.

1. **O**NE examined in the Admiralty court was used here at the hearing. Toth. 288. cites 16 Eliz. Watkins v. Furland.

2. The lord chancellor's opinion was, that the *old and new proofs* should be read upon a new bill to prove better matter. Toth. 81. cites Hill. 1590. Stanley v. Young.

3. Witnesses in the court of wards and Exchequer chamber may be used in this court. Toth. 286. cites 10 Jac. Ld. Morrison v. Wethired.

4. *Shop-books* were read as an evidence at the hearing. Toth. 154. cites Mich. 15 Car. Brown v. Debest.

5. If

3. If it is *upon bill and answer only*, then after the bill is opened, the answer is to be wholly read, and must be admitted true in all points. And no other evidence is to be given but *matter of record*, to which the answer refers, and which is provable by the record. P. R. C. 190. cites Pr. H. Ch. 18.

6. If the *subpœna to rejoin* be not served, &c. though it be sued out, the cause must be heard on bill and answer, and no proofs admitted to be read. P. R. C. 190. cites Toth, 46.

7. A bill formerly exhibited against the plaintiff by the now defendant ought not to be given in evidence, unless proved, that it was exhibited by the order, *direction and privity* of the defendant, 16 Car. 2. N. Ch. R. 102. Woollet v. Roberts.

16 & 17  
Car. 2. 1  
Ch. Cases,  
64. S. C.

8. A release after a replication and issue joined cannot be read at hearing; for it may be fraudulent or by surprize; but is to be examined by a new bill. 17 Car. 2. 3 Ch. R. 19. Hayne v. Hayne.

N. Ch. R.  
105. S. C.

9. Depositions taken in a former cause ought not to be used against the new defendants, unless they claim under the defendants in the former cause. 21 Car. 2. 2 Ch. R. 43. Tolson v. Lamplugh.

10. Bill for writings by the heir; defendant sets forth a lease for 60 years, but at the hearing shewed a conveyance to him by the plaintiff himself, which was proved in the books as well as the lease; so that a thing was proved not in issue, which was much contested by the counsel of the other side. Ld. Keeper, I shall not decree an inheritance away against what I see, and dismissed the bill. Pasch, 26 Car. 2. 2 Chan. Cases 196. Strode v. Strode.

11. Depositions in the spiritual court against a man shall not be used here, without some special order for that purpose; but a man's own answer on oath, let it be taken where it will, though it be a voluntary oath before a justice of peace, shall be read against him here. Pasch. 1682. Vern. 53. Mildmay v. Mildmay.

12. The defendant, on presenting the plaintiff to a living, took a bond from him to resign, and after put it in suit, and recovered and levied 98 l. and the plaintiff's bill was for relief; the defendant did not by answer pretend any misbehaviour, yet examined to several misbehaviours; and it was urged, that these depositions could not be read, because those misbehaviours were not in issue; and so inclined my lord keeper, but after allowed them to be read; and founded his decree on them. Hill. 1702. Abr. Equ. Cases. 228. Hodgson v. Thornton.

13. On appeal from the Rolls, it was objected to the evidence of a witness examined in the cause, and read at the hearing at the Rolls, that he had in answer to a bill exhibited against him, since confessed, that on the day he was examined, plaintiff gave him bond to convey part of the land to him on his recovery of it. Wright K. assisted by 2 Just. ordered this answer to be read. Mich. 1704. 2 Vern. 463. Needham v. Smith.

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14. Copy of a note taken by one that is dead, and who was intrusted therewith, under which, according to the copy, was wrote an acknowledgment, that nothing was due, was allowed to be read as evidence, though not proved a true copy; and though defendant had sworn there was no such acknowledgment under the note; but upon the

the producing the note, it appeared that *the bottom of it was torn off*. Hill. 1707. 2 Vern. 603. Winne v. Loyd.

15. Where plaintiff in his bill set forth, that *letters of administration* were granted to him, as by the same ready to be produced may appear, and this was not denied by the defendant's answer; they may be rendered in court without examining to them. Hill. 8 Annæ. G. Equ. R. 75. Brown v. Pitman.

16. After bill and answer came in and replication filed, several witnesses were examined, and their depositions taken; then the plaintiff moved to *withdraw his replication*, and took exceptions to the answer, and got a *second answer*, and then replied again and examined other witnesses, and now on the hearing would read the other depositions; but it was insisted that they could not be read, because the replication was withdrawn, and so taken without any replication, and therefore irregular and ought to be suppressed, and Ld. Harcourt ordered it accordingly; for they *should have examined them de novo after the second answer and replication*, or have moved the court for liberty to make use of them at the hearing. Pasch. 1714. Ch. Prec. 386. Andrews v. Brown.

17. *Depositions taken in a cause, but not read at the hearing of the cause, were admitted to be read at the re-hearing*, and so is the constant practice of the court. But in *appeal to the lords*, nothing is read but what was read below. Sel. Cases in Chan. in Ld. King's time. 21. Trin. 11 Geo. 1. Christmases v. Christmases.

18. The *depositions of one who was a defendant, and struck out and examined as a witness*, were offered to be read, and the case of COKE v. GOUGH, was cited as a case in which it was so done. But Ld. chancellor said, he would not do it 'till he saw that case, and that he had no great reverence for that rule, but if it be a rule, he must pursue it. Sel. Chan. Cases in Ld. King's time. 41. Trin. 11 Geo. Stephens v. Craven.

19. A *bond for performance of articles, though cancelled*, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond, Hill. 12 Geo. 1. G. Equ. R. 183. Anon.

### (D) What may be read. By whom.

1. **W**HERE there are *cross causes, depositions in either cause* may be used in both, and was so ordered, which order was after publication in the first cause, wherein the proof was made, but before publication in the second cause. Vid. Mich. 26 Car. 2. 1 Chan. Cases 236. Norcliff v. Worley.

2. An *executor* may be admitted to *prove the revocation of a legacy*, though he has proved the will. For he only swears, that he believes it to be the last will, and he might not then know of the revocation. Mich. 1681. Vern. 20. Jervois v. Duke.

3. It is a common case, where *one legatee* has brought his bill against an *executor*, and *proved assets*; and afterwards *another legatee* brings his bill, that he should have the benefit of the *depositions*

tions in the former suit, though he was not party to it; per Serjeant Phillips. Mich. 1686. Vern. 413. in the case of Coke v. Fountain.

4. On a bill by A. against E. F. and G. the defendants had examined some witnesses, and afterwards a bill is brought by E.—E. being now plaintiff, may read those depositions against A. or any of the defendants in the first cause; per Ld. Wright. Ch. Prec. 233. Mich. 1704. Barstow v. Palmes,

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(E) What may be read, Deponents Interested.

1. **U**MP I R E himself, though excepted to, was read as a witness, North K. Pasch. 1683. Vern. 159. in case of Brown, v. Brown.

2. A party plaintiff, (though the other party plaintiff had an order to examine him de bene esse) could not be read, but must have been dismissed before he could have become a witness; but if the same party, being only a trustee, had been made a defendant, and in his answer had disclaimed all interest upon oath, he might have been a good witness, North. K. Hill. 1683. Vern. 230. Phillips v. Duke of Bucks.

3. Depositions taken in the cause where the plaintiff's father was a party, the suit being in all matters the same, but the now plaintiff not claiming as heir, and the father being only tenant for life, not allowed to be read, but only on the common order for leave to read them at the hearing, saving just exceptions. Mich. 1686. Vern. 413. Coke v. Fountaine.

4. A witness examined before the hearing, while she was interested; but after the hearing, she released her interest, and was examined again before the master. Her depositions were allowed to be read. Mich. 1704. 2 Vern. 472. Callow v. Mime.

5. One examined as a witness when disinterested, afterwards becomes interested by the estates being devised to him; he is now plaintiff in a bill of revivor; the Lord Chancellor allowed the depositions to be read. Mich. 1715. 2 Vern. 699. Goss & al. v. Tracy,

Wms's  
Rep. 289,  
S. C.

(F) Hearing. Where all the Parties need not be brought to a Hearing.

1. **I**F a necessary defendant be prosecuted regularly to a sequestration, the plaintiff may go on without him against the other defendants; but serving a subpoena at a place where he lodged but once, and that 2 years before such service, is not good. Mich. 1699. Ch. Prec. 99. Barker v. Blackbourne.

(G) What

(G) What must be pleaded, or may be objected at the Hearing.

1. **T**H E *jurisdiction* of this court, if questioned, must be pleaded to, and it is too late to object it at the hearing. 2 Vern. 484. Hill. 1704. Trelawney v. Williams.

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Heir.

Fol. 90.

(A) In what Cases the Heir may be *charged*, where the Ancestor cannot be charged.

The heir shall never be bound by *express warranty*, but where the ancestor is bound by the same. Co. Litt. 386. cited Arg. Show.

[ 1. ] IF A. grant for him and his heirs to B. for years, or, &c. an annuity to have to him after the death of A. the grantor, though A. himself could never be charged upon this grant, inasmuch as it is to be paid after his death, yet, inasmuch as he binds himself and his heirs, his heir shall be charged if he has assets, as well as where a man binds himself and his heirs by *obligation* to pay money after his death, P. 4 Car. B. Rot. 1413. adjudged, this being moved in arrest of judgment as I hear, and writ of error brought in B. R. upon it. ]

379.—And per Yelverton J. a warranty, which is so granted to commence 40 years after, binds the heir, though the father dies before the commencement of it. Quod fuit concessum. Litt. R. 245, cites it as the case of Tewkly v. Clothworker.—Het. 137. cites it as S. C.

For no man may charge his heir but as part of

[ 2. But if a man grants an annuity, and charges only the heir to pay it, and not himself, this is a void grant, Hob. Rep. 174. in case of Oates v. Frith. ]

himself, and therefore must begin with himself. Hob. 130, S. C.—cited Arg. Show. 359. and said, if a man bind his heirs to pay a sum of money, it is void.

But the law is now altered by

3. A man shall not be charged as heir in action of debt, in respect of a *special occupancy*. 10 Rep. 98. in Seymour's case.

29 Car. 2. cap. 3. s. 12. which says, that any estate pur autre vie, if no devise be, shall be chargeable in the hands of the heir, if it comes to him by a special occupancy, as assets by descent.

(B) In



(B) In what Cases he shall be charged *without Assets.*

[ 1. ] If a man in writ of error against the heir, upon a recovery by his ancestor, reverse the judgment, yet the heir shall not be charged of damages without assets in fee by descent. 9 H. 6. 49. ]

Br. Assets  
per De-  
scend, pl.  
3. cites  
S. C.

2. A man had restitution, as heir by suit by petition, to land, to which the king was intitled, and the king brought writ of error, and the first judgment of the issue between the king and him upon the petition was reversed, and other issue tried for the king *ad damnum* for waste in the time of the father of the defendant, and in his own time to 40*l.* and the king recovered the damages against the defendant, as well for waste in the time of the father, as in his own time, and yet the heir had nothing by descent from his father; and the reason was, because *scire facias* issued against him generally as heir, and he was returned warned, and made default; quod nota. Br. Damages, pl. 161. cites 39 Aff. 18.

3. The heir shall be charged in writ of annuity upon grant of his father, if he had assets per descent in fee by the same ancestor; contra in annuity upon prescription; for there it cannot appear if he has assets by the same ancestor; for the commencement of such annuity does not appear. Br. Annuity, pl. 45. cites F. N. B. 152.

4. A. tenant for life, remainder to B. his son in tail. A. entered into a statute, and died; the conusee sued a *sci. fa.* against B. the heir of A. who was the issue in tail. The sheriff returned him warned, but he made default, and thereupon the plaintiff had execution without any plea pleaded by the heir. Windham J. thought at first that this return should not bind the heir, the conveyance being by A. who was only tenant for life, and so the lands in the hands of B. never affected, and that such return in this case was all one as to B. as if it had been against a stranger. But Twissden answered, that had A. been \*tenant in tail it had been all one, as had been often adjudged. And afterwards it was adjudged per tot. Cur. that B. was bound by this execution; and they agreed that he has no remedy by ejectment, Aud. Quer. or any other way, but against the sheriff, if he made a false return of the *scire feci*. Sid. 54. Mich. 13 Car. 2. B. R. Day v. Guildford.

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Raym. 19.  
S. C.—Lev.  
41. S. C.  
but states it  
at first as  
if B. had  
the remain-  
der in fee.

\* 2 Sid. 7.  
and 12  
GILBURN  
v. RACK,  
that after  
judg-  
ment a-  
gainst the  
tail. Mich.

ancestor as tenant in fee, the heir cannot come and say that he was only tenant in

5. In debt against the heir upon the bond of the ancestor, the sheriff returns that the defendant has lands by descent, which are really of his own purchase. North Ch. J. said, that if the sheriff's return cannot be traversed, the heir shall be relieved in an ejectment. Trin. 29 Car. 2. C. B. 1 Mod. 253. Anon.

(B. 2) Heir. *Charged in what Cases and how.*

Br. Debt,  
pl. 236.  
S. P. cites  
S. C. and  
the heir  
shall not be  
charged of  
the debt of

his ancestor but in default of chattels.——Br. Executors, pl. 124. cites S. C.——Br. Executions<sup>9</sup> pl. 28. cites S. C. And so see that the heir by assets shall be charged upon recovery against his ancestor, and yet in a bond he shall not be charged, unless he binds himself and his heirs expressly; contra of executors, as appears elsewhere——But by Vavisor contra, absentibus Brian and Fineux.——Br. Debt, pl. 237. cites 10 H. 7. 5.

1. UPON damages recovered against the father in a real action, the heir shall not be charged, nor process made against him, till the executors are returned nihil, and then the heir shall be charged; for the land of the father is charged by the judgment, as 'tis by statute merchant, recognizance, or the like; per Cur. Br. Charge, pl. 51. cites 7 H. 4. 31.

2. Heir cannot be charged by act of his ancestor without profit to be taken by it. Per Fairfax. Br. Prescription, pl. 78. cites 21 E. 4. 38.

3. At common law there was no remedy against the heir upon judgment against the father; per Jones J. 3 Bull. 320.—And from the 18 E. 2. till 7 H. 4. the law did run for current, that the heir was not chargeable in debt, if the executor had assets. And the reason why he was then held to be charged, was, because it was his own debt, and he is charged as debtor, and the writ against him is in the debet and the detinet. Per Doderidge J. Ibid. 321.

The ancestor bound himself, his heirs, executors, &c. in a bond for payment of 100*l.* and it not being paid, a judgment was had against the ancestor. Per Roll. Ch. J. the

4. In case of a recognizance there are no words to charge the heir, being only *vult & concedit quod executio fiat de terris & tenementis*; and in such case he is not charged as a debtor, but as tertenant, but yet not meerly as tertenant, and the rather because he comes in as privy in blood; and in case of a judgment against the ancestor, the tertenant may say, that the heir hath land by descent; the heir comes in as privy to the first judgment, and if he hath land by descent he is to be charged before the tertenants, and he shall not have contribution, but against the other heirs; but the land only which descends is subject to the judgment against the ancestor; per Doderidge J. 3 Bull. 321. in case of Boyer v. Rivett.

heir is not privy to the judgment, nor made so by an extent, and the extent is only upon him as tertenant, and so cannot have a writ of error till after execution. Sty. 38, 39. Trin. 23 Car. B. R. White v. Thomas.——But where debt is brought against the heir, he is charged not as tertenant, but as debtor; for he is bound in the bond; per Doderidge J. 3 Bull. 321. in case of Boyer v. Rivet.——S. P. Ibid. 322. per Crew Ch. J.

\*[240]

5. In case of a warranty if one be vouched as heir within age, he shall not be charged further than for the land he has by descent; and if he enters into the warranty with a protestation, that he hath *riens per descent*, and this be found against him, that he hath land by descent, he shall recover of this only in value, and of no other. Per Doderidge J. 3 Bull. 321. in case of Boyer v. Rivet.

6. Debt was brought against one as heir, for escape of a prisoner suffered by his father, of one in custody upon a condemnation; but the

the court held that it *did not lie without especialty charging the heir by express words*, and no law nor statute charges the heir for the tort or trespass of his father. D. 271. pl. 25. Anon.

7. *Nor does such action lie against the heir, though the ancestor was condemned in debt upon obligation in his life, and died before execution, but the land which he had shall be extended by elegit, upon a scire facias brought against him as tertenant of the land liable to the execution.* D. 271. a. pl. 25. Hill. 10 Eliz. Anon.

8. If an heir who *has nothing by descent promises to pay a debt*, an action on the case will not lie against him upon such promise. 4 Le. 6. pl. 23. S. R. but cites 3 Le. 67. H. 19 Eliz. B. R. Hodgson v. Maynard. M. 36

Eliz. B. R.—A promise by the heir to pay a debt, if the plaintiff will forbear his suit for a time, is no consideration; because the heir is *not liable to any debt without specialty*. Mich. 2 Ja. B. R. Yelv. 56. in case of Fish v. Richardson.

But where the father was indebted to J. S. and made a fraudulent deed of gift of his goods to his son; and the son, upon discourse of the fraudulent deed, promised J. S. that, upon consideration he would deliver up the bond to him, and make him an acquittance and discharge of the debt, he would pay him. J. S. brought an action; and though it was objected in arrest of judgment, that it did not appear that the son was liable, either as heir or executor, or administrator, or executor de son tort, and so the delivery of the bond and the making the acquittance no good consideration; yet it was resolved to be good, and that it should be intended that he was liable, or at least that the acquittance was made to the party who was liable; for he promised to discharge the debt, and that shall be intended to be to the party who was liable to the payment, or otherwise it would be no discharge. 1 Sid. 31. pl. 9. Hill. 12 & 13 Car. 2. Anon.

9. 3 W. & M. cap. 14. s. 5. Enacts that *where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands or tenements descending to him, and shall alien the same before any action brought; such heir at law shall be answerable for such debt, in an action of debt, to the value of the land by him aliened; in which cases all creditors shall be preferred, as in actions against executors; and such execution shall be taken out upon any judgment obtained against such heir, to the value of the land, as if the same were his own debt, saving that the lands, bona fide aliened before the action brought, shall not be liable.*

10. Where it is said that a decree is equal to a judgment, or to be paid next thereto, this must be intended only out of the personal estate; for a decree for a debt does not bind the real estate, but *affects only in personam not in rem*; and the remedy upon a decree to affect the land, is only a contempt, whereupon the party proceeds to a sequestration, and if the defendant die, the real estate will not be affected in the heir's hands. 2 Wms's Rep. (621.) Trin. 1721. by the master of the Rolls. Bligh v. Lord Darnley.

11. Mortgagor died, and after his death, part of his estate was settled by a private act of parliament, in trustees as a fund to pay all his debts. Afterwards his heir disposed of the fund. By this he was answerable for the debts, and therefore his personal estate liable to his father's debts. Cited per Cur. 2 Wms's Rep. 596. Hill. 1731. as Sir John Napier's case. But where no fund came to the heir for payment of debts, as where tenant for life

made a mortgage by virtue of a power, and upon an assignment thereof, his heir, being the next in remainder in tail, covenanted to pay the money, and the father died, and then the son died; he in the next remainder shall not charge the son's personal estate with payment, in case of the real, because the land was the original debtor, and must continue so, there being nothing substituted in its place, as in Sir JOHN NAPIER'S case there was. 2 Wms's Rep. 596. Hill. 1731. Evelyn v. Evelyn.

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But the report takes no notice of the lord chancellor's opinion as to the point, whether the heir was to be bound by this specialty, and so seems imperfect.

12. By marriage articles 400 l. was to be vested in A. and B. in trust, but neither of them to be answerable for the other; B. received the whole, and gave a receipt for it, and by writing under his hand and seal declared that A. had received none of it. B. dies intestate without ever placing out the 400 l. The master of the rolls decreed this a specialty-debt, but to affect the executor only, and not the heir, he not being bound, nor the declaration under hand and seal extending to him: this case came on afterwards before the lord chancellor, who said, that this without doubt ought to be considered as a debt by specialty, and so affirmed the decree. Cases in Chanc. in Lord Talbot's time, 109, 110. Trin. 1735. Gifford v. Manley.

See Discent,  
(I) Fraud.  
(F) pl. 16.

(C) In what Cases the Judgment shall be General or Special of Land descended. [by Reason of false Pleading, &c.]

Pl. C. 440.  
Davie v.  
Pepys.

[1.] IN an action of debt against an heir, if the defendant confesses the action, and shews the certainty of the assets, which he has by descent; neither his body nor any of his goods, nor any of his other lands shall be chargeable to the debt, but only this land which he has by descent. For the judgment shall be to recover the debt to be levied of the lands descended. 21 E. 3. 10. 40 E. 3. 15. D. 3. and 4 Ma. 149. 80. 23 El. 373. 14. Old book of entries 172. Debt in heir. D. 23 El. 373. 14.]

So, though the debt be ever so great, and the land descended of ever so small value,

[2. In an action of debt against an heir, if the defendant pleads *riens per descent*, and this is found against him, the judgment shall be general, viz. to recover the debt, and not special, to be levied of the lands descended for his false plea. D. 3. and 4. Ma. 149. 80. 18 Eliz. 344. 1. 21 E. 3. 9. b. 10. Adjudged 3 Ma. Brook Assets per Discent 3.]

and though in such case it was held 34 H. 6. 22. that nothing should be put in execution but the land descended, yet it was adjudged contrary. 3 M. 1. Br. Assets per Descent, pl. 5.——See Ibid. pl. 13. cites 40 E. 3. 19. and pl. 15. cites 21 E. 3. 9. that it is the same in *formedon*.

If a debt be recovered against the ancestor, who dies, and the plaintiff sues *scire facias* upon the judgment against the heir, who pleads *riens per descent*, and it is found that he has two acres, yet judgment shall be given but only for the land which he has by descent; for he is charged as *tenant* and not as heir. Poph. 153. Bowyer v. Rivet.——3 Bull. 317. S. C.——But where debt is brought against the heir, he is charged as debtor and not as tenant; for he is bound in the bond; per Doderidge J. 3 Bull. 321. in S. C.

In debt on bond against B. as heir of A.—B. pleaded *riens per descent in fee simple*; plaintiff replied that he had by descent in fee divers lands in such a county. The jury found that he had divers lands in fee by descent; whereupon a general judgment was given against B. It was moved that the judgment was erroneous; for that the plea and verdict were uncertain, by not shewing what lands. But curia contra, and distinguished this from the case of such finding in the case of an executor defendant not shewing the value of the assets found, according to the 40 E. 3. 15. For there he ought to recover according to the assets found, but here judgment general shall be given for his false plea, and so the quantity of the assets is not material. Roll. R. 234. Mich. 17 Jac. B. R. Evett v. Sutcliffe.——Upon a motion for a new trial, Twisden said, that in his practice, where the heir pleaded such plea to an action of debt upon a bond of his ancestor, and the plaintiff knew that the defendant had levied a fine, and it was produced at the trial; but because they had not a deed to lead to the uses, it was urged that the use was to the conusor and his heirs, and so the heir in by descent, upon which there was a verdict against him, and it being a just and due debt, they could never after get a new trial. Mich. 21 Car. 2. 1669. B. R. 1 Mod. 2. pl. 9.

[3. In

[3. In an action of debt against an heir, if the defendant *confesses the action, but does not shew the certainty of the assets* which he has, the judgment shall be general against him to recover the debt; because the action is in the debt, and it shall be presumed that he has assets. D. 18 El. 344. 1. Pl. C. 440. Contra D. 3 and 4 Ma. 149. 80. two precedents to the contrary.]

[4. So, if judgment be given against an heir by *non sum informatus*, the judgment shall be general for the cause aforesaid. D. 18 Eliz. 344. 1. Pl. C. 440.]

Poph. 154.  
Contra in  
case of  
Bowyer v.

Rivet.—3 Bulf. 320. per Jones J. contra in S. C. — Upon such plea his body shall not be in execution; for it is not his debt, though the writ be in the debt and detinet, for there is no other form. D. 81. pl. 62. marg. cites Mr. Mason's Reports. 41 Eliz.

[5. So, if judgment be given against an heir by *nihil dicit*, the judgment shall be general for the cause aforesaid. D. 5 El. 225. S. 34. Trewiniard's case, Com. 440. Davis v. Pepis. Dy. 18 Eliz. 344. S. 1. \* Henningham's case. Contra D. 6 & 7 E. 6. 81. S. 62. P. 11 Car. B. R. Sanderson v. Ashurst. Dubitatur by the court, and divided among themselves.]

\*Fol. 71.

D. 341. pl.  
1. — And  
execution  
being a-

warded by *cap. ad satisfaciendum*, error was assigned tam in redditione judicii, quam in redditione executionis, and took a difference, that where the heir pleads a *false plea*, there his body and all his lands are liable as if for his own debt. But if he be condemned by *default or acknowledges the action*, that the execution shall be only of the lands descended, sed non allocatur; for by not shewing how much he hath by descent, he loses the benefit which the law gives him, and assets shall be intended, and judgment affirmed nisi; per Gawdy and Clench J. Popham and Fenner being absent. Cro. E. 692. Barker v. Bourn. — Mo. 522. Hill. 41 Eliz. S. C.

[6. If the profits descended from the death of the ancestor to the day of the writ amount to sufficient to satisfy, and the plaintiff will shew this to the court in an action of debt against an heir, and the defendant cannot deny it, the plaintiff shall have a general judgment and execution presently. D. 18 El. 344. 1.]

[7. In a writ of annuity, if the plaintiff counts for *arrearages*, &c. against an heir upon a grant of his ancestor, if the defendant pleads *non est factum of his ancestor*, and this is found against him, he may have a *special judgment for the damages and arrearages* of the land descended, and this is no error. For this is in case of annuity, which is *always executory afterwards* for arrearages, which shall afterwards incur, and this is at the election of the plaintiff at the least; for by this he shall have \* *all the land descended in execution*; whereas upon a general judgment he shall have only the moiety of all his land in execution, and also this is for the advantage of the heir, and therefore cannot be assigned for error. Mich. & Hill. 11 Car. B. R. per Curiam in a writ of error. Franke v. Stukeley. — Intratur Hill. 10 Car. Rot. 990.]

S. C. cited  
Show. 78.  
in case of  
Brandling  
v. Milbank.  
\*See (C. 2.)  
— The  
court held  
that the de-  
nying the  
deed to be  
his father's  
was not a  
*false plea*  
within his  
cognizance.  
But though  
it should be

false, yet being charged in respect of his ancestor's deed, the land of his ancestor only shall be taken in execution: for that is the cause of the charge. Cro. C. 435. Hill. 11 Car. B. R. (seems to be S. C. by the name of) Clothworthy v. Clothworthy.

[8. In an action of debt against an heir, if he pleads *riens per descent*, and this is found for the plaintiff, if a judgment be given upon it, that the plaintiff recover the debt, damages and costs of the land descended, & quia nescitur, what land is descended, a writ is awarded

Sti. 287.  
S. C.



7 Mod. 44.  
per Holt  
Ch. J. in  
delivering  
the opinion  
of the court,  
in the case  
of Smith v.  
Angell.

In debt a-  
gainst heir,  
who has re-  
version in fee  
upon estate  
tail, he may  
plead *riens*  
by descent  
generally.  
3 Lev. 287.  
Kellow v.  
Rowden.  
—Carth.  
129. S. C.

\*[243]

awarded to inquire what land descended, this judgment is erroneous; for by the law the judgment ought to be general, which cannot be altered without the assent of the plaintiff, and here *no assent appears* in this case. Tr. 1651. Adjudged per Curiam in a writ of error upon a judgment in B. and it was reversed accordingly. Allen v. Holden.—Intratur Pasch. 1650. Rot. 547.]

[9. So in action of debt against an heir, if he pleads *riens per descent*, and this is found by a jury against him, and further found, that he has such certain land by descent, and thereupon judgment is \* given, that the plaintiff recover his debt, damages and costs of the land descended; this is an erroneous judgment, because it is not general according to the law, the which cannot be altered without the assent of the plaintiff: also it seems that *the jury, upon this issue, cannot inquire what was the assets*. Pasch. 1652. Adjudged in writ of error upon such judgment in B. and the judgment reversed accordingly. Snelgrave v. Bosvill.—Intratur M. 1651. Rot. 200.]

10. In formedon, the tenant pleaded a deed and assets descended, and the demandant pleaded *riens per descent*, and 'twas found that the demandant had land by descent; the demandant shall be barred of all by his false plea, though the land descended be not of the full value of the land in demand; per Wilby, Hill, and Shard. Quere inde. Br. Barre, pl. 19. 21 E. 3. 9.

11. If the heir be condemned in any plea whatsoever, or by default, or without plea by any way whatsoever, it is the practice, that the plaintiff have execution of the body of the heir or of his goods, or elegit of all his lands whatsoever, unless he confesses the debt, and shews the certainty of the land descended. Pl. C. 440. b. by the reporter, in case of Davye v. Pepys.

12. It seems that there is a diversity between the case of an executor and that of an heir; for if executor in debt pleads *riens enter mains*, or not the deed of the testator or the like, and it is found against him, nothing shall be put in execution but the goods of the deceased; because it is not the debt of the executor, but of the testator, and so is charged *en auter droit*, and has the goods *en auter droit*. But the heir when he denies assets, and it is found against him, or when he denies not assets, but pleads other matter, in which it is contained that he has assets, the said debt of the ancestor becomes the proper debt of the heir in respect of the assets which he has in his own right; and so the property, which he has in his own right of the land, makes the debt his proper debt, and for that reason the writ shall be in the debet and detinet. Pl. C. 440. b. 441. by the reporter in case of Davye v. Pepys.

13. A. devised to his wife, 'till B. his son and heir should be 24, and if B. died before without heir of his body, then the land to remain over to his daughter. In debt against B. as heir of A. he pleaded *riens per descent* but the third part of the manor of D.—B. was above 24. It was held by Dyer and Manwood, that here was no estate tail, but that the fee descended and remained in B. unless he had died under 24, and then the entail would have vested with the

D. 124. a.  
pl. 38. (bis)  
S. C.

3 Le. 64.  
70. S. R.



the remainder over. And therefore a general judgment should be given against him as of his own debt, and that an *elegit* should go of a moiety of all his lands, and a *capias* also. But Manwood conceived, that if a general judgment be given against the heir by default, a *capias* lies not, though it lies in case of a false plea. But Dyer e contra. 2 Le. 11. Hill. 20 Eliz. C. B. Hinde v. Lyon.

14. Debt upon a bond against the defendant as brother and heir to J. S. who pleaded *riens per descent* from his said brother. It was found that J. S. was seised in fee and had issue and died seised, and the issue died without issue, whereby the lands descended to the defendant as heir to the son of his brother. It was adjudged for the defendant; for though he is chargeable as heir upon this bond, yet he is but a collateral heir, and it ought to be specially declared, and the issue ought to be joined accordingly; but upon this issue it is found against the plaintiff; for the defendant has nothing as immediate heir to his brother, but by descent from the son of his brother; and to charge him, he ought to have declared specially. Cro. C. 151. Hill. 4 Car. B. R. Jenks v. . . . .

S. C. cited by Holt Ch. J. Show. 248. in case of KELLOW v. ROWDEN, and distinguished that case from this of Jenks's, for that in this, the land was affets in the

eldest son, whereas in that of KELLOW v. ROWDEN, the estate of the nephew was not chargeable.

15. In debt against the heir upon a bond, he confessed, that he had a dry reversion, but nothing more; the plaintiff said, that he had affets ultra, upon which they were at issue, and afterwards the plaintiff waived the issue, and prayed judgment of the reversion, quando acciderit, which was granted by the court. Roll. R. 57. pl. 34. Trin. 12 Jac. B. R. Anon.

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16. Father is tenant for life or in tail, and acknowledges a statute and dies. *Sci. fac.* is sued against the heir, who is returned warned, but made \* default, and so judgment against him; he is without remedy. Lev. 41. Trin. 13 Car. 2. B. R. Day v. Guildford.

Sid. 54. S. C. — Mo. 169. Sir Wm. Herbert's case.

17. Debt on bond against an heir, he pleads payment by his ancestor, judgment general was given and affirmed per 3 J. against 1. Show. 78. Mich. 1 W. & M. Brandling v. Milbank.

18. *Sci. Fa.* against the heir, on a judgment against the ancestor; if he plead a false plea to the *sci. fa.* and 'tis found against him, the judgment shall be of the lands descended, because execution must be upon the judgment against the ancestor. Carth. 93. Mich. 1 W. & M. B. R. Brandling v. Milbank.

Comb. 162. S. C. — Per Doderidge J. 3 Bulf. 321. and cites 33 E. 3.

Fitzh. Execution. 162,

19. A. seised in fee, obliges himself and his heirs by bond to pay so much money, &c. and then makes a lease for years, and dies, whereby the reversion in fee descends to the heir. Holt Ch. J. in delivering the opinion of the court said, that in debt against the heir, he could not plead this lease for years in bar of execution, but might without danger confess affets, without taking notice of the term for years. 7 Mod. 40, 41, 42. Trin. 1 Annæ. B. R. Smith v. Angell.

20. And in the case above, the heir pleaded further a decree in  
U 2 Chancery

• 1 Salk.  
355. S. C.

*Chancery for dower to his ancestor's widow of a third part of the premises for her life, and so prayed judgment, whether he as son and heir ought to be charged beside the reversion of the term aforeaid, (for years) and of the third part, whereof the wife was endowed, when they should (\* respectively) happen.* Holt Ch. J. in delivering the opinion of the court, held, that the dower was ill pleaded, in not saying, that it was by metes and bounds, nor that the Ld. Chancellor did endow her, nor has he any thing to do, as to assigning dower, though in case of lands held of the king in chivalry, he might, during such tenure, have done it. And that the decree vested no legal interest in her, though the heir might do it in pursuance of a decree, and when he does, she is in by his assignment, and not by the decree. So that, by its not being a title vested, he has *confessed assets, by setting forth only a reversion, depending on a freehold, without shewing that there was any freehold.* And if the assignment of dower were good pro tanto, yet here are two thirds whereof she was not endowed, and that is only charged with an estate for years, and that is enough to charge him with a general judgment. 7 Mod. 40 to 44. Smith v. Angell.

21. *And he said, that it is not in the power of the court to give a special judgment in this case, if the plaintiff does not desire it; for it would be erroneous, and cited 2 Roll. Ab. 71, that if it be by consent, they may give a special judgment. But he asked, how they could do so here? For if it be upon the confession, we must allow the plea good, viz. that it is a reversion expectant upon an estate for life, when it does appear that it is not so. And for this false plea in bar of the plaintiff's execution appearing to the court, viz. that there never was such an estate for life in being, and which is of the same effect as if a verdict had found it, so the plaintiff had a general judgment.* 7 Mod. 40 to 44. Smith v. Angell.

1 Salk.  
355. S. C.

22. *If the heir confesses assets by descent in A. and B. besides which he has no more, and issue is taken, that he has more.—If more assets are found, there shall be general judgment; per Holt Ch. J. in delivering the opinion of the court.* 7 Mod. 44. Trin. 1 Annæ, in case of Smith v. Angel.—and he cited 2 Le.—Vid. supra, Hinde v. Lyon.

[ 245 ] 23. *In suits against heirs, the law of England imitates the civil law, where an heir, being sued by a bond creditor, is sued for his own debt in the debet and detinet, and is, prima facie, supposed to have assets, but that he may discharge himself by saying, that at the time of the writ brought, he had no assets, or if he has assets descended, may shew those assets, of which the plaintiff may if he pleases take judgment; and that in case the heir had aliened before action brought, though at law there was no remedy against him, yet he was responsible in equity for the value of the land aliened; but now he is liable at law, by the 4 W. & M. 14. per Ld. Macclesfield.* Wms's Rep. 777. Hill. 1721. in case of Coleman v. Winch.

(C. 2) *What Heir, or who as Heir shall be charged, and How.*

1. **I**F a man, seised of lands in *gavelkind*, binds himself and his heirs by obligation, and dies; debt shall be maintainable against all the three sons; for the heir is not chargeable, unless he hath lands by descent. Co. Litt. 376. b. (i.)

So, if a man bind himself and heirs in an obligation, and leaves

land at common law, and land in *gavelkind*, the creditors must sue all the heirs; and so if one be heir of the part of the father, and another of the part of the mother, and both have land by descent, he shall have several actions, and execution shall cease, till he can take it against both. Hob. 25. cites 11 E. 3. F. Debt. 7. and 11 H. 7. 12.

2. A. seised in fee, had issue two sons, and bound himself and his heirs in a bond, and died seised of assets, and the eldest son entered and died without issue, and the younger son entered; he shall be charged by these assets as son and heir of his father, though there was a mediate descent to the eldest. And the same law of grandfather, father and son. D. 368. pl. 46. Pasch. 22 Eliz. Anon.

3. So of grandfather and two daughters, who have each a son, if the grandfather is bound for him and his heirs, and dies seised of assets, and the daughters enter and die without making partition, the sons enter they shall be charged. And by Littleton, they shall be in as one heir, &c. D. 368. pl. 46. Anon.

4. All manner of heirs shall be charged on obligation of the father; heirs of the part of the father, and of the mother, heirs in *gavelkind*, borough english, and all heirs immediate or mediate. Jo. 88. per Jones and Doderidge J. in case of Bowyer v. Rivit.

Het. 134. Bell's case.

5. It was said by the court, that debt lies against the heir of an heir, upon an obligation of the ancestor, who obliges himself and his heirs, unto the tenth degree. Noy. 56. Denny's case.—And cited Dyer 344. that debt lies against the executor of an heir.

6. By 29 Car. 2. cap. 3. § 7. It is provided, that no heir, that shall be chargeable by reason of any estate or trust made assets by law, shall, by reason of any plea, confession of the action, or suffering judgment by nient dedire, or other matter, be chargeable to pay the condemnation out of his own estate; but execution shall be sued of the whole estate so made assets, in whose hands soever it shall come after the writ purchased, in the same manner, as by the common law, where, the heir pleading a true plea, judgment is prayed against him thereupon.

7. If one binds himself and his heirs, the heir's lands are chargeable as he is *tertenant*, and not as heir; per Holt Ch. J. 12 Mod. 404 Trin. 12 W. 3. B. R. Anon.

## (D) Execution, [of what.]

D. 81. pl.  
62. cites  
a special  
judgment.  
P. 5. E. 6.  
Rot. 510.  
Scilicet,  
quod

[1.] IF the judgment in action of debt against an heir be *general*, upon *riens per descent* pleaded, and this found against him, or by confession, without shewing what assets he had, or upon *non sum informatus* or *nihil dicit*, the execution may be *general* also, as to have execution of the moiety of all his land, &c. D. 3 & 4 Ma. 149. 80.]

*prædictus querens recuperaret debitum de terr. & tenement. quæ fuerunt prædict' antecessoris in feodo simplici tempore mortis suæ in manibus defend' exist-nt.* But this was upon confession. — Upon such plea the plaintiff shall not have *Ca. Sa.* inasmuch as it is not the heir's proper debt; \* nor eligit of other lands, than of land descended in fee simple, &c. and so the eligit shall be special in this case; by the opinion of all the justices of C. B. D. 81. pl. 62. Luson's case. — \* Orig. (de).

Carth. 245.  
Gree v.  
Oliver:

[2. But if in an action of debt brought against an heir the defendant acknowledges the action, and shews the certainty of the assets, and upon this judgment is given to recover the debt, to be levied of the assets descended; there the plaintiff shall have a writ of execution to levy this of all the land descended, and not to have a moiety, as upon an *elegit*. D. 3 & 4 Ma. 149. 80.]

\*Fol. 72.

Upon a  
false plea by  
the heir,  
the plaintiff  
may elect to  
take the  
assets by de-  
scend in  
execution,  
or an *elegit*

[3. So it seems if in an action of debt against an heir judgment general be given upon *riens per descent* pleaded, *nihil dicit*, confession without shewing assets, or upon *non sum informatus*, though the plaintiff may have execution by an *elegit* of the moiety of all his land \* yet it seems that he may, at his election, surmise that he had such land by descent, and pray to have execution of all this land. For otherwise, if the plaintiff shall not have this election, but is put to his *elegit* general, then he shall have but a moiety in execution, and peradventure the heir has not any other land besides the assets. Vide for this D. 3 & 4 Ma. 149.]

of all his land; per Jones J. Poph. 155. in case of Bowyer v. Revet.

Mr. Girdler said, that he had seen several cases in B. R. where, upon prayer, there was a special execution, and that he had the number-rolls of several, which he had perused. And in some cases such a special execution may be very advantageous; for then such lands were chargeable from the rolls of the original; whereas on a general one, they might be aliened before execution. 2 Show. 174. Anon. — 1 Mod. 253. Anon. contra.

Carth. 245. GREE V. OLIVER. S. P. by which a judgment obtained on the bond of the ancestor, on the heir's pleading *riens per descent præter* the lands in question, took preference of a judgment general obtained prior on a writ filed after.

Where the heir is to be charged upon judgment had against the father, in such case, though he plead *riens* by descent, and it is found against him, yet no more shall be given in execution, but the moiety of the lands in the hands of the heir, which were his father's at the time of the judgment or before; for the heir was charged, not as heir, but as tenant, and no action of debt lies against the heir on judgment against the father, but a *Sci Fa.* only; resolved JO. 88. Bowyer v. Rivit. — 3 Bull. 317 to 322. S. C. — Poph. 153. S. C. — Palmer 419. Pasch. 1 Car. B. R. S. C.

\* And. 28.  
pl. 65. S. C.  
by name of  
HECKER  
AND HAR-  
RISON V.  
TIRREL,  
and says,

4. In debt by J. S. and W. R. against B. as heir, B. pleaded *riens per descent*, and it was found in the county of Suffex, that he had assets in the cinque ports, [\* and shewed where.] And judgment was given of a moiety of his lands, as well those by descent as by purchase. 3 Le. 3. pl. 7. Trin. 3 & 4 P. & M. Hecks v. Tirrel.

that judgment general was given against the defendant, and the plaintiffs shall have several *elgits*

to have execution of the moieties of the lands of the defendant generally, and not specially, as of lands descended to him; whereof the one writ in the cinque ports, and another writ in common course, in the county where, &c. But the plaintiffs were compelled in the first place to have a certiorari to remove the same records into Chancery, and thence by mittimus to the constable of Dover to make execution of this judgment.

5. There is a difference where the heir is charged by warranty of his father, and where by obligation; for where he was charged upon warranty of his father, and he pleaded *riens per descent*, and found against him, viz. that he has by descent, but not assets, [or sufficient]; in this case execution shall be of the lands by descent only; but otherwise in the case of the obligation; per Jones and Doderidge J. and it was not contradicted by the other justices, Jo. 87, 88. Hill. 1 Car. B. R. in case of Bowyer v. Rivit. [ 247 ]

6. In a *warrantia chartæ* against the heir he pleaded *riens per descent* &c. In this case the plaintiff shall recover *pro loco & tempore*. 8 Rep. 134. in Mary Shipley's case. So in debt against the heir, if he pleads *riens* per descent, the plaintiff may have judgment immediately, and *sci. fa.* when assets descend. *Ibid.*

## (D. 2) Execution. Priority. Who shall have it.

1. **A.** Brought debt against the heir on a bond of his ancestor, pending which action B. brought debt against the same heir upon another obligation of his ancestor. B. got judgment first, and then A. had judgment; North Ch. J. held it very clear, that B. who got the first judgment, should be first satisfied. For that the land was not bound 'till the judgment given. Trin. 29 Car. 2. C. B. 1 Mod. 253. Anon.

2. But if the heir, after the first action brought, had aliened the land, which he had by descent, and B. the plaintiff in the second action commenced, after such alienation had obtained judgment, and then A. had obtained judgment likewise, in such case A. should be first satisfied, and B. not at all; per North Ch. J. Trin. 29 Car. 2. C. B. 1 Mod. 253. Anon.

## (E) Who, at Common Law.

1. **BY** the common law, before and at the conquest, the children, both male and female inherited alike, and the estate whether real, or personal, descended to all equally; per Holt Ch. J. cites Seld. Eadm. 134. Lamb. Sax. Laws 36. fo. 167.—In the reign of H. 1. females began to be excluded, and the males inherited equally the socage-land. Glanvil. 7. cap. 3. At that time the land descended to the father, if the son died without issue. Lamb. 202, 203. L. L. 41. 1. c. 70. And yet about this time, or in the time of H. 2. the father and mother began to be excluded as to the real estate, but not as to the personal. 1 Salk. 251. Blackborough v. Davis. 12 Mod. 623, 624. and Wms's Rep. 50. per Holt Ch. J. S. P. in S. C.

2. A. seised in fee of 2 houses, had three brothers B. C. and D. and devised his house in possession of J. S. to his three brothers, among them;

\* Such devise shall be understood of the principal heir of the house; per Hobart, Ch. J. Hob. 33.

them, and his house in B's possession to B. and he to pay 5l. to R. IV. to find him schooling, and else to remain to the \* house, provided that the houses be not sold, but go to the next of the name and blood that are males (if it may be). A. dies, living B. C. and D. and then B. dies without issue. C. enters and dies leaving issue a son. The question was, whether the son of C. or D. should have the house? And upon debate of this matter, Mounson, Manwood, and Dyer thought, that the son of C. should have the remainder to him and the heirs male of his body, the remainder to D. in like manner, and the one to succeed the other according to the course of the common law. But Harper e contra. D. 333. pl. 29. Pasch. 16 Eliz. Chapman's case.

[ 248 ] (E. 2) Who, in the *Right Line* Ascending, or Descending.

See (E. 3)  
—See Descent.

1. **I**T is a maxim in the law of England, that an inheritance cannot lineally ascend; per Hale Ch. J. Vent. 415.
2. If a man purchase land in fee simple, and dies without issue, in the first degree the law respects *dignity of sex*, and not proximity, and therefore the remote heir of the part of the father shall have it before the near heir of the part of the mother. But in any degree paramount the first, the law respects not, and therefore the near heir by the grandmother; on the part of the father, shall have it before the remote heir of the grandfather on the part of the father. Bacon's Elements 3.

See Descent.

(E. 3) Who, in the *Collateral Line*.

1. **T**HREE sorts of persons cannot have heirs in *transversali linea*, but in *recta linea*, viz. 1st, a bastard, 2dly, a person attainted, 3dly, an alien. Arg. Godb. 275. in Godfrey v. Dixon's case.
2. Children inherit their ancestors without limit in the *right ascending line*, and are not inherited by them. But in the *collateral lines* of uncle and nephew, the uncle as well inherits the nephew as the nephew the uncle. Vaugh. 244. in case of Harrison v. Burwell.

See Descent.

(E. 4) Who, in Case of a *Purchaser*.

See (W).  
—S. C. cited Noy. 159. in case of the King

1. **I**F purchaser has issue a son and dies, and the son enters, and dies without issue, and without heir of the part of the father; the heir of the part of his father's mother shall have the land by descent, but the heir of the part of the mother of such issue shall not



not inherit. Agreed Pl. C. 446. in case of Clere v. Brook and Cobham.——— cites \* 12 E. 4. 14.——Pl. C. 449. b. v. Boraſton and Adams. —Be-

cause, though ſuch heir is of the blood of him that was laſt ſeiſed, yet he is not of the blood to the father, which was the firſt purchaſor, and if after the purchaſor's death his ſon does not enter, then the heir of the part of the mother ſhall not have it, becauſe he is not of the blood of him that was laſt ſeiſed. Fin. Law, 8vo. 116, 117.

2. Son purchaſed land in fee, and died without iſſue, leaving a mother and a grandmother of the father's ſide; the grandmother had a brother and ſo had the mother; and the queſtion was whether the brother of the grandmother, or the brother of the mother ſhould be heir to the ſon; and the opinion of all the juſtices of C. B. was that the brother of the grandmother ſhall inherit as next of blood to him of the part of the father, &c. and that \* 12 E. 4. is accordingly; and adjudged, againſt the opinion of Jeffreys, that the uncle of the part of the mother ſhall not be heir, but the great uncle, viz. the brother of the grandmother; becauſe in him is the more ancient and worthy, and alſo the more intire blood. D. 314. pl. 95. Trin. 14 Eliz. Cleer v. Brook. S. C. adjudged 15 Eliz. C. B. Pl. C. 444. 449. b.—Diſcents ſhall go to the moſt worthy blood, and therefore the brother of the grandmother of the father of the part of the father ſhall

be preferred to the brother of the grandmother of the part of the father; for the brother of the grandfather is ſon to the great grandfather, and ſo comes of the worthier race; and if the grandfather had no brother but had a ſiſter, it ſhould deſcend to the ſiſter, and to her line, rather than to the brother of the mother of the father of the purchaſor, for the ſiſter of the grandfather is daughter to the great grandfather, and ſo comes of the race of the males, of which the purchaſor came, and ſo of the race moſt worthy, Pl. C. 445. Reſolved in caſe of Clere v. Brook.——\* Br. Diſcent, pl. 38. cites 12 E. 4. 14.

3. And the brother of the grandmother of the part of the father [ 249 ] ſhall be preferred before the brother of the great grandmother, notwithstanding that the blood of the laſt is derived by 2 males, viz. the father and the grandfather, and the blood of the former by one male only, as was objected. Pl. C. 450. b.—In an additional note, adds that all the juſtices of C. B. agreed in this point. Pl. C. 450. b. 441. Clere v. Brook alſ. Cobham.

4. If a purchaſor dies without iſſue, and has no heir of the part of the father, the land ſhall deſcend to the next heir of the part of the mother, and this ſhall be intended to be the heirs of the race of the males, whereof the mother is deſcended, rather than to others; as where the grandfather of the mother, viz. the father of the father of the mother of the purchaſor has a brother, and the grandmother of the mother of the purchaſor, viz. the mother of the father of the mother of the purchaſor has a brother, there if the purchaſor dies without iſſue, not having heir of the part of his father, the brother of the grandfather of the mother, viz. the brother of the father of the father of the mother ſhall have the land by deſcent, and not the brother of the grandmother of the mother, viz. the brother of the mother of the father of the mother of the purchaſor; for ſuch brother of the grandfather of the mother is of the worthier race; for he is ſon to the great grandfather of the mother, who ſhall be preferred before the brother of the part of the grandmother of the mother; becauſe he is ſon to the mother's grandfather in another race, viz. in a race conjoined to the race of the males, from which the purchaſor's mother deſcended by marriage of the feme, viz. by marriage

*marriage of the mother's grandmother to the mother's grandfather; and therefore the brother of the mother's grandfather of the part of her father and his issues shall be heirs to the purchaser, and not the brother of the mother's grandmother; nor can he be heir to the purchaser so long as the purchaser's mother's grandfather of the part of her father has an heir, causa qua supra. Agreed. Pl. C. 445. b. Pasch. 15 Eliz. C. B. in case of Clere v. Brooke.*

5. In these cases *no marriage is to be regarded, but the marriage of the father and mother of the purchaser which preceded the purchase; for no marriage after will make any inheritable to the land so purchased. Pl. C. 447. in case of Clere v. Brooke.*

See Discent  
(F)

(E. 5) *What Persons may be Heir.*

*If land descends to a man who is entered into religion, and not professed, he shall have it. Contra, after profession. Br. Nonablitie, pl. 2.*

1. **W H E T H E R** a monk professed may take as heir? a difference was made by the counsel between a monk and a monk professed, and that it was a disability at common law; but it was answered by the other side, that if it was so then, it is not so now; because there is no way of trial, whether a man is a monk professed or not; for at common law it was by the certificate of the bishop, which cannot be done now. See 9 Mod. 54. Sir Lawrence Anderton v. the Commissioners of the forfeited estates.

cites 3 H. 6. 23. per Marten.

\* S. P. and the law says that the land shall rather escheat; per master of the Rolls. 2 Wms's Rep. 666. Mich. 1734.

2. Though a father or mother, as such, cannot inherit immediately after the son; yet if the case should so happen that the father or mother were *cousin to the son and, as such, his heir*, they may take notwithstanding, and this does not hinder them from taking in the capacity or relation of cousin. 2 Wms's Rep. (613.) (614.) per Master of the Rolls, Trin. 1731. Eastwood v. Vinke. — als. Eastwood v. Styles.

Cowper v. Earl Cowper.

[ 250 ]

See Discent  
(G)

(E. 6) *Who. By Matter subsequent.*

1. **A N** abbot purchases to him and his heirs, and after is deraigned and dies; his heir shall not have the land, for he had not such manner of capacity at the time of the purchase. Br. Discent, pl. 62. cites 9 H. 5. 9.

(F) *Who shall inherit as Heir. Divorce.*

1. **R E N T** granted out of land at common law and borough english, &c. descends to the heir at common law; for where custom and common law meet, so that one or the other must have the preference, the common law takes place. And. 191. in case of Smith v. Lane.

2. A man marries a wife pre-contracted; they have issue two sons; a divorce is had; one of them purchases land and dies without

out issue; the other shall not be his heir. Arg. Noy. 162. 163. in case of the King v. Boraston and Adams.

3. If two are *divorced* for consanguinity, if they were *ignorant of the consanguinity*, the issue shall be legitimate. Arg. Roll. R. 212. cites 18 E. 4. 29.

## (F. 2) Heir. Who in Case of *Bastards* and their Issue.

1. **I**F the *issue* of a bastard purchases land and dies without issue, though it cannot descend to any of the part of the father, yet it may to heir the heir of *the part of the mother*; for the heirs of the part of the mother make not any conveyance by the bastard. Arg. Noy. 159. in case of the King v. Boraston and Adams.

## (F. 3) Where he shall take by *Descent or Purchase*. See Discent (I)

1. **NOTE**, that Sir John Hufley, knight, *enfeoffed certain persons in fee to the use of Anne his wife for her life, and after to the use of the heirs males of his body, and for default of such issue, to the use of the heirs males of the body of Sir W. H. his father, and for default of such issue to the use of his right heirs, and after has issue W. Hufley, and then Sir John was attainted of treason, anno 29 H. 8. and put to execution, and after Anne died, and the said W. Hufley prayed ouster le main of the king, and by the king's attorney he shall have it; for this name (heirs males of the body) is only a name of purchase, and Sir William Hufley [the son] shall not have it as heir to Sir John, but as purchaser.* Br. Nofme, pl. 1. cites 37 H. 8.

Br. N. C.  
37 H. 8. pl.  
302. S. C.  
—Br. Li-  
very, pl. 1.  
S. C. But  
Brook  
makes a  
quare.

2. When the heir takes that, which his ancestor would have taken if living, he takes by descent and not by purchase. 1 Rep. 98. in Shelly's case.

3. So it was where no right descended to the heir of the covenant, but only a possibility of an use which might have vested in the ancestor, the heir was in by descent; cited in SHELLY'S CASE. 1 Rep. 99. as Wood's case.

Cited 3  
Mod. 61.—  
S. C. and  
P. cited  
per Parker  
C. 10 Mod.

425. in case of Marks v. Marks.

## (F. 4) Take. Where, In Nature of a Descent. [251]

1. **A.** Seised of the manor of S. covenanted with J. N. that when J. S. should enfeoff A. of the manor of D. then A. would stand seised of the manor of S. to the use of J. N. and his heirs. J. N. died, his heir within age. J. S. enfeoffed A. It was held that the heir should be adjudged in in course and nature of a descent, and yet it was neither right, title, use nor action, which descended,

And it is  
laid down  
as a rule in  
SHELLY'S  
CASE, that  
where the  
heir takes  
any thing

which might have vested in the ancestor, there although at first it

vested in the heir and never in the ancestor, yet the heir shall be esteemed in by descent; per Parker C. 10 Mod. 425. cites Wood's CASE. cited 1 Rep. 99. in Shelly's case.

descended, but only a possibility of an use, which could not be released nor discharged; yet if the condition had been performed, it might have vested in the ancestor, and then the heir should have claimed by descent. 1 Rep. 99. a. in SHELLY'S CASE, cites it as adjudged 3 Eliz. in the court of wards, Wood's case.

2. *A. made a feoffment to the use of himself for life, and after the death of him and M. his wife to the use of B. (eldest son of A.) for his life, and after the death of A. M. and B. to the use of B. and the heirs males of his body, and for default of such issue, to the use of the heirs of B.*—*B. had issue a daughter, and then by fine and indenture granted to G. for 500 years; B. dies; M. dies, A. surviving; upon a reference out of chancery to the Lord Ch. J. Hale, and after hearing the arguments of counsel, his lordship was of opinion, that the estate as above limited to B. was a contingent remainder, and that this contingent remainder descends to the heir of B. and he shall have it in course and nature of a descent.* January 3, 1672. Pollex. 55. 65. and 66. Weale v. Lower.

\* See Discent (A)—Gavelkind (B)

It is partible among the males. Jenk. 205.

### (F. 5) By \* Custom. Who.

1. **R**ENT in fee or tail granted out of gavelkind lands follows the nature of the land, and descends as the land does. Jenk. 193. pl. 100. cites 26 H. 8. 5. four times adjudged. pl. 32. cites 26 H. 8. 3.—Mod. 98. S. P. because the rent is part of the profits of the land, and issues out of the land; adjudged, Mich. 25 Car. 2. B. R. Randal v. Jenkins.—2 Lev. 87. S. C. by name of Randal v. Writtle.—3 Keb. 165. S. C.—S. P. cited by Twisden. Pasch. 26 Car. 2. B. R. as adjudged, that it is of the nature of the land. Mod. 112. pl. 7.—Br. Rents, pl. 13. cites 22 Ass. 78. S. P. though it was granted since time of memory.—S. P. cited by lord C. Jeffries to have been adjudged by Ld. Ch. J. Hale of a rent-charge created de novo. Vern. 489. in case of Edwin v. Thomas.—It was adjudged, that if A. seised of land in *fee* and gavelkind grants a rent-charge out of them to B. in fee, and B. dies leaving 3 sons, the eldest son shall have all the rent. Noy. 15. Randal v. Roberts.

2. *Stallage and piccage is incident to the soil.* Mo. 474. Mich. 39 & 40 Eliz. in case of Heddy als. Heddy v. Welhouse.—

And therefore, if the king grants fair or market with toll certain to one and his heirs, to be held within *borough english land*, and the grantee dies, the heir at common law shall have the fair or market and the toll, but the younger son shall have piccage and stallage with the soil by the custom. Ibid.

3. Upon the evidence given to the jury as to a custom, *whether the eldest sister only should inherit*, on failure of issue male, the court enforced the parties which maintained the custom, to shew *precedents in the court rolls* to prove the usage; and per Coke Ch. J. without such proof and that it had been put in ure, though it had been deemed and reported to have been the true custom, yet the court could give *no credit to the proof by witnesses*. But in this case the jury gave their verdict for the custom which was proved only by witnesses, whereas divers court rolls in 6 H. 4. were against the

the custom, viz. that the sisters should inherit as coparceners by the common law, and the reason of the jury's finding for the custom was, because they \* of their own knowledge knew the usage of the country, and that in divers places it had been so *used in the hundred within which this manor is.* 4 Le. 242. Pasch. 8 Jac. C. B. Ratcliff v. Chaplin. \* Jo. 16, 17.

4. If the youngest son in *borough-english* dies, the *middle brother* shall have the land by the custom. Bulf. 93. Mich, 8 Jac. in case of Davis v. Hales.

5. If a *custom* be alleged that the *eldest daughter* shall solely inherit, the eldest sister shall not inherit by force of that custom. Ruled per tot. Cur. Godb. 166. Pasch. 8 Jac. C. B. Rapley v. Chaplin.

6. So if the custom be that the *eldest daughter*, or *eldest sister*, shall inherit, the *eldest aunt* shall not inherit by that custom. Ibid.

4 Le. 242.  
pl. 395. S.  
C. & P.

7. So if the custom be that the *youngest son* shall inherit, the \* *youngest brother* shall not inherit by the custom; and Forster J. said that it was so adjudged in one Denton's case. Ibid.

Cro. J. 193.  
Mich. 5  
Jac. B. R.  
Bailey v.  
Stevens.

8. As to descent there is *no difference* between a *copyhold in borough-english* and a *freehold* in *borough-english*. Cro. C. 411. Trin. 11 Car. in case of Reeve v. Malster.

9. A. seised in fee of copyhold lands of the nature of *borough-english*, descendable to the youngest son, surrendered the same to the use of *himself and M. his wife for life, and to his heirs*; A. dies leaving 3 sons B. C. and D. *M. enters and enjoys*; D. dies; per 2 justices, B. shall take after the death of M. because C. cannot have it as brother and heir to D. by the custom; for the *custom extends only to the youngest son*, and not among brothers where no such custom is found, and without a special custom found, that it shall descend to the youngest brother, the law will not admit it; for customs are taken strictly. Secondly it was agreed by all that though *D. died before admittance*, it is *not material*; for he was a copyholder, and might have surrendered, or charged, or leased, &c. and if *M. had died living D. and D. had entered and died without issue*, then B. should have had the land as heir to D. But in the principal case, it *being a reversion expectant upon estate for life*, and D. *never being seised of the land in possession*, but dying in the life of the tenant for life *without issue*, the great question was, if C. as youngest son may claim it, or B. shall have it as heir at common law? Brampton Ch. J. and Berkley J. held that C. should have it, and Jones and Croke J. held that B. should have it. Cro. C. 410. Trin. 11 Car. B. R. Reeve v. Malster.

Jo. 361.  
S. C. ad-  
journ'd—  
S. C. cited  
per Holt  
Ch. J.  
in deliver-  
ing the opi-  
nion of the  
court in the  
case of  
CLEMENT  
V. SCUDA-  
MORE and  
distinguish-  
ed from  
that as  
being more  
special; the  
case of  
CLEMENT  
V. SCUDA-  
MORE being  
that if a  
man died  
seised gene-  
rally, with-  
out saying

in fee. Wms's Rep. 67, 68. and after page 69, he says, that if Jones's and Croke's opinion were to prevail, it could not but occasion uncertainty and consequently confusion.

10. A *custom* that *lands* shall descend always to the *heirs males*, viz. to the males in the *collateral line*, excluding females in the *lineal*, was held good. Vent. 88. Trin. 22 Car. 2. B. R. Sympton v. Quinley.

11. A copyhold shall descend according to the common rules of law, unless custom particularly alters and orders it otherwise; per Eyre

The court  
seemed  
clear that

the custo-  
mary de-  
scend should

be governed by the reason and rules of the common law. 11 Mod. 107. Mich. 1706. B. R. Brown v. Dyer.

Wms's Rep.  
63. S. C.

Wms's Rep.  
67. Hill. 2

Annæ, B. R.  
S. C.

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Eyre J. Show. 84. Hill. 1 W. & M. in case of King v. Dill-  
ston.

12. *Borough-english* lands descend to the representative of the youngest son. 1 Salk. 243. Hill. 2 Annæ, B. R. Clement v. Scudamore.—6 Mod. 120. S. C.

13. Where custom makes an heir, the law implies all incidents in course of descent. 1 Salk. 243. Clement v. Scudamore.

14. So that if the father is disseised, and dies, whereby he is not seised at the time of his death, yet the right of entry shall descend to the youngest son, and if he dies, then to his daughter. Ibid.

Estate *par  
auter vie*,  
of lands in  
*borough-eng-  
lish*, shall  
descend to  
the heir in  
*borough-*

15. If a lease be made to H. and his heirs for three lives, of lands of the nature of *borough-english*; this descendable freehold shall go to the youngest son, though it is a new created estate; for the custom is inherent in the land; and so it is of a rent, for it issues out of the estate; 1 Salk. 244. per Holt; in case of Clement v. Scudamore.

*english*; per Cur. 2 Vern. 226. cites it as adjudged per Hale Ch. J. in the case of \* Dowdeswell v. Dowdeswell.—\* The court held, that the custom run with the land, and guided the descent to the youngest son, and so it was adjudged. 2 Lev. 139. Trin. 27 Car. 2. B. R. Baxter v. Doudswell.

### (G) By Limitation.

Vid. De-  
vise, (Z. a.)

i. **L E A S E** to A. for life, remainder to the next of his blood. A. has issue B. and C.—B. has issue and dies, then A. dies. C. shall have the land and not the issue of B. for now C. is the next of blood to A. and not the son of B. though B. was the eldest brother; per Wilby. Br. Done, &c. pl. 21. cites 30 Aff. 47.

2. Lease for life to A. remainder to the right heirs of B. who has issue three daughters and dies; the eldest shall have the remainder and not the other with her because she is the more worthy; per Wray Ch. J. 2 Le. 219. Pasch. 16 Eliz. B. R. in Humphreston's case.

3. A. made a feoffment in fee to the use of C. his younger son in tail, and after to the use of the heirs of the body of A. in posterum procreand. and at the time he had two sons, B. and C. afterwards another son was born. C. died without issue; per Wray J. The land shall go to the third son born after the feoffment; for this word (in posterum) is a forcible word to create a special inheritance, without that it had been a general tail. 3 Le. 87. Mich. 26 Eliz. B. R. Anon.

4. Lease for life, remainder to the next of blood, his brother of the half blood shall have this remainder before the uncle or aunt of the whole blood; per Coke Ch. J. Roll. R. 114. Hill. 12 Jac. B. R.



5. Devise to a third daughter, remainder *proximo consanguineo* of the devisor, the eldest daughter is the next. Vid. 2 Roll. R. 256. Perin v. Pearce.

(G. 2) *Immediate Heir. Who shall be deemed so in Law, though in a Remote Degree.*

Vid. Dis-  
cent.—  
Formedon  
(H.)

1. **A.** Has a daughter his heir apparent : this *daughter has a son* ; *she dies* in her father's life-time, then A. is killed ; this *son shall have an appeal of the death of his grandfather* ; for by the death of his mother in his grandfather's life-time, the son is the immediate heir to him ; by all the serjeants in England. Jenk. 6. pl. 8. cites 15 E. 2.

Jenk. 81.  
pl. 60. cites  
17 E. 4. 1.  
22 H. 6.  
43. Mag.  
Charta, 33.  
Stamf. 58.

(G. 3) *By Limitation who. Where it is limited to the \* Heirs Male.*

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\* See Devi-  
see.

1. **A.** *Devise* lands to B. *and to the heirs males of his body.* B. *has issue a daughter, who has issue a son* ; the *daughter dies in the life of B.* afterwards A. dies, and afterwards B. dies ; this son shall take by this devise ; for although he is not the son but the grandson of B. he is the heir male of B. And I so understand the principal case, that if the daughter had survived B. and A. had died in the life of the daughter ; the son of the daughter in this case should not take, for he is not heir male to B. This son cannot be heir to B. in his mother's life-time. For if so, the fee would be in abeyance during the life of the mother, which the law will not suffer. *Testamenta latissimam interpretationem habere debent.* The law is *otherwise upon a gift in tail*, the male in this case ought to convey by males. Jenk. 81. pl. 60. cites 28 H. 6.

S. P. by  
Paston. 9  
H. 6. 24.

2. Where land is given to a man and his feme for life, the remainder to the heirs males of the body of the man, this remainder cannot be vested in the life of the man ; for it is not tail in the man, by reason of the estate of the feme, yet if he has issue two sons, the eldest has issue a daughter and dies, the father and mother dies, the younger son shall have the land as heir male, and yet he is not heir in fact. Br. Nofme, pl. 40. cites 37 H. 8.

Br. N. C.  
37 H. 8. pl.  
302. 2 C.

3. So where land is given to W. N. for life, the remainder to J. S. for life, the remainder to the heirs males of the body of the said W. N. who has two sons ; the eldest has issue a daughter and dies, and W. N. and J. S. die : the youngest son shall have the land as heir male, yet he is not heir in fact, but his niece is heir to his father ; for it is no matter of the first vesting, nor of the remainder. Br. Nofme, pl. 40. cites 37 H. 8.

4. A. seised of lands in fee, having a son, a daughter and a brother, *devise* the land to his son, and if he die without issue, then to the right heirs males of his name and blood, to be divided part-  
like

like for ever. A. dies. The son dies without issue. The daughter shall take and not the uncle; for the right heir male in this case ought to take by purchase, and to be heir male, and the uncle is male, but not heir. Adjudged and affirmed in error. Jenk. 294. pl. 41. cites Hob. 29. Cownden v. Clerk.

A. had two daughters and a nephew, and devised to his daughters 2000 l.

and gave the land to his nephew, by the name of his heir male. Provided if his daughters troubled the heir, the devise of the 2000 l. to be void; and adjudged good; per Cowper C. 2 Vern. 735. in case of Newcomen v. Barkham.—said it was cited by Ld. Ch. J. \* Hale, in case of Pybus v. Mitford.——\* Vent. 381.

Cited Arg. Gibb. 317, 320.—S. C. cited Arg. Wms's Rep. 369, 370.—2 Vern. 196. Per commissioners held, that the heirs of the body took

6. A term for years was assigned in trust for baron and feme for their lives, and of the survivor of them, to receive the profits for so many years of the term as they or the survivor of them should happen to live, and after their deaths, to the heirs of the body of the feme, by the baron. The plaintiff's counsel, to support the remainder, would construe (heirs of the body) to be words of purchase or description and not of limitation. But per Cur. The whole interest of the term vested in the wife, and must go to her executors or administrators; per Jefferies C. Pasch. 1688. 2 Vern. 43. \* Peacock v. Spooner.

by way of purchase, and as a person well described, and the limitation of the term to them good, and dismissed the wife's executor's bill. Trin. 1690. S. C.

† Note, In this case they cited and relied on the case of WARMAN v. SEYMAN. 2 Chan. Cases, 209. Mich. 27 Car. 2. and BOWMAN v. YATES, where the words, heirs of the body, were looked upon to be a good description of the person intended to take on a second marriage, though there was issue by a former wife, and so he was not strictly heir. Ut ante.

Note, This decree and dismissal was affirmed in dom. proc. But contra per Lord Keeper. Hill. 1710, where it was decreed, that the heirs of the body could not take as purchasers, and says, if the legal estate had been so limited, the mother must have taken the whole, and the trust of a term must be governed by the same rule. 2 Vern. 668. Webb v. Webb.

Wms's Rep. 135. S. C. Hill. 1710, and his lordship said, that before the case of PEACOCK v. SPOONER, he never heard it said, that the limitations of a term in equity, differed from the case of a freehold at common law.

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7. A man having issue a son by a former wife, upon his marriage with a second wife, by fine grants 150 l. per ann. out of lands for her jointure, and if he should have heirs male, then those heirs male should have another 150 l. per ann. during the life of such second wife, and after her decease, the heirs male of his body, and his said second wife, should have 300 l. per ann. &c. He has a son also by the second wife. The court thought that by the true meaning of the marriage agreement, the son of the second wife is a person well described to take the rent, cited N. Ch. R. 123. as decreed 20 January, 1666, in the case of Seymour v. Boreman and Yates.

8. J. S. covenanted to stand seised to the use of A. his eldest son and the heirs male of his body on M. his wife to be begotten, and for want of such issue to the heirs male of the covenantor, and for want of such issue to his own right heirs for ever. A. has five

daughters but no son living; resolved that A.'s younger brother shall take, and not the daughters, who are heirs at law. 2 Mod. 207. Pasch. 29 Car. 2. C. B. Soutchcott and Stowell.—Contra to Creswold's case. And. 3. Dy. 156. 24.

9. It may be admitted, that the words (heir male) \* without more, will not carry it in a descent, or by way of limitation, if he be not also heir. † But one may take as heir of the body of a person dead, though not heir general: per Cowper C. 2 Vern. 732. Hill. 1716. Newcomen v. Barkham.

Ch. Prec. 442, 461. S. C. by the name of Brown v. Barkham. —the

difference is between heirs male, or heirs female generally, and a devise to the heirs male, &c. of the body; per Cowper C. Hill. 1716. Ch. Prec. 466. Brown v. Barkham.—\* Ch. Prec. 54. Trin. 1695. Starling v. Ettrick.—\* Ch. Prec. 589. Pasch. 1722. per Ld. C. Macclesfield, Dawes v. Ferrars.—† Ch. Prec. 483. Brown v. Barkham.

10. The rule that he, that takes as a purchaser by the name of heir male, must answer the whole description, so as he must be both male and heir, is a rule \* without foundation, in natural reason, and is raised and supported only by the artificial reasoning of lawyers, and under this head we may consider the case of COWNDEN AND CLERK, in Hob. and ASHENHURST'S CASE, cited at the end of that case, and also the case of † STIRLING V. ETTRICK in this court, in all which it is observable, 1. That the limitations were only to the heirs male, not saying of the body. 2. Whoever observes the manner of my Ld. Hobart's argument, Fol. 32. will find his own opinion to be for the devise, if it had been made to the heirs male of the body, and there seems to have been some † mistake crept into the print, in the transcribing that part of the case which looks otherwise. And as to the case of ‖ STIRLING V. ETTRICK, besides that, there is no mention of the word body, that was in case of a deed directing a conveyance to his heirs male, and therefore he thought the decrec extremely right, and should have given the same, if it had come before him; per Cowper C. Hill. 1716. Ch. Prec. 462, 463. in case of Brown v. Barkham.

\*S. P. per Ld Macclesfield, and said, that Anderson in his report of the same case of SHELLEY's says the judges gave no reason at all for their opinions, though Ld Coke had made so long a report of their arguments; but since

the law has been so taken ever since, it is dangerous to remove ancient land-marks, and accordingly allowed a demurrer by the heir at law. Ch. Prec. 589. Pasch. 1722. Dawes v. Ferrars.—† Ch. Prec. 54. S. C.—† Ch. Prec. 466.—‖ Ch. Prec. 54. S. C. decreed per Ld Somers.

11. In case of a descent, the heir male of the body takes only as person described; and if a person may take by description of the person, then it certainly follows, that he must take when the description is true, and is perfect and compleat; per Cowper C. 2 Vern. R. 732. Barkham v. Newcomen & e contra.

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12. A. devised to the heirs male of B. lawfully begotten, and for want of such heir to his own right heirs; it was held good, though not to the heirs of the body, and though those words (of her body) were wanting, yet they were supplied by the description, and made good by other words tantamount; cited per Cowper C. 2 Vern. 735. to have been adjudged in the House of Lords, in the case of Long v. Beaumont.

Ch. Prec. 442, 461. Brown v. Barkham. S. C. S. C. cited Arg. Ch. Prec. 443.—S. C. cited per Cowper C. Ch. Prec. 467. in case of Brown v. Barkham.—2 Lev. 234.

13. Devise to the heirs male of J. S. now living, adjudged a good devise; per Cowper C. Hill. 1716. 2 Vern. R. 734. in case

S. C. — of NEWCOMEN v. BARKHAM, cites the case of JAMES v. RICHARDSON, in Pollex. 457. and 2 Vent. 311. S. C. but in the names of \* Burchet v. Durdant  
S. C. cited Ch. Prec. 443. — S. C. cited Wms's Rep. 233. and said, that it was twice affirmed in the House of Lords.

Vent. 372. — S. C. cited per Cowper C. 2 Vern. 735. in case of \* NEWCOMEN v. BARKHAM, and says, that it was held with Hale, that the description was sufficient, and the implication needless, and says, the opinion of Hale and Wild may outweigh, by way of authority, the opinion of Coke, counsel obiter in SHELLY'S CASE, and that of Hobart, in Counden v. Clerk. fo. 29. — \* Ch. Prec. 467. S. C.

14. Covenant to stand seised to the use of the *heirs male on the body of his second wife*; though he had *a son living by his first wife*, yet it was held good even in a deed. Hale and Wild J. held it good by description, but the other J. by implication of an estate for life in the covenantor. 2 Lev. 79. Hill. 24 & 25 Car. 2. B. R. Pybus v. Mitford.

Vid. Ch. Prec. 464. 465. Cowper C. in case of Brown v. Barkham. — 15. A man may take as *heir special*, where the intent is manifest to exclude the *heir general*. Arg. Ch. Prec. 447. cites Pasch. 4 W. & M. in C. B. Baker v. Wall.

— The case was, A. by will devised to his eldest *heir male and his heirs males for ever* all his lands in S. and if there be a female, she to have 12 l. per ann. for her life. A. had two sons, B. and C. B. died in A.'s life, leaving M. a daughter; yet the land was adjudged to C. cited per Ld Cowper, Ch. Prec. 468. in case of Brown v. Barkham.

S. P. 11 H. 4. 74. 16. Though a person can not take as *heir male during the life of his ancestor*, as in ARCHER'S CASE. 1 Rep. 66. yet (contrary to Hobart's opinion) in the case of COUNDEN v. CLERK. Hob. 32. if such was his opinion) a *limitation to the heirs male of the body of a person dead before* was sufficient to vest in them by purchase within the statute, and before the statute de donis; per Cowper C. Hill. 1716. Vid. Ch. Prec. 461, 462, 466. Brown v. Barkham.

Abr. Equ. cases, 214. 215. S. C. — S. C. cited Arg. Wms's Rep. 368. and says, that the reasons of the prevailing judgment seemed to be, that the will took notice that J. S. was living, and that in default of such issue of J. S. the remainder was to go to the testator's right heirs.

17. Devise to the *heirs male of J. S. begotten*, the said J. S. having a son, and the testator taking notice that J. S. was then living, by bequeathing a legacy to her, and also giving B. his heir at law, an annuity out of the premises to her and her heirs. It was adjudged by the whole court of Exchequer, except baron Bury, that the son of J. S. was intitled to the premises, and not the heir at law of the testator, which judgment was after reversed in the Exchequer Chamber, but that reversal was reversed in the House of Peers (May, 1717.). The reasons were thought to be, that the words were a *designatio personæ*. And that the word (*heir*) has, in law several significations. That in the strictest sense it signifies one who had succeeded to a dead ancestor, but in a more general sense, it signifies an heir apparent, which supposes the ancestor living, and that in this last sense, it is used in statutes, law-books and records; that taking it in the strict sense, it would destroy \* a great part, whereas in the larger, it would support the whole will and intent of the testator, and that is the principal rule for the exposition of a will. Wms's Rep. 229 to 233. Trin. 1713. Darbison, als. Long v. Beaumont.

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18. A,

18. A. seised in fee, devised land to M. his grand daughter (being his heir at law) for her life, remainder to his own right heirs male for ever. A. died, leaving M. his heir at law, and also a deceased brother's son, being the next in the male line. Upon a bill by the nephew against the grand daughter, she demurred; for that the plaintiff, by his own shewing, had no title to the premises. The counsel of the plaintiff insisted that Ld Coke's opinion, 1 Inst. 24. b. that he who takes as heir male by purchase, must be compleatly heir, as well as heir male, was denied, and instanced in the case of BROWN AND BARKHAM, by Ld Cowper, PYBUS AND MITFORD. Vent. 372. and the case cited there, by Ld. Hale; yet Ld. Macclesfield interrupted the counsel, and said, he would not suffer the bar to dispute what was the foundation or landmark of the law, though perhaps was it res integra, it might be reasonable. And said, that the words [*heirs male*] must be intended heirs male of the body, and would never extend to an heir male of any collateral line, and it not being said in the will, heir of the body, or of his name, M. the grand-daughter might have an heir male, though not of his name. 2 Wms's Rep. 1 to 3. Pasch. 1722. Dawes v. Ferrers.

Ld Mac-  
clesfield  
distinguish-  
ed this  
case from  
the case of  
BROWN v.  
BARKHAM,  
that, that  
was merely  
of a trust, but  
the principal  
case is of a  
legal estate,  
where the  
rule of law  
that has so  
long pre-  
vailed and  
been taken  
for granted  
must be ob-  
served.  
Besides,  
that this

differed from that case, the remainder in that being limited to the heirs male of the body of Sir R. Barkham, the grandfather; whereas here the devise was to the heirs male, without saying of any body, and therefore allowed the demurrer. Ibid.—And cited the case of Ford v. Ld. Osluston, S. P.

#### (G. 4) By Limitation. Who. Heirs Females.

1. IF lands are given to B. for life, the remainder to the heirs female of the body of J. S. who is dead, and he had issue a son and a daughter, and after the tenant for life dies; the daughter shall not have the land, because she is not heir; per Ellerker. Br. Taile, &c. pl. 3. cites 9 H. 6. 23.

Br. Devise.  
pl. 5. cites  
S. C.—  
Br. Done.  
pl. 61. cites  
37 H. 8.  
S. P.

2. But if a gift is made to B. and the heirs female of his body, or otherwise, it is good, though he has a son and a daughter and dies, and the daughter shall have it, notwithstanding the son be living. Br. Done, &c. pl. 61. cites it as agreed. 37 H. 8. and also that it was held by Hare, who was master of the rolls, that there is a difference between a gift in possession, to a man and his heirs female, &c. and a gift to a stranger, the remainder to the heirs female of another; for there they ought to be heirs in fact, when the remainder falls, or otherwise the remainder is void for ever.

Co. Litt.  
19. 2. 164.  
a.—Br.  
Nofme, pl.  
1. cites 37  
H. 8. in  
Sir John  
Hussey's  
case.—And  
pl. 40. Ibid.  
cites S. C.  
—Br. N.  
C. pl. 303.  
37 H. 8.

S. C.—Br. Done, pl. 42. cites S. C.—S. C. cited, 1 Rep. 102. b. 103. a. in SHELLEY'S CASE, and the difference taken by Ld. Brooke, Br. Done, pl. 42. between a claim by purchase, and a claim by descent, was taken notice of and approved, and that though in the LD. HUSSEY'S CASE. (Br. Done. pl. 61.) Ld Brooke has not expressed the judgment; yet it was said that it was adjudged that the right heirs of his body could not, as a purchaser, take the remainder, because he was not heir of his body to take it by purchase, by reason of the attainder of the father; and cites the opinion of Hare, master of the rolls, and concludes that so it appears by those authorities, that in case of purchase, the heir male of the body ought to be heir in fact.

\* Quere, if those words, (or otherwise) should not be omitted, they not being in Br. N. C. pl. 302. as I can find.

But in the case of the gift to B. and the heirs females of his body, it is a good tail, though he has a son and a daughter, because it was estate tail vested in the donee by the gift. Br. Tail, pl. 3. cites 9 H. 6. 23.—A son's daughter cannot take by limitation, to the heirs female of the

body



body of the father. For she must derive all by the females; per *Ld Wright. 2 Vern 409*  
*Johnson v. Northey.*

† I do not observe this point in Br. N. C. 37 H. 8. pl. 303.  
 \* 3. If one gives land to B. and his heirs female, and B. has issue a son and a daughter, and dies, the daughter shall † not have the land. Because she is not heir. Br. Done, &c. pl. 61. cites 37 H. 8.

Which is the case referred to; but the point there, as to this matter, is all along of a gift to B. and the heirs female of his body, unless in one place after the repetition of those words (of his body) the gift is stated to be to a man and his heirs female, &c. which [&c.] seem to intend (of his body.) For a gift to one and his heirs male, or to one and his heirs female, (without more words) makes a fee simple, and therefore on such limitation, the daughter cannot take where there is a son. But if the words (of his body) had been added, it would make a good estate tail. See Co. Litt. S. 22, 24, 31. And see 9 H. 6. 25. a. And there Paston said, that though the gift be to one, and his heirs female † and the heirs of the body of their heirs begotten, yet the daughter has no estate tail, as he apprehends) because she can not have fee simple † and tail.——† The last edition of the year book is (fee simple a tail.) But the former edition is fee-simple & taile.)

† S. P. by Paston. 11 H. 6. 13. a.——Br. Tail, pl. 3. cites 9 H. 6. 23. per Paston, that it is not tail, neither by gift or devise, because these words, (body of, &c.) is wanting in the premises, and therefore the words subsequent will not serve to make a tail.

Br. Estates, pl. 69. cites 9 H. 6. 23. that the daughter shall have the land; for though she is not heir, yet she is heir female; per Newton, to which Martin J. agreed.——The case put by Newton, 9 H. 6. 23. b. is of a gift to one and the heirs female of his body, though in the case put by Martin there, fol. 25. a. those words, (of the body) are not mentioned, yet they seem to be understood.——And so is Br. Nofme, pl. 1. which cites 37 H. 8. but says, that others were of a contrary opinion, and took a diversity where the gift is to the father himself, and where it is to the heirs of his body by remainder.——See Chan. Prec. 461, &c. *Brown v. Barkham.*

## (G. 5) Limitation. Who shall take by the Word (Heir.) In Respect of the Nature of Estates.

Br. Done, &c. pl. 42. cites 37 H. 8. S. C.—Br. Nofme, pl. 6. cites 38 H. 8. S. C.—Br. N. C. 37 H. 8. pl. 302. S. C.—1 Rep. 103. in Shelly's case.——Hob. 31.  
 1. WHERE land in gavelkind is given to one for life, remainder to the right heirs of J. S. who has issue 4 sons, and dies, and afterwards the tenant for life dies, the eldest son shall have the land; for he is right heir at common law, and this is a name of purchase which shall be ordered by the common law; but e contra of descents to heirs in gavelkind. Br. Discent, pl. 59. cites 37 & 38 H. 8.

2. A. seised of gavelkind in fee, by will devised it to B. and M. his wife, remainder proximo hæredi masculo de corporibus suis legitime procreatis in perpetuum. Afterwards A. and M. have three sons and die. Whether the eldest son should have the whole remainder, or in common with his brothers was demurred in law in B. R. and was several times argued. [But nothing said there as to the opinion of the court, &c.] D. 133. b. pl. 5. Mich. 3 & 4 P. & M. Anon.

Nelf. Abr. 396. pl. 1. cites it as adjudged. D. 179.—The words  
 3. A. seised in fee of land in borough-english, after the statute 27 H. 8. made a feoffment to the use of himself, and the heirs males of his body according to the course of the common law; A. died, leaving 2 sons, the eldest entered. It seemed to all the board in serjeant's int,



inn, that the youngest shall have it by descent, notwithstanding the words (according to the course of the common law.) Pasch. 2 Eliz. D. 179. b. pl. 45. Anon. (according to the course of the com-

mon law) are void; for *customs which go with the land*, as this is, and gavelkind, and such like customs, which fix and order the descents of inheritances, can be altered only by parliament; by Catlin, Dyer, Sanders, Whiddan, Browne, and Benlowe. Jenk. 220. pl. 70.——S. P. Per Wray Ch. J. 2 Le. 219. Pasch. 16 Eliz. B. R. in Humphreston's case.——S. P. Per Cowper, C. Hill. 1716. Ch. Prec. 464. But if the limitation had been to the right heirs of J. S. in gavelkind, it would go to all the sons.——2 Vern. 732, 733. in case of Newcomen v. Barkham.

4. A. seised in fee of *borough-english*, devises it to B. his son in tail, and dies; B. dies seised leaving two sons; resolved that the younger son shall inherit as well to the tail as to the fee simple. Noy. 106. Trin. 44 Eliz. C. B. Weeks v. Carvel. [ 259 ]

5. So all the issues shall inherit an *estate tail in gavelkind* land. Ibid. cites D. 176. [but it seems it should be 179.] 26 H. 8. 5. 22 E. 4. 10. b.

6. A. seised of copyhold land in fee of the nature of *borough-english*, surrenders it, according to the custom, to the use of J. S. and his heirs, who died before admittance, leaving two sons; it seems, that the youngest son shall have the land, because he is in by descent, or at least by force of the first surrender, and so in nature of a descent. Per Glyn Ch. J. Hill. 1657. B. R. 2 Sid. 61. S. P. Mod. 102. cites it as the case of BAKER v. DEREHAM, and that the opinion of

the court was, that the right would descend to the youngest according to the custom.——S. P. cited by Wylde, Trin. 26 Car. 2. B. R. as held that the youngest son should have it. Vent. 261. in case of Batmore v. Graves.

7. J. S. seised of land in *borough-english*, demised it to A. and his heirs for the life of B.—A. died leaving two sons, C. and D. It was argued, that it should go to C. for that it is not a descent to him as heir, but a special limitation to prevent an occupancy, and that he takes it as special occupant and purchaser, and therefore ought to be heir at the common law; but it was answered, that he took it as heir, and that in 10 Rep. in SEYMAIN's case, such estate is taken as a descendable freehold, and then it ought to descend to him as heir by the custom which runs with the land, and guides the descent to the youngest son; and of this opinion was the court, and gave judgment accordingly. 2 Lev. 138. Trin. 27 Car. 2. B. R. Baxter v. Doudswell. Co. Litt. 110. b. accordingly.

8. If a man has *lands at common law*, and *lands in gavelkind*, and he devises his lands at common law to his heirs in gavelkind; (so of lands at common law, and lands in *borough-english*.) In these cases, if the testator stops at the word *heir* or *heirs*, it is certain the youngest son in the one case, or all the sons in the other case cannot take; because the eldest son only is heir; but now take all the words together, and then it is most certainly a good devise to the youngest son, who is heir in *borough english* in the one case, and to all the sons who are heirs in gavelkind in the other. Per Cowper C. Hill. 1716. Ch. Prec. 464. in case of Brown v. Barkham.

(H) Where *Jus Representationis* is preferable to *Jus Propinquitatis*, & Vice Versa.

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1. ONE has issue two sons, *A. and B.* and dies; *B. has issue two sons, C. and D.* and dies; *C. the eldest son has issue and dies; A. purchases land in fee simple, and dies without issue; D. is his next cousin, and yet shall not inherit, but the issue of C.* For he that is inheritable is accounted in law next of blood, and therefore here is understood a division of *next*, viz. *next jure representationis & jure propinquitatis.* Legally in course of descents, he that has *jus representationis* is next of blood inheritable, and the issue of *C.* does represent the person of *C.* and if *C.* had lived, he had been legally next of blood; and *whensoever the father, if he had lived, should have inherited, his lineal heir by right of representation shall inherit* before any other, though another be *jure propinquitatis* nearer of blood; and therefore Littleton intends his case of cousin of blood immediately inheritable; so as this produces another division of *next blood*, viz. *immediately inheritable* as the issue of *C.* and *immediately* inheritable as *D.* if the issue of *C.* die without issue; for the issue of *C.* and all that live, be they never so remote, shall inherit before *D.* or his line, &c. And here arises a diversity in law, between *next of blood inheritable by descent*, and *next of blood capable by purchase*; and therefore in the case abovementioned, *lease for life to A. the remainder to his next of blood in fee*; in this case *D.* shall take the remainder, because he is next of blood, and capable by purchase though he be not legally next to take as heir by descent. Co. Litt. 10. b.

2. Some do hold upon the words of Littleton, that if a *lease for life* were made *to the son*, the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle; for that Littleton says, the father is next of blood, and yet the uncle is heir: as if a man has *issue two sons*, and the *eldest son has issue a son, and dies*, a remainder is limited to the next of his blood; the younger son shall take it, yet the other is his heir. Co. Litt. 10. b.

3. When the right heir claims by purchase, he must be a complete right heir in judgment of law. Co. Litt. 164. a.

4. It was found by special verdict, that the land was borough english, and that the custom of the manor was, that all copyhold tenements did, and ought to descend to the youngest son and his heirs; that *A. had issue five sons, B. C. D. E. and F.* that *F. died*, living *A.* and leaving a daughter *J.* and that after *F.'s death A. purchased the land in question, and was admitted to hold according to the custom of the manor*, and after died seised, and *E. the fourth son entered.* The question was, if *J. the daughter of F.* has good title as representative of *F.* who, if he had lived, would have inherited as heir to *A.* and it was adjudged for the daughter. 6 Mod. 120. Hill, 2 Annæ, B. R. Clement v. Scudamore.

2 Salk. 243.  
S. C.—  
Wms's  
Rep. 63.  
S. C.

(I) Bound.

(I) Bound. In what Cafes.

See (L. 2)

1. **N**O man shall charge his heir but as part of himself, and so begin with himself; therefore a *contract concerning his land*, which should otherwise go to the issue, shall not bind, because the *ancestor was not bound himself*. Arg. Show. 379. cites Hob. 130. Oates v. Frith.

'Tis a *maxim* that the heir is not bound where the ancestor is not bound

himself. Cro. C. 371. cites 31 E. 3. Grants 85. — S. P. but otherwise by a *warranty in law*. Co. Litt. 386. a.

2. The father *covenants by articles, &c.* and afterwards conveys the land to his son; the father dies, the son is sued as heir, and being ordered to perform his father's covenants, he refused, insisting, that he is not chargeable with his father's covenants as heir, the *lands being conveyed to him*; nor as executor, having no assets. This court ordered him to seal the covenant according to the said articles, and thereby covenant to free the premisses from leases and incumbrances, or stand committed. 1 Car. Chan. R. 18. Pool v. Pool.

Toth. 170. cites 14 Car. 1. S. C.

3. A *verbal contract* cannot create a penalty to oblige the heir. Vent. 76. Pasch. 22 Car. 2. B. R. Gibbons v. North.

(I. 2) Bound by *Aquiescence* under a Will.

1. **A**. *Devised* lands to R. S. and T. and their heirs for her *four daughters, and their children, and such of the children as should be alive at the last*; and then declares the trust of all her *estate undisposed of by her said will*, to be *for her and her heirs*; the trustees sell the inheritance of the lands, and distribute the money among the daughters, the heir at law being privy and not claiming; and after a *fine was levied and 5 years passed*. Upon a difference between R. one of the trustees, and the heir at law, R. was awarded to pay the heir at law 200l. \* and to give a *general release of all actions real and personal*, which was done, but no notice taken of the breach of trust aforesaid; ten years afterwards R. *purchased back the lands to him and his heirs*, for a full value; the heir at law brings his bill against R. after 31 years possession, to have an execution of the trust, and the lands to be decreed to him, suggesting, that the words of the will gave only an estate for life to the daughters, and that A. had not disposed of the fee, as by a deed executed to the same trustees he has power to do; but Lord North thought, after so long a possession, such a disposal should be presumed, and the *original will being lost, and in Dutch*, he would suppose the copy true; and there being a release and fine, and the heir privy, he dismissed the bill, though after two decrees by Nottingham C. Vern. 144. Hill. 1682. Bovey v. Smith.

See Vern. 60. S. C. and 84. S. C. where it is said that Ld. Nottingham's former decrees were with the approbation of Ld. Ch. J. North.

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2. A *younger son* brings a bill, and *surmises, that a copyhold, which his father had devised to him by will, was surrendered to the*

use of his will; or however, that being for the advancement of a child, it ought to be made good here. He made no proof of any surrender, nor that a court was called for that purpose, nor any proof that any of the court rolls were lost, (which was pretended) and *he was well provided for, without this copyhold; and the elder brother was in possession 20 years, by consent of the plaintiff; so the bill was dismissed with costs.* Pasch. 1700. Abr. Equ. Cases 123. James v. James.

3. A. by will gave lands to J. S. and having, after his will made, purchased other lands, he on his death bed *desired B. his heir at law, not to binder his nephew J. S. from enjoying the new purchased lands, though he had not by any writing declared the trust for J. S. and his heirs; B. suffers J. S. to enjoy it 11 years, and then pretends he thought the after purchased lands had passed by the will; Lord Cowper decreed, that this was out of the statute of frauds, and that B. letting J. S. enjoy it so long, was an execution of the trust, and so out of the statute; and though no express fraud was proved, yet the possession for 11 years was a strong presumption that he suffered it as an execution of the testator's declaration.* Mich. 7 Annæ, G. Equ. R. 11. Harris v. Horwell.

### (K) Charged. By what Conveyance.

1. **A** *Feoffment by the heir in the life of the ancestor without warranty* is no bar after the ancestor's death. Per Brian and Catesby; e contra Tremayle.. Br. Barre, pl. 86. cites 21 E. 4. 81.

2. A *trust for payment of debts generally* is good against an heir, though no creditor be party to the deed, nor debt expressed in particular, nor covenant in the lease to pay; but Lord Keeper said, he would not maintain it against a *purchaser*. Hill. 26 & 27 Car. 2. 1 Chan. Cases, 249. Leech v. Leech.

### (K. 2) Pleadings in Actions against him.

1. **D**EBT against the heir; the defendant pleaded *riens per descent*, the *plaintiff said, assets in the county of E. C. and S.* and the *visne* was of all three counties; but per Norton, if he has *assets in any of them* it is sufficient. Br. Assets per descent, pl. 24. cites 28 E. 3. and 27 E. 3. 78. But in such case three several juries were awarded. Fitzh. Visne, 9.

[ 262 ] 2. *Debt* against the heir, he pleaded *riens per descent*; and per Hank. if he had by descent in *ancient demesne*, he shall be charged by it of the debt; *quære in formedon*, if the same law. Note, that there is franktenement, and base tenure in ancient demesne. Br. Assets per descent, pl. 11. cites 7 H. 4. 14.

3. In *debt* against the heir upon an obligation of his ancestor, he cannot plead a *release* made to the executor of his ancestor, *without shewing the release*; for there is *privity* between them; per Fitzherbert. Br. Monstrans, pl. 61, cites 14 H. 8. 4.

4. If

4. If a man *oblige himself and his heirs* in an obligation, and dies, and assets descend, and the *heir aliens the assets*, there he is discharged; but if he *re-purchase* the same land, it shall be charged, for it is sufficient for the plaintiff to say, upon *riens per descent* pleaded by the defendant, *that assets descended to him in fee simple, of which he was seised at the day of the writ purchased*; per Englefield and Brown, which was agreed; but at another day Fitzherbert and Shelley denied this case, therefore *quære*; for an action personal once extinct, is extinct for ever, as it seems. And also by the re-purchase he is not in by descent. Br. Assets per descent, pl. 1. cites 26 H. 8. 1.

5. In debt against the heir upon a bond of the ancestor; he pleaded, *that his ancestor made J. S. his executor, who had assets*; that J. S. died, and administration was granted to W. R. whereupon it was demurred, and judgment was given for the plaintiff; for the obligee may sue either the heir or executor at his election. Bendl. 96. pl. 142. Hill. 3 Eliz. \* Quarrels v. Capell.

S. P. 3 Lev, 189. Davis v. Churchman.—Br. Assets per descent, pl. 33 cites 10 H. 7. 8.—  
\* D. 204 b. pl. 2 S. C.

6. Debt lies against the executor of the heir, upon the obligation of the ancestor, without any *averment in the count, that assets descended*, which is intendible in law, till the contrary be pleaded by the defendant; per Manwood, Mich. 17 & 18 Eliz. D. 344. b. in pl. 1. cites M. 5 Eliz. Lib. Int. 171.

7. Debt was brought against the executor of the heir upon the bond of the ancestor, without any *averment in the count, that assets descended to the heir*; this is intendible in law till the contrary be pleaded by the defendant. Mich. 17 & 18 Eliz. D. 344. b. pl. 1. cites Lib. Intrat. fo. 171.

S. C. cited Pl. C. 441. for that the assets descended to the heir made it as

a duty due by the heir, but the reporter who cited the case says, *quære tamen de ceo.*

8. The writ against the heir for a debt of the ancestor is in the *debet & detinet*; per Dyer. 2 Le. 11. Hill. 20 Eliz. C. B. in case of Hinde v. Lyon.

And because the action was in the *detinet*

only it was held ill, though it was insisted to be for the defendant's benefit, and cited 10 H. 7. 8. b. nor was it cured by verdict, and so the court gave judgment *quod querens nil capiat per billam.* Lev. 130. GOODWIN v. NEWTON. Pasch. 16 Car. 2. B. R.—But Mich. 19 Car. 2. B. R. it was held that it was cured by *verdict* by the 16 & 17 Car. 2. 8. but would have been ill upon *demurrer*. Sid. 342. Comber v. Watton.

9. Debt against the niece, as cousin and heir to the uncle, who was the obligor; the defendant confessed the declaration by nient dedire, but that *nothing in fee simple is descended to her, but a reversion of a moore in S. in the county of, &c. post mortem J. N. &c.* The plaintiff may pray *special judgment* upon this confession, viz. *Quod recuparet debitum & dampna de prædicta reversione levand' cum acciderit*, and special writ shall issue to *extend the whole 30 acres*; and it seems that this was the law before the statute W. 2. 18. D. 373. b. Mich. 22 & 23 Eliz. pl. 14. Anon.

10. Judgment was had against the heir upon the bond of his ancestor, but being named son and *heir apparent* in the pleadings, whereas he was heir in fact, the judgment was reversed. Ow. 119. Pasch. 35 El. B. R. Pendigate v. Audley.



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11. Error upon a judgment in debt; for that in the writ he was named *son and heir apparent*, and in the declaration *son and heir* generally; and for this variance the judgment was reversed; yet it was said that apparent was surplusage, sed non allocatur. Cro. Eliz. 333. Trin. 36 Eliz. B. R. Annesley v. Stokes.

Nelf. Abr. 924. pl. 7. adds, that upon demurrer the heir had judgment, because after that writ and

12. Debt against the heir, who pleaded *riens per descent on the day of the action* brought, the plaintiff replied, that he *had formerly brought an action against the heir for the same debt*, and thereupon he was *outlawed*, which was afterwards reversed; and then he immediately brought a new action, and averred, that the heir had assets at the time of the first writ; defendant demurred, but no judgment. Hob. 248. Hill. 12 Jac. Spray v. Sherrott.

before the second action he had aliened the assets, and in such case he is not chargeable.—— Cro. J. 589. in case of WALTHALL v. ALDRICH a president was shewn of 9 Jac. between CHERITON AND SPRAY, and that verdict and judgment was for the plaintiff.

S. P. and judgment was stayed, but the plaintiff seeing the opinion of the court prayed nil capiat per billam, and so no judgment. Lev. 165. Hunt

13. In *assumpsit* against the heir on a promise to pay a bond debt of his father's, upon consideration of the plaintiff's forbearing to sue him (the heir) for it; upon non assumpsit pleaded a verdict was for the plaintiff, and it was moved in arrest of judgment, because it was *not said that the father obliged him and his heirs*, and that therefore it does not appear that the defendant was liable to an action, and so the consideration void; but it was adjudged that it should be *intended after verdict*, it being found by the jury; and the plaintiff had judgment upon the argument of the reporter. Raym. 128. Marg. cites Trin. 1656. B. R. St. Paul v. Lord Rivers.

v. Swain.——And the Lord ST. PAUL'S CASE, being cited as adjudged contra in the late time no regard was given to it, and Twisden who was counsel in the case, said that it was then taken to be a hard case. Ibid.——In the case of HUNT v. SWAIN the court doubted. Sid. 248.——S. C. adjourned Raym. 127. Pasch. 17 Car. 2. B. R.

It was insisted that though such declaration might be *ill on demurrer*, yet it is good after a verdict, the jury finding him obliged as son and heir, and that otherwise there had been no consideration, and so the jury must have found non assumpsit; sed non allocatur; for though they will intend a personal lien against an executor, if he has assets in his hands, though it be not averred, yet *the court will not intend a real lien against the heir, though he be bound by the obligation of his ancestor, unless it be expressly alleged*, and therefore they would not intend it here, though it be after a verdict, and so judgment was arrested. Quod nota, 2 Saund. 136. Barber v. Fox.——Vent. 159. Trin. 22 Car. 2. B. R.

14. In debt on bond against B. as heir of A, he pleaded *that A, was seised in fee, and conveyed to trustees to the use of himself for life, remainder to the heirs male of his body, remainder in fee to his own right heirs, with power to the trustees to lease for three lives or 99 years. The trustees made a lease for 99 years, and B. pleaded that he had no assets præter the reversion expectant on the said lease. The plaintiff replied, protestando, that the settlement is fraudulent, pro placito saith, that he has assets by descent sufficient to pay him. It was thereupon demurred, and insisted that the bar is good, and that the plaintiff should not have replied generally, that defendant had assets by descent, but to the præter only: but it was answered, that the plea is no more than riens per descent; for the reversion which he pleads is not chargeable, being after an estate tail; for if the lease were expired, yet the plaintiff could not recover, and so the præter is insignificant, the lands under it not being chargeable. And the plaintiff having traversed all that is material,*  
be



he need take no notice of more. And accordingly, the court held the præter idle, and the general replication good, and gave judgment for the plaintiff. 2 Mod. 50. Trin. 27 Car. 2. C. B. Osbaston v. Stanhope.

15. In a bill by obligee against the heir of the obligor for payment of a debt out of assets alleged to be descended, if the bill does not allege that the heir was bound by the bond, defendant may demur; per North K. Vern. 180. Trin. 1683. Croffing v. Honour.

16. In debt against B. as heir of A. she pleaded *riens per descent*, and the jury found that A. died seised in fee, leaving issue B. his daughter, and his wife enseint of a son, who was afterwards born, but died within an hour. \* It was adjudged against the plaintiff, because he declared against B. as daughter and heir of A. her father, when she was sister and heir of her brother who was last seised. 3 Mod. 256. Trin. 1 W. & M. B. R. cited per Eyre J. as the case of Duke v. Spring.

See Trial (C. 8) pl. 62.—But a mediate heir of an obligor, to whom a reversion expectant on an estate tail, (and

not a fee simple in possession) descended by mediate descents, may be declared against as immediate heir of him, without mentioning the intermediate descents. Adjudged against the opinion of Eyre J. Carth. 129. Pasch. 2 W. & M. B. R. Kellow v. Rowden.—3 Lev. 286. S. C.—3 Mod. 253. S. C.—Show. 244. Mich. 2 W. & M. S. C.—But if a mediate heir had been actually seised of the fee simple, the declaration should have been special. Agreed Carth. 128, as was held in Jenks's case.—Cro. C. 151. S. C. and held, that being a collateral heir, he should be charged specially.

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17. In debt upon a bond of the ancestors brought against C. as heir, he (being both heir and executor) pleaded in abatement, that there was another action pending against him and others as executors. It was objected, that he could not charge one and the same person as heir, and also as executor at the same time; for by this means, he may have two judgments at one and the same time for the same thing, and for which he has no remedy by aud. querela; and of such opinion was Pollexfen Ch. J. on the first argument. But Powell J. contra; for being one and the same person, representing as well the heir as the executor, it is all one as if it were in diverse persons. Rooksby J. then saying nothing. But afterwards Pollexfen being dead, judgment was given by Powell and Rooksby that defendant answer over. 3 Lev. 303. Pasch. 2 W. & M. C. B. Haight v. Lanham.

18. A stranger need not shew cosinage in any case; a man may bring an action against a cousin and heir as cousin and heir, without shewing how. Per Holt Ch. J. Show. 249. Mich. 2 W. & M. in case of Kellow v. Rowden.

In debt on a bond of the ancestor, the plaintiff need not shew how

heir, &c. For the plaintiff is a stranger and it would be hard to compel him to set forth another's pedigree. 1 Salk. 355. Denham v. Stephenson.—6 Mod. 241. S. C. Mich. 3 Anne, B. R.

19. 3 & 4 W. & M. 14. s. 6. enacts, that where an action of debt upon a specialty is brought against an heir, he may plead *riens per descent* at the time of the original writ brought or bill filed, and the plaintiff may reply, that he had lands, &c. from his ancestor before the original writ brought, &c. and if upon issue joined thereon, it be found for the plaintiff, the jury shall enquire of the value of the lands descended, and thereupon judgment shall be given, and execution awarded to the value of the land; but if judgment given against such heir be by confession, without confessing the assets descended, or

In debt against an heir, who pleaded *riens per descent* on the day of the bill: The plaintiff replied specially that the obligor (fa-

upon

ther of the defendant) upon demurrer, or nihil dicit, it shall be for the debt and damages, died on such without any writ to enquire of the lands,

a day, and that defendant, after the death of the father, and before the day of the bill, &c. viz. such a day, which was a day after the death of the obligor, had lands by descent from his father in fee simple, unde prædicto (the plaintiff,) de debito prædicti satisfecisse potuit, viz. apud H. prædict. & hoc paratus est verificare unde petit iudicium according to this statute. It was objected that the replication was ill, because the plaintiff had put the value of the lands in issue by these words, unde, &c. de debito prædicto satisfecisse potuit, which should have been omitted, because the statute is express, that after the issue tried, the jury shall enquire of the value, so that it is matter of inquest only ex officio, and not to the point of the issue. And, that by this statute, the plaintiff is only to recover pro tanto, with respect to the value of such aliened asset, and is not to have a general judgment against the heir as at common law upon a false plea. But per Cur. upon debate, this replication was held good, and that if unde, &c. de debito prædicto satisfecisse potuit, had been left out, it might have been a good cause of objection. For the statute gives no occasion to alter any more of the form of the replication common in such cases, but only as to the time concerning the assets by descent; and the conclusion, which before the statute was to the country, must now be with an avowment only, that the defendant may have an opportunity to answer the new matter alledged in the replication; and the plaintiff had judgment. Carth. 353. Trin. 7 W. 3. B. R. Redthaw v. Hester. 5 Mod. 122. S. C. but not said there to be adjudged, though Nelf. Abr. t. t. Heir. (B) pl. 19. is so.

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20. A. seised in fee took to baron J. S. they have issue B. and C. and then A. the feme died seised, and J. S. was tenant by the curtesy, during whose life, B. to whom the reversion descended, entered into a bond, and died, leaving E. his daughter and heir; then E. died, and the land descended to F. her aunt, the said J. S. being still living. In debt on this bond, the count was against F. as heir of E. the daughter and heir of B. and adjudged for the plaintiff, per tot. Cur. (Nevill being absent) Lutw. 507. Trin. 6 W. & M. C. B. Rooke v. Clealand.

See Fines  
(R. 2)—  
Formedon  
(C)

### (L) Pleadings in Actions, &c. by him.

1. HE, who is in possession by descent, need not shew specialty. Per Cur. Br. Monstrans, pl. 65. cites 24 E. 3. 52.

2. A man may have writ of cosinage, though his cousin did not die seised; for if he was seised the day of his death it suffices; because, so are the words of the writ, and so is F. N. B. tit. Mortdancestor, quod nota. Br. Cosinage, pl. 1. cites 40 E. 3. 38.

\* In this writ it may be declared debtors, though it be not contained in the writ.

3. \* Scire facias upon a fine was brought as cousin and heir, and did not shew how cousin, and therefore judgment of the writ, & non allocatur; for in † formedon it ought to be shewn, but in scire facias the one and the other is sufficient. Br. Brief, pl. 47. cites 41 E. 3. 13.

Br. Cosinage, pl. 13. cites 27 H. 6. 2.—The cosinage was shewn in the count only, and good; for it is a writ judicial; contra in writ original, as formedon, &c. Br. Brief, pl. 518. cites 8 H. 4. 22.—† S. P. Br. Cosinage, pl. 13. cites 12 H. 4. 1.—But see pl. 10. contra.—In scire facias upon fine by one as cousin and heir, the plaintiff did not shew how cousin by writ nor by roll, and therefore the writ was abated by award after issue joined, and in another term; for the writ is insufficient by matter apparent. Br. Cosinage, pl. 8. cites 38 H. 6. 4.—S. P. Br. Cosinage, pl. 13. cites 38 H. 6. 37.—S. P. And it was not amended; for it was in another term. Br. Brief, pl. 249. cites 38 H. 6. 39.

In avowry for rent granted 12 E. 2. the defendant shewed the descent to J. S. whose heir he is, but shews not how he was heir. The plaintiff demurred generally; and the court thought that he need not shew in the writ how heir, but in the declaration; and an avowry is as a declaration. But they held, that to shew how heir is only form, because not traversable, but that heir or not heir only is issuable; and that therefore, upon a general demurrer, this is holpen by the statute 27 Eliz. but the † not pleading the deed of the rent here shewn in court, or that hic in curia profert is matter of substance not aided by the statute. Mo. 885. pl. 1243. Heard v. Baskervill.—And it is there

where said, that in error in B. R. it was adjudged that such exception was not good. Cites Sir Henry Wallop's case.——† Hobert Ch. J. cited S. P. and S. E. Hob. 301.

4. Intrusion of ward, where the plaintiff made title to the ward as heir to his father, who held of him in chivalry; the defendant said that the land was given to the father and mother, and to the heirs of their two bodies, and the feme survived, judgment of the writ, which does not make him heir to the mother, & non allocatur; for this writ is in the personalty, otherwise it is in writ of ward, which is real, and therefore the defendant was compelled to answer. Br. Brief, pl. 507. cites 43 E. 3. 4.

5. In scire facias to execute a fine the plaintiff demanded as cousin and heir, and shewed the consanguinity out of the writ, and not within, as in formedon, and exception was taken to the writ, & non allocatur; wherefore he conveyed as son of J. the son of E. and the tenant said, that E. had no such son as J. and good, without giving other mother; contrary if he had said that J. was not the son of E. for in the one case he affirms such person to be, and in the other not, and the other said that such son J. was born and begotten at D. in another county, and the visne was of both counties. Br. Sci. fa. pl. 67. cites 8 H. 4. 22.

6. Scire facias against a parson upon a recovery in cessavit against the predecessor by the father and mother of the plaintiff, and he brought this action as heir of his mother. Caund. prayed judgment of the writ; for he should make himself heir to both. But per Fulth. not, but only to the mother who survived; and per Brown, it appears in the record that the baron had nothing but in jure uxoris, and therefore the writ awarded good. Br. Brief, pl. 170. cites 8 H. 6. 24.

7. Scire facias by two, as cousins and heir of N. and J. viz. as daughters of M. son of the said N. and J. and cousins and heir of the said N. and \* J. and did not shew the death of M. their father, and yet well per Cur. For it shall be intended that he is dead, by reason that they are named daughters of N. and cousins and heirs of N. and J. which cannot be if M. son of the said N. and J. was not dead, quod nota. Br. Brief, pl. 412. cites 11 H. 6. 43.

S. P. ibid. pl. 497. cites 33 H. 6. 54.—— S. P. Br. Repleder, pl. 32. cites 7 H. 7. 7. —So in appeal of death

by the son and heir, he is not bound to say that the deceased had no feme living at the time, &c. nor in appeal by cousin and heir, to say that the deceased had no son. Ibid.——But in formedon in remainder or reverter, where he claims as heir by descent of the land, he shall shew the death of tenant in tail. Note a diversity. Ibid.

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8. In scire facias of land, as cousin and heir upon a fine, or the like, if idem dies be given, there it is not usual to enter the consanguinity, but if the party prays execution, then it is used to enter the consanguinity in such form, et super hoc idem petens dicit quod ipse est consanguineus et beres, &c. And shew how cousin, & petit executionem, and it was held good enough. Per Comberf. Prothonotary. Quod nota bene. Br. Consanguinity, pl. 12. cites 33 H. 6. 54.

9. In waste, if the defendant appears, and the plaintiff conveys the reversion as cousin and heir to the lessor, he shall shew how cousin; and e contra where the defendant makes default, by which a writ to enquire of waste is awarded, quod nota diversitat. Br. Titles, pl. 56. cites 34 H. 6. 44.

10. In

So in *cui in vita*, he need not shew how

cousin till the *deraigning of the warranty* to the vouchee, when he appears; per Fenaot. *Quod non negatur*. Br. Colnage, pl. 5. cites 38 E. 3. 15.

10. In *formedon*, the tenant vouched one J. as cousin and heir, and shewed how cousin; and per tot. Cur. he need not shew how cousin in this action. Br. Voucher, pl. 76. cites 15 E. 4. 4.

11. *Contra in writ of entry* within the degrees; for he ought not to vouch out of the line, therefore he shall shew there how cousin. Ibid.

12. Error was assigned, because the tenant in the former record pleaded that his father was seised in fee, and died seised, and the land descended to him as son and heir of his said father, and did not say that he was his son and heir in fact, and yet well, per Cur. For the usual entry is not otherwise, and so it is used that a man may justify as servant, &c. as bailiff, &c. or as executor of such a testament, &c. to do such act; and it is used in pleading, that a man was seised in his demesne as of fee, and not in his demesne in fee; the same law to say as cousin and heir, &c. and so no error by the opinion of the court, and after it was adjudged no error. Br. Error, pl. 143. cites 5 H. 7. 2.

13. In *trespass*; the defendant said that his father was seised, and died by protestation seised, and he entered as heir, and gave colour to the plaintiff; there this bar ought to be confessed, avoided, or traversed, *Quod nota*; per Cur. Br. Barre, pl. 2. cites 26 H. 8. 7.

3 Mod. 254, 255. in case of Kellow v. Rowden.

14. \* Where a man claims as heir in fee simple to any man by descent, he must make himself heir to him who was last seised actually of the inheritance. Co. Litt. 11. b.

3 Mod. 256. in case of KELLOW v. ROW-

15. If a man claims as cousin and heir, he must shew how, but not when he claims as brother or son and heir. Per Dodderidge J. Godb. 275. pl. 388.

DEN per Eyre J.—If one brings a *formedon in descender*, he must name every one to whom any right did descend, or otherwise the writ will abate. Per Eyre J. 3 Mod. 256.

But in a writ of error to reverse a fine as cousin and heir, and assigns errors, and brings a *sci fac ad audiend. errores*, and shews not in either of the said writ how cousin; it was resolved good upon demurrer; for the one is but a commission to hear the errors, and needs not such certainty; and the other is but a writ founded thereupon, nor is it requisite that the title be shewed therein, unless it be in a special case. Cro. J. 160. Pasch. 5 Jac. B. R. Champnoon v. Godolphin.

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16. In debt for rent by the heir, reserved on a lease made by the father, the plaintiff counts that he is son and heir of the lessor, but does not allege, that he brings the action as heir; and upon exception taken, Williams J. said, that he ought to have shewed in his declaration; how he came to the reversion, and thereby to intitle himself to his action, and adjudged for the defendant. Bull. 48. Mich. 8 Jac. Smith v. Nufam.

17. Error to reverse a fine taken by commission, and the error assigned was, that the cognisor died before the return of the writ of covenant. But this point was not argued, because justice Allybon was of opinion, that the plaintiff in the errors had not well intitled himself by the writ; for it was brought by him as *consanguineus & heres scilicet filius*, &c. but doth not shew how he was of kindred. To this objection Sir William Williams the solicitor

Solicitor general replied, that if a descent be from 20 ancestors, it is not necessary to say that he was son and heir of such a one, who was son and heir of such a one, who was son and heir of such a one, and so to the twentieth ancestor. Agreeable to this are all the precedents in formedons it is only said that *jus descendit*. Adjournatur. 3 Mod. 152. Hill. 3 Jac. B. R. Price v. Davies.

18. In pleading, if the son will make himself heir \* to the uncle, he must shew how, and make the father a medium; that is, that inheritance descends to him, ut consanguineo et hæredi; viz. son of such a one, who is brother and heir to the uncle. 12 Mod. 619. Hill. 13 W. 3. B. R. in case of Blackborough v. Davis.

\* S. P. agreed by Holt Ch. J. Show 249. in case of Kellow v. Rowden.—

But a son need never shew his consanguinity; for he is immediate heir. Ibid. per Holt.

19. And so in case of descent from the grandfather, you must do it in like manner by the father, that it descends to him ut consanguineo et hæredi, viz. as son and heir to the father, who is son and heir to the grandfather. 12 Mod. 619. in case of Blackborough v. Davis.

20. But brother and sister are in an immediate degree to one another, and for that need not mention the father in making title to each other; and for this he quoted the great case of FOSTER and RAMSEY in the Exchequer; two sons of an alien, born in England, one of them dies, the other shall be his heir, and making title he need not mention the father. 12 Mod. 619. in case of Blackborough v. Davis.

(L. 2.) Charged. Included, though not named. See Covenant (D)

1. If a man leases for years by deed with warranty, and the lessee is ousted by a stranger by title, action of covenant lies against the lessor, and against the heir, if he has obliged the heir to warranty, and so see that the heir is not bound, if the warranty does not express heirs, per Littleton. Br. Descent, pl. 50. cites 32 H. 6. 32.

Br. Covenant, pl. 28. cites S. C.—The warranty must name the heirs expressly, S. C.

and the heirs must have assets by descent in fee simple. Br. Covenant, pl. 38. cites S. C.

2. And if a man covenant by indenture to build a house, and does not, and dies; action of covenant lies against the executors, because the testator broke his covenant, but not against the heir without warranty; and so see that the executor may be bound without express words of executors; per Littleton. Br. Discent, pl. 50. cites 32 H. 6. 32.

Br. Covenant, pl. 38. cites S. C. & P. by Littleton.

3. Heir shall not be charged in grant nor in warranty without express words of heirs. Br. Grants, pl. 161. cites 21 H. 7. 4.

S. P. agreed to be law. Pasch. 18

Ja. B. R. Cro. J. 570. in the Exchequer chamber, in case of Goodwin v. Goodwin.

4. A. makes feoffment in fee to B. and binds himself only to warranty without more; B. is impleaded and voucheth A. who entereth into the warranty, and loseth so as judgment is given against B. and also to recover in value against A. who before execution

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ution dies; per Cur. B. shall have execution in value against the heir of A. 4 Le. 206. Mich. 21 Eliz. B. R. Anon.

(M) Where he shall be the *first Taker*.

1. **I**F the king grants to me that my heirs shall be quit of toll, this is a good grant for my heirs, and yet I myself shall not take advantage; per Danby. But Prisot dubitavit. Br. Patents, pl. 28. cites 38 H. 6. 10.

2. If tenant for life be of land out of which a rent is issuing in fee, and the tenant for life purchase the same rent by grant, this grant is good to take effect in the heirs of the tenant for life, and yet he had possession in the whole land at the time of the grant, &c. Perk. f. 81.

3. A man cannot at this day grant lands in tail, and reserve a rent to his heirs, and exclude the grantor himself; for the heir cannot take any thing in the life of the ancestor, neither can the heir take any thing by descent, when the ancestor himself is excluded. Co. Litt. 99. b.

4. If a man had granted lands at the common law, to hold of his heirs, these words (to hold of his heirs) are void, and he shall hold of the grantor, as he held over; which he should have done if he had made no reservation at all. Co. Litt. 99. b.

5. If covenant be by indenture, that A.'s son shall marry B.'s daughter, for which B. gave to A. 100l. and for this A. covenants with B. that if the marriage shall not take effect, that A. and his heirs shall be seised of 1000 acres in D. to the use of B. and his heirs until A. his heirs or executors repay the 100l. and after B. has issue within age and dies, and the marriage did not take effect, by which the estate is executed in the heir of B. by the statute of uses made anno 27 H. 8. notwithstanding that B. was dead before the refusal of the marriage, for now the use and possession is vested in the heir of B. so that the indentures and covenants shall have relation to the making of the indenture; for these indentures bind the land with the use, which indentures were in the life of B. But quære, if the heir of B. shall be in ward to the lord? For he is heir and yet purchaser as it seems. Br. Feoffments al. Uses, pl. 59. cites 3 M. 1.

6. A. made a grant to B. that if B. paid A. 20l. at Easter, B. should have an annuity of 40s. to him and his heirs; if B. dies before Easter, B.'s heir shall never have it; per Anderson Ch. J. Goldsb. 64. in pl. 2. Mich. 29 & 30 Eliz.

7. A man cannot entail a remainder to his right heirs, unless he begin first in himself. Arg. Le. 102. Pasch. 30 Eliz. B. R. in case of ALLEN v. PALMER, cites D. 237. and Br. 32. H. 8. Gard. 93.

8. A. in consideration of 100l. bargains and sells Black Acre by indenture inrolled to B. and by the same deed, in consideration of the said 100l. and of rent to be granted afterwards by B. covenants, that if he sells any part of his other lands that B. shall have the first offer for the purchase of them, and if he attempts to sell without such offer to B. that then A. and his heirs will stand seised, for the same

1 Rep. 155. b. in the RECTOR OF CHEDDINGTON's case, cites S. C. and the reporter cites the reason.—S. C. cited Arg. Mo. 481. 482. 517.—Pollex. 60.

Where a man covenants with B. that if he doth not marry, he will stand seised to



*same considerations*, to the use of B. and his heirs of all such lands as he shall attempt to alien without such notice; B. dies, leaving M. his heir; A. without notice sells other land to J. S. who had notice of the covenant; the rent was not granted, yet the justices agreed that the consideration was good enough, though, *but one of the two things be performed*, that is the payment of the money; and secondly, that the rent should have been granted in convenient times which, not being done, is no part of the consideration. Thirdly, they doubted if the heir of B. should take benefit of the contingent use. Mo. 547. Hill. 37 Eliz. Mills v. Parsons.

the use of B. and his heirs; B. dies; the covenantor does not marry; this use arises as well to the heir of B. as to B. himself if he had been living, and

he shall have the land in the nature of a descent. 2 Mod. 209. Pasch. 29 Car. 2. Arg. in case of Southcott v. Stowell.—cites 2 Roll. Abr. 794. Parsons v. Willis.

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9. A deed of *bargain and sale* was inrolled after the death of bargainee and within the 6 months. It was resolved by the three Ch. J. on a case out of the court of wards, that the heir was to sue livery; for they agreed, that this differed from all the cases put in *SHELLY'S CASE* of recovery, fine executory, or covenant to raise uses, as in *WOOD'S CASE* there, and the like where the estate vests in the heir, though quasi heir that never was in the ancestor; for this upon the inrollment settles in law, as between the bargainor and bargainee *ab initio*, upon the statute 27 H. 8. 10. of uses, which joins all the estates to the uses ipso facto, only the statute of inrollment says, that in that case it shall not vest, except the deed be inrolled; so that if it be inrolled it vests, not by the statute of inrollments, but by the statute of uses, presently. Hob. 136. Pasch. 15 Jac. Dimmock's case.

10. If a man *devise* lands to one and to his heirs, and after the devisee dies before the deviser, the devise is void; for the will was alterable at the pleasure of the deviser, and the heir cannot be purchaser. 1 Rep. 155. b. Mich. 40 & 41 Eliz. B. R. in the Rector of Cheddington's case.—Cites Pl. C. 345. a. \* Bret v. Rigden.

\* S. C. cited 1 Roll. R. 253. Mich. 13 Jac. B. R.—S. C. cited Jo.

59. per Jones J. Or if a *feoffment* be made, and before livery the feoffee dies; or if grantee of the reversion dies before attainment, the heir shall not take; for the conveyance was not perfect.—But if a man *devise* to J. S. upon contingent, and deviser dies, and then J. S. dies before the contingent, and after the contingent happens, it seems that the heir shall take; for the will, which was the conveyance, was perfect by the death of the deviser, and not to be altered by any; per Jones J. Jo. 59. Mich. 22 Jac. B. R. in case of Foy v. Hyde.—For when the conveyance is perfect in the life of an ancestor, the heir shall take though the contingency does not happen in the life of the ancestor; per Jones J. 2 Roll. R. 484. in S. C. by name of Hurd v. Foy.

11. Bond by A. to B. Upon condition to *assure* land during his life to B. and his heirs; B. dies, living A. per Whitlock and Jones J. the conveyance must be made to the heir, but Dodderidge and Hyde J. contra; but judgment by the consent of Hyde Ch. J. was given for the plaintiff. Jo. 181. Trin. 4 Car. B. R. Eaton v. Butter.

Jenk. 249. Pl. 40.

12. Upon *render by fine* to A. and his heirs, if conusee dies before entry, the heir of the conusee may enter; for the land is bound with the fine. Jenk. 124. pl. 50. 249. pl. 40.

S. P. Jo. 59. cites \* *SHELLY'S CASE*, and 1 Rep. 105. a.

the Rector of Cheddington's case.—\* 1

Jenk. 249.  
pl. 40.  
S. P. and  
says the  
heir shall  
take by de-  
scent.—Mo.

13. Upon *covenant to raise uses upon grant or agreement per-  
formed, or to be performed, and covenantee dies before entry, or  
before such performance; the heir of the covenantee after such  
performance, may enter; for the land is bound with the covenant.*  
Jenk. 124. pl. 50.

139. S. P. cites 3 Mar. Br. Feoffments 59. Mo. 482. Arg. cites S. C. and Mo. 517. cites S. C.  
—Mo. 482. Arg. cites 1 Rep. 93. Shelly's case.—If the contingent is performed it shall vest in  
the heir; per Jones J. Jo. 59. in case of Foy v. Hyrde.

14. In case of an *exchange* if one of the exchangers enters and  
dies, and the other dies before entry; now the heir of him that  
had not entered may enter, and he shall be *in by descent*, though  
his father never had any thing in it. Jenk. 249. pl. 40.

15. Where the *first purchaser is incapable*, none shall take that  
must derive their title under him. Arg. 10 Mod. 116. Hill. 11  
Annæ, C. B.

16. As a future interest in a term will go to the executor, so a  
*future interest in an estate of inheritance*, will by the same reason  
descend to the heir; per Jekyl Master of the Rolls. Mich. 5 Geo.  
1. 10 Mod. 421. in case of Marks v. Marks.

[ 270 ] 17. Before the statute *de donis*, the donor had but a *possibility*  
barrable after issue at the pleasure of the donee, but yet this possi-  
bility was descendable to the heir; per Jekyl Master of the Rolls.  
Mich. 5 Geo. 1. 10 Mod. 421. cites 2 Inst. 335.

18. The heir shall be in by descent *where the land might possi-  
bly have vested in the ancestor.* 10 Mod. 421. cites 1 Rep. 98. 2  
Shelly's case.

(M. 2) Where the Heir shall *take by a Grant*  
made to his Ancestor, *though his Ancestor could not*  
*take by it.*

1. **A** rent *issuing out of lands in fee was granted to the tenant by  
the curtesy in fee; it will not be taken as extinct, but the  
rent will go to his heirs, although he himself could not have it.*  
Arg. Godb. 128. cites 5 E. 3.

2. If land be given for life, *remainder to the right heirs of W.  
N. which W. N. is attainted and dies; none shall have this land;*  
for he has no heir by reason of the attainder; and although it be a  
name of purchase yet none may take it but he who is heir. Br.  
Discent, pl. 59. cites 37 & 38 H. 8.

3. A man cannot, either by conveyance at the common law, or  
by limitation of uses, or devise, *make his right heir a purchaser;*  
per Wylde J. who said he agreed also GRISWOLD'S CASE, in D.  
156. But where it *operates by transmutation of possession, a limita-  
tion to the heirs of the body of the covenantor is void and no use  
will arise.* Though in case of a *covenant to stand seised (as the  
principal case was)* nothing moves out of the covenantor;  
he retains the land and directs the use and keeps sufficient in him

to maintain this use. There is a great difference between a conveyance *at the common law*, and a conveyance *to uses*; for at the common law the heir cannot take where the ancestor could not, but otherwise it is in case of uses; per Wylde J. Vent. 372. 373. Trin. 26 Car. 2 B. R. in case of Pibus v. Mitford.—Cites 2 Roll. 794. and says, that so is 1 Rep. 99. a. Wood's case cited in Shelly's case.

4. Land was given to A. and B. so long as they lived jointly together, the remainder to the right heirs of him that dies first; A. dies, the heir of A. shall have the land by descent, and yet the remainder did not vest during the life of A. for the death of A. must precede the remainder; per Jekyl Master of the Rolls. Mich. 5 Geo. 1 10 Mod. 421. cites Co. Litt. 378. b.

### (M. 3) Incapable. Who shall take.

1. **T**HERE is a difference when the incapacity is in him, that is to take by purchase, and when in him who is to take by descent; for where the first purchaser is incapable, there none shall take that must derive their title under him; but where the incapacity happens in course of descent, there the estate will go over to him to whom it should go, if the person made incapable were really dead; per Sir Thomas Powis. Arg. 10 Mod. 116. Hill. 11 Annæ, C. B. in case of Thornby and Fleetwood.

2. If tenant in tail has issue two sons, and the eldest is a monk or an alien, or abjures the realm; in all these cases the younger brother shall inherit. Arg. 10 Mod. 116. cites Co. Litt. 132. Belknap's case.

### (N) Take. Where one may take by the Name of [ 271 ] Heir in the Life of his Ancestor.

1. **F**EOFFMENT to the use of his wife for life, and after to the use of the heirs of the body of the feoffor (and his wife without saying any thing of the fee-simple of the use; the baron and feme have issue and) the wife dies, and the feoffor makes lease for years and dies; now his issue shall not avoid this lease, because a man cannot have heirs in his life, so that at the time of the death of the wife there was none to take by the remainder, and therefore the feoffor had fee, and the lease good and shall bind the heir. Dal. 20. pl. 8. 3 & 4 P. & M. per Bromley and Portman.

What is in the parenthesis is in D. 99. a. b. but not in Dal.—It seems the issue cannot enter either in the life of his father

or after his decease; because he cannot be right heir of the body of his father in the life of his father. D. 99. a. b. pl. 64.—S. C. cited Le. 102. pl. 133.

2. Testator had issue two sons and a daughter, and he devised his lands to the youngest son in tail, and for want of such issue, then to the heirs of the body of the eldest son; and if he die without issue, then to the daughter in fee; the youngest son died without issue, and afterwards

afterwards the eldest son likewise died; but left issue. Adjudged that the daughter should have the land; because the issue of the eldest son could not take by the name of heir in the life time of his father; and all the court held strongly that it is all one in case of a devise as of a grant. 2 Le. 70. 29 Eliz. B. R. Challoner v. Bowyer.

3. *A. a copyholder surrendered to J. S. for life, and afterwards to the right heirs of A. and then he made another surrender of his reversion to the use of W. R. in fee and died; J. S. and the right heir of A. entered; and Coke a counsel argued that by the first surrender nothing remained in him, but the fee was reserved to his right heirs, and if he had not made the second surrender of the reversion, his right heir would have been in by purchase, and not by descent; and the common difference is, where it is made to the use of the surrenderor himself for life, and afterwards to another in tail, remainder to the right heirs of the surrenderor, and where the first limitation is not to the surrenderor for life, &c. For in the first case his right heir shall be in by descent, and in the other by purchase. 1 Le. 101. Pasch. 30 Eliz. B. R. in case of Allen v. Palmer.*

### (O) Where it is a *Word of Limitation or Purchase.*

*And an estate for life by implication to*

1. *A man cannot make his heirs, or heirs of his body, purchasers unless he depart with the whole fee simple. Co. Litt. 22. b.*

the donor of a fine to uses will prevent the heir to take as a purchaser. See Mo. 284. Fenwick v. Mitford. — So in a covenant to stand seised. See 2 Lev. 75. Pybus v. Mitford. — For there was no disposition of the old estate during the life of the party, and therefore it still continued in him, and then the remainder to his own right heirs knit and consolidated with that old use undisposed of for life, and consequently his right heirs could not be purchasers, and the old use was construed to continue for life; because it might happen that all the estates might determine during his life, and then there would be no person to take the freehold whilst he lived; for he could have no heirs till after his death, and he had made no disposition of the use during his life, and therefore the use continued in him during his life, and that upon determination of the intermediate estates, being united and conjoined with the remainder to his right heirs made it one consolidated fee in himself, and so his heirs must take by descent and not by purchase; but where the entire use was expressly limited out of him during his life, so that by no possibility the intermediate estate can determine during his life, there the remainder to the right heirs is a good remainder and they shall take by purchase and not by descent. Tr. 1712. Arg. Ch. Prec. 341. 242. cites, as to this last point, the case of Tipping v. Cofin. — Carth. 273. S. C. adjudged Hill. 5 W. & M. B. R. — 4 Mod. 380. S. C. argued.

[ 272 ] 2. The word heir is not always and of necessity to be intended as a word of limitation. Wms's Rep. 59. agreed Hill. 1702. and cited 2 Vent. 311. Burchett v. Durdant. — And. 2 Jo. 114. Lisle v. Gray.

See Conditions. (N. d) Covenant, (H)

(O. 2) *Advantage. Of what Things he shall take Advantage. Entry in General. And what Things may descend to him.*

1. *IN affise, a man was disseised, and would not enter, but died, the heir may enter. Br. Entre Cong. pl. 63. cites 27 Aff. 32.*

2. So

2. So of an *alienation of the tenant for life in fee*, if he in *reversion dies*, the heir may enter; for entry may descend; and where descent is, or he who has title of entry is within age, he may enter by reason of the nonage. Br. Entre Cong. pl. 63. cites 27 Aff. 32.

3. When an *entry is vested in the father*, it shall descend to the son. Br. Entre Cong. pl. 85. cites 43 Aff. 45.

4. *Title of entry* of an ancestor may descend to his heir. Br. Entre Cong. pl. 17. cites 50 E. 3. 21.

5. In assise, if a man *be disseised and dies*, his heir within age, and the heir enters, he shall be in ward, and shall have his age; and none may enter upon him, no more than upon a dying seised; per Hull, which none denied, and it seems to be good reason, for it avoids mesne acts. Br. Entre Cong. pl. 22. cites 9 H. 4. 5.

6. If I *enfeoff A.* upon condition, *that if my heir pay to him 20 s. after my death*, that then he may re-enter, and after my death my heir pays to him 20 s. he may enter; per Skreene and Urswick, quod Brian concessit; and yet the condition is not reserved to the father, so cannot descend to the son, therefore quære. Br. Conditions, pl. 63. cites 15 E. 4. 13.

(O. 3) *Entry.* In what Case the Heir may enter, though the Ancestor was barred.

1. **I** F a man *disseises his father*, and makes a feoffment without warranty, and the father dies, the heir cannot enter, and yet the heir of the heir may enter. But he who made the feoffment cannot enter against his own feoffment, though right descends by the death of his father who was disseised; per Priot. Br. Entre Cong. pl. 47. cites 39 H. 6. 42. \*

2. Grandfather, father and son, the father *disseised the grandfather*, and made a feoffment without warranty, and died, and after the grandfather died, the son may enter. Br. Entre Cong. pl. 121. cites Littleton, Discontinuance.

(P.) In what Cases the Heir shall enter for Condition broken, &c. and what shall be said such a Condition. [ 273 ]

1. **A** man *devised his land to be sold by his executor, and died*, and A. tendered money to the executor, but not to the value, and he refused to the intent to sell more dear, and held the land for two years, and took the profits to his own use; the heir entered, and well by judgment; and per Mowbray, the executor \* must sell as soon as he can. Br. Entre Cong. pl. 124. cites 38 Aff. 3. S. P. because the profits shall be to the use of the soul of the testator, it being directed to be distributed for that purpose. Br. Conditions, pl. 215. cites S. C. — \* Orig. (poit)

2. *Land is devised to A. to find a chaplain, but he does not find one; the heir may re-enter.* Br. Conditions, pl. 218. cites 49 Aff. 8

Nelf. Abr.  
929. pl. 4.  
cites it as  
adjudged.

3. A. was seised in fee of land held in socage, and by his last will in writing gave the land in the premisses of it *to his wife for term of her life, upon condition, that she should find B. his eldest son at school, and educate him in virtue & bonis moribus at her cost, till his full age of 21 years; and after, in the end of the will, he gave the land, after the death of his wife, to his second son in tail, saving the fee simple, and died; his wife entered, and broke the condition, and the said B. after his full age entered, and, living the wife, brought action of trespass; if his entry was lawful or not, was the question.* Argued for the heir. D. 126. b. 127. a. pl. 51. Hill. 2 & 3 P. & M. Warren v. Lee.

4. A. indebted to J. S. in 500 l. by bond (in which neither day of payment nor condition was expressed) *devised lands to B. and C. his sons and executors in fee simple, upon condition that if they should not pay the said 500 l. to the said J. S. according to the tenor of the said obligation, then the devise should be void, and that then as now and now as then I give, &c. the premisses to D. uncle of the said B. and C. to hold to him and his heirs for ever, upon condition that he shall pay the said 500 l. to J. S. as he hath willed his executors to do.* A. died, the 500 l. not paid by the executors. D. the uncle died, and then J. S. requested the executors to pay the money. The question was, whether the heir of D. the uncle might enter and perform the condition, or not? Quære. D. 128. pl. 59. Hill. 2 & 3 P. & M. Wilford v. Wilford.

5. *The heir may enter for condition broke in the life of his father, if it was a condition in deed, but not for a condition in law.* Mo. 52. Pasch. 5 Eliz. in Eyre's case.

6. A. enfeoffed J. S. and J. N. and their heirs by indenture, and by another indenture executed at the same time, reciting the former indenture, the said J. S. and J. N. granted, that *immediately after J. S. and J. N. have enjoyed the same for 100 years, the said A. his heirs, &c. might re-enter as in their first estate, notwithstanding the said feoffment and livery.* Both indentures were executed at the same time; the 100 years expired. It was resolved that the heir of A. might enter, because it appears that the intent of the livery was so, which intent is the use of the feoffment, and this arises out of the possession of the feoffees immediately after the enjoyment of the 100 years, by means whereof, and of the statute of 27 H. 8. the heir may enter. Mo. 722. Mich. 33 & 34 Eliz. Boydel v. Walthall.

7. *A. devised land for years to J. S. reddend & solvend' 20 s. annuatim at Mich. to J. D.* And for non-payment of that sum the heir entered, supposing that those words made a condition, and that the condition was broken, and that he therefore might enter; and his entry was adjudged lawful. Cro. E. 454. Mich. 37 & 38 Eliz. B. R. Fox v. Carlyne.

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8. An heir at law sought to take advantage upon breach of a condition, *because legacies were not paid according to the will; but because*



because there was an intention to pay it, and an *agreement* between the sisters, it was decreed against the heir. Toth. 170. cites 11 Car. Salmon v. Vaux.

(P. 2) *Advantage. Of what the Heir shall take Advantage. Things done in the Life of the Ancestor. Forfeitures, &c.*

1. **T**HE heir may enter for an alienation made to the disinheri-  
tance of his father in the life of his father, where the father himself did not enter. Br. Entre Cong. pl. 8. cites 41 E. 3. 21.

2. The heir shall never have the ward fallen in the time of the ancestor, unless the ancestor took a writ of right of ward in his life; for this is a real action, which may descend, and the ancestor was out of possession. Br. Ravishment de Garde, pl. 12. cites 17 H. 4. 54.

3. In *ejectione custodiæ*, it was said that the heir cannot enter by a clause of re-entry for rent, unless the rent was due in the time of the heir; nevertheless it seems, if the rent be due tempore patris, and he demanded it, so that he might re-enter, and died before entry, that the heir may enter; for the entry is descended, and the case was of a reservation made upon a feoffment in fee reserving rent. Br. Entre Cong. pl. 24. cites 13 H. 4. 17.

4. A copyholder committed a forfeiture by suffering his house to be ruinous, and making a lease for 10 years. These were both admitted to be causes of forfeiture. Two coparceners were lords of the manor, and one died, by which the whole descended to the survivor, and whether she could take advantage of this forfeiture was the question? And per Powell J. At common law, the heir was intitled to take advantage of any causes of forfeiture in the time of his ancestor, but *waist & cessavit*. As to *waist* he could not, because it is a personal wrong, which dies with the person; and as to *cessavit* he could not, because the tenant by statute has liberty to save himself by tender of arrears, which are not due to the heir, but to the executors; but that in all other cases, the estate determines by the act of forfeiture, and though the tenant holds in possession, it is a disseisin to the lord if he will. But the other three held, that the continuing in of the tenant after forfeiture was no disseisin at the election of the lord; they held the making the lease a forfeiture, because it was a breach of trust, and that it was a personal wrong as much as *waist*, which cannot be transferred by descent, but must be took advantage of by him who was wronged; and that the estate of the copyholder was not determined; because the lord by acceptance of rent, &c. might affirm it; and that as to the election, it was a thing intire, and therefore the surviving sister could not make election after the death of her sister. 1 Salk. 186. Trin. 10 W. 3. C. B. Eastcourt v. Weeks.

See Heir  
Lo:ms.

(Q) Actions by him, for what.

Arg. 10.  
Mod. 529.

1. ACTION lies for the heir for *defacing* or *destroying the tomb or monument* of his ancestor; so for *removing the gravestone, or coat armour*, or carrying them away, either the heir or executor may have an action; per Coke Ch. J. Godb. 200. cites 6 E. 6.

[ 275 ] (Q. 2) Actions. What Actions the Heir shall have for Things done in the Time of the Ancestor.

1. IF a farm is out of repair in the life of the ancestor, and after the heir brings an action, he shall receive damages for the whole time; but the heir ought not to allege a breach in the ancestor's time, because that belongs to the executor; per Hplt Ch. J. 11 Mod. 45. pl. 10.

(Q. 3) Where the Heir shall be compelled to join in a Sale.

S. C. cited  
Chan. Cases  
180. by the  
name of  
Atby v.  
Doyl, & al.

1. THE words of a will were thus, viz. *my will is, and I do hereby authorise that my executors shall sell my lands, &c. called B. to any person or persons, whatsoever, and their heirs and assigns for ever for the best value, with as convenient speed as may be, and with the money to pay all my just and due debts.* The executor did not sell according to the directions of the will: the court, on a bill brought by the creditors, decreed, with the assistance of the judges, and reading of precedents, that the lands be sold, and that the heir join in the sale. Chan. Rep. 168. 1655. Amby v. Gower.

2. J. S. seized in fee devised lands to his executors to sell and pay debts. The heir shall be compelled to join in the sale; and the lord keeper said it was so ruled in parliament. Chan. R. 262. Trin. 27 Car. 2. Fowle v. Green.

3. Lands were settled on trustees to be sold for payment of debts. The creditors brought their bill to compel a sale, and suggested that the trustees pretended a want of power, and the heir insisted that he had securities with which the land was chargeable, and the widow pretended that she had a jointure, prior to all other incumbrances, but is willing to accept of 2000 l. in lieu thereof, and that the person, from whom the estate was originally purchased, knowing that the writings were casually burnt, refuses to execute a release for the satisfaction of a purchaser. The court decreed the estate to be sold, and the contending parties to join, that the creditors

creditors may be satisfied (saying the jointure of the widow, or 2000 l. in lieu thereof) and with the money (after the charges of trustees deducted, and just allowances made them) to satisfy the debts in equal proportions as far as the same will extend, the trustees to be indemnified, and such securities as the creditors have for their respective debts, to be delivered up to the purchaser. Fin. Rep. 264. Trin. 28 Car. 2. Bennet v. Ingoldsby, Hampson & al.

4. A. seised in fee, did by his last will *appoint that his debts should be paid out of his estate*, and devised one moiety to his wife, and the other moiety to his eldest son and his other children, *and declared that all his estate both real and personal should be for the uses aforesaid, and made the plaintiffs executors.* The executors paid several debts, but there not being sufficient for payment of the rest out of the personal estate, the court decreed an account of the personal estate, and that the heir join in a sale of the real estate, and that the purchaser hold against him, and all claiming under him. Fin. Rep. 415. Hill. 31 Car. 2. Stubbs v. Stubbs.

5. Lands were settled on trustees for raising *maintenance and portions* for daughters; the bill was to have a sale, and that the heir might join; though the estate in fee was in the trustees, yet decreed that the heir should join; per lords commissioners. Pasch. 1689. 2 Vern. 99. Roll v. Roll.

6. A. having only one son and one daughter, *devised 500 l. portion to his daughter, to be paid by his executor, at 21, out of his personal estate, and rents and profits of his lands, and if not raised by that time, then his executor should stand seised, and receive and take the rents, issues and profits of his lands until the 500 l. should be raised, and after payment devised the lands to his son.* The daughter at 18 married J. S. the plaintiff; she died before 21, leaving issue a daughter. The husband, as administrator to his wife, brought a bill to have the 500 l. raised out of the land; and the lord keeper decreed accordingly, and with interest and costs, and the heir forthwith to join; although the incumbrances were so great that the whole inheritance would produce little more than the 500 l. 2 Vern. 424. Pasch. 1701. Jackson v. Farrand.

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(Q. 4) Where the Heir shall be *compelled to convey* Land absolutely or conditionally *in Pursuance of* his Ancestor's Agreement. See Agreement (E)

1. **T**HE heir is *not bound* in equity to assure lands which his father bargained and took money for. Toth. 169. cites 1584. Weston v. Danvers.

2. A. being desirous to purchase an estate of J. S. which was formerly sold out of his family, employed B. as his *agent, to contract for and take up money to pay for the purchase* thereof, which he did, and articles were executed. B. paid part of the money, but

but not in the manner agreed by the articles, and for other part unpaid B. was sued; and before any conveyance made, the vendor died, and likewise B. but before B.'s death he paid other monies to the heir of the vendor, and died [indebted very greatly. Upon an offer by the defendant, the heir of the vendor, that, upon payment of the residue of the purchase money, and interest and costs in the several suits relating to this dispute, and to be indemnified from the heirs of B. &c. and from all costs he shall be put unto, until a perfect release or conveyance be procured from them, he would convey according to the original articles with warranty and covenant therein contained, the same was decreed accordingly. Fin. Rep. 201. Hill, 27 Car. 2. Earl of Bath v. Sir Eliab Harvey.

(R) *Favoured.* In general.

1. **I**F a man who had *land by descent*, had *issue several sons*, he *could not have given* any of this land to any of his younger sons, *without consent of the eldest*; and this was to the intent, that the father, who might have a greater affection for a younger son, should not disinherit an elder. 6 Rep. 17. a. says, that it appears by Glanvil, who was chief justice in the time of H. 2. in lib. 7. cap. 1. fo. 44.

2. In B. R. a man prayed *scire facias against the heir, and the tertendants* of one against whom he had recovered *damages in re-disseisin*, and was denied; for *first he shall have execution against the executor*, and if the sheriff returns nichill, he shall have execution against the heir; for the land shall not be charged, but in default of chattels. Br. Executions, pl. 28. cites 7 H. 4. 31.

3. In a case which carries the land from the heir, there ought to be a strong and *strict*, and not a favourable *construction* made to the prejudice of the heir. Vid. Lane, 57. in case of Sweet v. Beale.

Cro. C. 369. Spirt v. Bence. — 8 Mod. 222. in case of Wright v. Horne. — Per Raymond J. Raym. 453. in case of Holmes v. Meynell. — Ch. Prec. 384. Boutel v. Mohun. — 2 Jo. 107. Arg. 114. Arg. cites Cro. C. 157. Ansley v. Chapman. — 447. \* Wilkinson v. Merriland. — Cro. E. 742. Taylor v. Sayer. — D. 371. — Per Trevor Ch. J. 12 Mod. 596, 597. in case of Shaw v. Bull. — *To disinherit an heir at law* there must be either express words, or a *necessary implication*. per Cowper K. Hill. 1706. 2 Vern. 571. City of London v. Garway.

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4. In a doubtful case, the heir at law is to be preferred. Hill. 13 & 14 Car. 2. 1 Chan. Cases, 7. in the case of Goring v. Bickerstaff & al.

Saund. 185. Arg. — to be preferred to a jointress, per Bridgman Ch. J. Cart. 111. — *But* where there is *no ambiguity*, heirship must not controul a plain and express will. Hill. 1697. 2 Vern. 340. per Holt Ch. J. in case of Cary v. Bertie.

Ch. Prec. 440. Mich. 1716. Symphon v. 5. An estate given by *implication in a will*, if it be to the *disinheriting* of the heir at law, is not good, if such implication be only *constructive*, and possible but not a *necessary* implication. Vaugh. 262.

262. 23 Car. 2. C. B. Gardner v. Sheldon.—Sti. 279. Arg. in Hornsby.—  
case of Saunders v. Rich. G. Equ. R. 115.

S. C. Hill. 1 Geo. 1.—*But a will, if clear, is as much to be favoured as any heir at law.* 6 Mod. 133. per Holt. Anon.—*As where A. by deed, made a lease for 500 years to 6 trustees, with power to make leases for 21 years, or 3 lives at any time within 31 years after the death of A. in trust for payment of his debts, and the surplus to be for such purposes as he should declare by his will, and gives two of the trustees, as were intended to be the acting persons, 20 l. a year for their pains; and there was a proviso, that if such person, to whom the inheritance should belong, should confirm such leases, as should be made by the trustees, and undertake the payment of such debts as should be then unpaid, the 500 years term should cease, &c. And by will of the same date, reciting the deed and power to dispose by will, appoints to the trustees the surplus, to be received by profits, and raised by leasing within the 31 years after the decease of A. without account, and devised the reversion to B. for life, and to his first, &c. son in tail. A. died; B. by bill offered to pay all the debts, and prayed relief against this power of making leases, during the 31 years, as a strange and unusual sort of settlement; that A. intended the trustees no other benefit but the 20 l. a year, and should they be suffered to make leases, according to the power, the provision made for B. for life, remainder to his first, &c. son in tail, would be vain and idle; because they may, in the last year of the 31, fill up estates for 21 years or three lives, so that probably neither the plaintiff nor any son of his will have any benefit by it. But Ld. C. Jefferies said, that A. had expressly given the surplus of the profits to the trustees, and he could not take it from them. In this case, some proof was offered tending to an ill practice in the person who drew the will; but his lordship said, that he knew that A. was in doubt which way to dispose of his estate, and that he had a personal kindness for some of the trustees, and no good opinion of the plaintiff, and therefore dismissed his bill. And afterwards the parties agreed in court for 600 l. to be given to the trustees, and they not to account for any profits received.* Vern. 433. Hill. 1686. Aspinwall v. Case & al.

6. A. devised land to his daughter and her heirs, but if B. his son (and heir) pay the daughter 50 l. at Michaelmas, then B. to have the land; B. paid the money, but not at the day; decreed the land to B. and his heirs, though his heirs were not mentioned in the devise to him. Hill. 30 & 31 Car. 2. 2 Chan. Cases 1. Bland v. Middleton. Ld. C. Macclesfield said, that in all cases where there is a measuring cast (as he

termed it) betwixt an executor and an heir, the latter shall in equity have the preference. 2 Wms's Rep. 176. Trin. 1723. in case of Edwards v. Lady Warwick.

7. A. devised lands to his wife. The son exhibits a bill pretending the devise to her void, because in the 25 Eliz. the lands were entailed to his great grandfather, to whom he is heir in tail, and to discover the deed in tail. She was ordered to bring in the writings, and the deed fell out to be among them. It was insisted for the wife, that unless the heir would confirm her estate, he ought not to be assisted by the court; for that the being wife is a consideration to raise an use at common law; and affirmed that there were precedents for \* her, and the rather, because his father had power to dock or bar the entail. But Ld Chancellor said, that though he would never help the issue against a purchaser, yet this is a bounty, and in such case, the heir having a good title shall be aided, and decreed the deed to the plaintiff. 2 Chan. Cases, 4. Mich. 32 Car. 2. Anon.

\* The original is (him.)

8. If a lease be made in trust to pay debts, and the lessor dies, the heir, paying the debts, shall be relieved against the lease; per Lord Chancellor. Hill. 1 Jac. 2. 2 Chan. Cases 172. in the case of Bodmin v. Vandebendy.

9. Where lands are vested in trustees by act of parliament to be mortgaged for a particular purpose, the mortgagee must take care that the money be applied accordingly, and the heir shall be no further charged. Trin. 1686. 2 Vern. 5. Cotterel and Holt v. Hampson and Bill,

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10. Ld.

10. *Ld. C. Jefferies* said, he would do all he could to *help a disinherited heir*; and the *executors* shall be *allowed* nothing more than what they can prove to have been actually paid towards satisfaction of *legacies* of 50 *l.* and 100 *l.* given to him, and paid into his father's hands, (who had afterwards given bond to leave the heir 6000 *l.* at his death) and *eo nomine*, as in part of the legacies, and shall pay the residue with interest. Mich. 1687. Vern. 482. in the case of *Cann v. Cann*.

Max. of Equ. 19. —So where the real estate was devi-

11. A. by his will, gave several particular legacies subject to particular charges, and gave the surplus to his wife, the personal estate shall be applied in case of the real, *against the residuary legatee*. Pasch. 1688. 2 Vern. 43. *White v. White*.

sed for payment of debts. Pasch. 32 Car. 2. 2 Vent. 349. Anon. —9 Mod. 186, 187. S. C. cited. —And also *against a devise*. 9 Mod. 189. cited by Prat C. J. as decreed in 1691, and in 1692 affirmed in parliament in the case of *Coote v. Moore*.

12. A. makes his wife executrix; she takes a *second husband*; decreed that he should be answerable for so much of the former husband's personal estate as she had possessed, notwithstanding he took it as a portion with the widow; and this was in favour of the heir, there being no creditors concerned in this case, and his bill was only to have the personal estate applied in case of the real. Pasch. 1688. 2 Vern. 61. *Batchelor v. Bean*.

S. P. but no decree. Mich. 1688. 2 Vern. 85. *Harrison v. Cage*.

13. *Settlement* was in trust to pay debts and legacies; the monies are raised, but *misapplied* by the trustees; the land is discharged, and the trustees liable. Mich. 1689. In Dom. Proc, 1 Salk. 153. Anon.

\* As if feme joins with baron in a mortgage of her own inheritance to raise money to

14. If a term be raised\* for a particular purpose, when that purpose is satisfied, the term shall be in trust for the heir. But he must have it as a term, which must go in a course of administration, and not in a course of descent; and per Commissioners decreed for the administrator of the heir, and not to the heir's heir. Pasch. 1690. 2 Vern. 139. *Levet v. Needham*.

buy a place for the baron, and baron covenants in the mortgage to pay the money, (4500*l.*) and on payment thereof, by a proviso, the term is to cease. The mortgage is afterwards assigned, and the proviso is, that on payment by them, or either of them, the term to be assigned, as they, or either of them shall direct. The baron soon after the mortgage promised his wife to apply the profits of his place to pay it off. Baron pays it off, and takes an assignment in trust for himself, and devises it to a second wife. —The son and heir of the baron and first wife brings a bill to have the mortgage assigned to him. Denied relief in chancery, but on payment of the principal interest and costs. But in dom. proc. decreed the mortgage to be assigned to the heir. Pasch. 1702. 2 Vern. 437. *E. Huntingdon v. Countess of Huntingdon*.

In case of a will, and legacies to the younger children, if the security sweeps away the personal estate, the legatees shall be relieved out of the real. per Finch. C. Mich. 32 Car. 2. 2 Chan. Cases 4. Anon.

15. A. dies *intestate*, leaving younger children unprovided for, and a mortgage on the estate, with covenant for payment of the money, and a recognizance for farther security. Whether the mortgagee by his covenant and recognizance shall sweep away all the personal estate, and leave the younger children destitute? Hill. 1693. 2 Vern. R. 309. *Mills v. Darrell*.

16. *Uncertain words* in a will must never be carried so far, as by them to disinherit the heir at law, and though there are words, which



which of themselves would disinherit him, yet if they come in company with other words, which do render their natural import less forcible, they ought to be construed \* favourably for the heir; per Powell J. 12 Mod. 594. Mich. 13 W. 3. B. R. in case of Shaw v. Bull.

17. Where a term is limited for raising portions for younger children by rents and profits, the heir *may have the portions raised by a sale*, though the younger children oppose it, as well as they may insist on a sale, if they think fit; per Wright K. Pasch. 1701. 2 Vern. 420. Warburton v. Warburton.

18. If the statute of 11 H. 7. of discontinuances be a *penal statute*, as the statute of Gloucester is, the heir shall not be aided or assisted in equity; per Wright K. Hill. 1704. 2 Vern. 489. in case of Clifton v. Jackson.

19. A. seised in fee of a reversion expectant on an estate for life, *conveyed to trustees, to sell for payment of debts in a schedule*, and the surplus to go to his heirs, executors and administrators. A.'s heir was a daughter, whom B. married. B. and his wife got a conveyance from the trustees to B. and his heirs, and paid some of the debts. The wife died without issue. The interest of the debts was unpaid. The wife's heir brought a bill and decreed, that the husband who received the profits in right of his wife, ought thereout to have paid the interest, and not suffer the debt to increase, and the defendant to account accordingly. Quære tamen. Mich. 1706. 2 Vern. 566. Brompton v. Alkis.

20. *Hæres natus* is rather to be favoured than *hæres factus*. Pasch. 1711. 2 Vern. 672. in case of MINSHULL v. LD. MOHUN, but the *hæres factus* shall be allowed the same advantage of a decree, as the *hæres natus*; and neither the one or the other shall be allowed to dispute the justice or validity of a decree, or to make a new defence. Ibid. and Pasch. 1706. 2 Vern. 548. Clare v. Wordell.

21. A. and B. aunt and niece, were coparceners. B. being in an ill health, and about to go abroad for the recovery thereof, conveyed her moiety to A. and in consideration thereof, A. gave bond to B. for 400 l. But B. on her going abroad, left the bond with A. Afterwards A. conveyed the land to J. S. to the use of J. S. his executors and administrators for 99 years, if she or B. should so long live, remainder to A. and her heirs; and A. declared the trust, to be, that A. should receive the rents and profits for so many years of the term as she should live, proviso, that if A. her executors, &c. should pay B. 400 l. then the term to be void. The same day that the deed was executed by A. to J. S. she made her will, and devised to B. 400 l. mentioning it to be the same sum secured by the bond, and likewise taken notice of in A.'s deed to J. S. and after by another clause, A. devised the said estate to the defendant J. M. her son and heir, and the heirs of his body, after the death of B. with remainder over and died. The question was, whether B. was to have this estate for life, by virtue of the devise to her for life, by implication, or whether that clause meant only to continue it, as a security to her for the 400 l. and interest. B. read one witness, to prove that A. declared she should have the estate for life. It was insisted for J. M. the defendant, that upon the circumstances

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ces of this case, it might reasonably be intended no other estate than what B. had before by the term; that as that was for life, it was natural and reasonable not to give away the estate till after her death; that as the term was redeemable, so must this estate too; because it might be intended no other, and therefore no such necessary implication of an absolute estate for life, as is allowed of in the books of law, to the disinheriton of the heir. Ld. Chancellor was of the same opinion, and especially for this last reason, that here was no necessary implication, and therefore decreed B. her 400 l. with interest, and dismissed her bill, as to the account of rents and profits, but without costs, because she had colour to make such demand. Chan. Prec. 381, 384. Pasch. 1714. Boutel v. Mohun & al.

See Devise.  
Mandy v.  
Mandy.

22. The heir at law shall not be disinherited, if the will can be satisfied by any other construction. Arg. Trin. 2 & 3 Geo. 2. C. B. Gibb. 72. cites 1 Salk. 228. 5 Mod. 63. Cro. E. 190. Mo. 635, 735. 2 Le. 222. 3 Le. 78. 1 Roll R. 319, 320. 3 Bulf. 98, 99. Hob. 285. Cart. 27. which he said prove only, that a devise of the profits will carry the land, but not, that a devise of the rent will carry the reversion.

See Devise.

(S) *Interim Estate.* In what Cases the Heir shall take it.

1. A trust upon a deed and will was limited on a condition precedent of having issue male; the trustees can take nothing 'till the condition be performed by marriage, and issue male; and then, by the rules of law, 'till some of the persons, to whom the trust is limited, can take the interim trust of the estate, it descends to the heir at law, and he is entitled to the profits, 'till the precedent condition be performed, or become impossible; and if the condition be performed, the trusts take effect; but if they be not performed, but become impossible, then the subsequent trusts take effect. Parl. Cases, 85. in case of Wood alias Cranmer v. the D. of Southampton.

In this case A. had devised to B. another estate, and thence it was objected, that he could never be supposed to have intended B. this surplus, and cited Chan. Cases, 196. NORTH V. CROMPTON. But Ld. C. Tal-

2. A. by will devised lands to trustees and their heirs, to the use of them and their heirs, in trust for C. son of B. (who was heir at law of A.) for life, and after in trust for the first, &c. son of the body of C. and the heirs male of the body of every such son. And for want of such issue, then, for all and every other son and sons, respectively and successively for their lives, &c. if any such should be, and for want of such issue then in trust for the first and every other son of D. with like remainders to E. &c. and for want of such issue, then in trust for the first, &c. son of F. with like remainders to the heirs male of the body of every such son of the said J. and for default of such issue, then in trust for his own right heirs for ever; provided that none, &c. to whom the estates are limited, shall be in actual possession, &c. of the rents, &c. until they shall respectively attain the age of 21. And that in the mean time the trustees shall make such allowance thereout for maintenance, &c. as they

*they shall think suitable, &c. And then he wills, that the overplus of such rents and profits do go to such person as shall be intituled unto, and come to the actual possession of the estate, &c. C. died in A.'s life-time, without issue. Then A. died without altering his will. B. had no other son but C. and no other remainderman was in esse at A.'s death, but a son of J. The question (in the state of the case, though nothing is reported as spoken to the point by counsel of either side) was, what was to become of the rents and profits, in case this be an executory devise, until the birth of a son to B. This was held at the rolls to be an executory devise, and afterwards by Ld. C. Talbot. And his lordship held, that 'till somebody is in esse to take under the executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir at law; the case being the same, where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case, and where but part of the legal estate is given away, and so the residue, undisposed of, descends upon the heir. Cases in Chan. in Ld. Talbot's time, 44. Mich. 1734. Hopkins v. Hopkins.*

but answered, that in this case the heir does not take by reason of the testator's intent, but the law throws it upon him; and wherever the testator has not disposed (he his intent that the heir should take or not take) yet still he shall take. For somebody must

take, and none being appointed by the testator the law throws, it upon the heir. Cases in Chan. in Ld. Talbot's time, 52. in S. C.——And said, it was so held by Ld. C. King, in case of Lady Hertford v. Ld. Weymouth.

## (S. 2) Marriage Portion. Where it shall go to the Heir.

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See Portions (I)—Charge,

1. **A** portion was agreed to be laid out in land by the father of the feme, to be settled on the husband and wife, and the heirs of their two bodies, the remainder to the heirs of the husband. The father gave bond to pay it within 3 months after demand, and interest in the mean time. By deed of the same date between the husband's father of the first, the husband of the second, and the wife's father of the third part, was agreed that the wife's father should detain the portion 'till such purchase made. They have issue; the wife dies; the issue dies; no purchase made. The husband received a part of the portion, and by his will devised the portion as part of his personal estate, and declared it should go to his executors, to pay his debts and legacies; decreed the money to the executor. Note, the bond given for the laying out the portion was made payable to the husband, his executors or administrators. 4 Car. 1. Chan. Rep. 30. Ferrers v. Ferrers.

2. *Lands are settled for raising daughters portions; one of the daughters marries and dies. The husband takes administration, and assigns over the portion to his son. Lord Keeper thought there was a considerable difference between assignment by the party, and assignment by the administrator, where the administrator was a stranger, or had no right before, and no colour of right but merely by the administration. But in this case the administration was pro forma only; for he had a right to the money, as a portion or provision*

vision for his wife, and every man has not ready money to give his daughters, but their portions are to be provided for by this means, and therefore it is reasonable to advance or promote the establishing of them, so that they might be disposeable by the husband (who settles a jointure) as money itself may be. Trin. 22 Car. 2. 1 Chan. Cases, 169. Hurst v. Goddard.

3. On marriage of A. and B. A. and the father of B. are to club 1500 l. to purchase land to be settled on A. and B. for her jointure, and on the heirs of their 2 bodies. A. dies, B. marries C.—B. dies. The purchase was never made, so that C. laid claim to B.'s moiety at least, there being no direction to whose right heirs the remainder should go. Ld. Chancellor decreed for the heir of A. Pasch. 1687. 2 Vern. 20. Knights v. Atkins and Peers.

Sec Execu-  
tor. (B. c.)

(T). Where he shall have the Surplus.

Trin. 34.  
Car. 2. 2  
Chan. Ca-  
ses, 115.

1. **T**HE surplusage of an estate after debts, legacies and portions paid, was ordered not to go to the executor but the heir. 1651. Chan. Rep. 164. Ollibear v. Bromfall.

Culpepper v. Aston.—The residue of a long term after debts paid, and a life determined, decreed to the heir, and not to the residuary legatee. 36 Car. 2. 2 Chan. Rep. 296. Woodhall v. Benson.

2. If a man seised of an estate of inheritance, makes a lease, or devises an estate for years, for payment of debts; if the profits of the land, surmount the debt, all that remains shall go to the heir, though not so expressed; and albeit it be in the case of an executor. Mich. 33 Car. 2. 2 Vent. 359. Anon.

It was  
afterwards  
held not to  
be a result-  
ing trust,  
and the  
heir was  
decreed to  
join in the  
Sale. Ch.  
Prec. 31.

3. A. devises his lands to his nephew to pay his debts, and makes his nephew his executor, but makes no disposition of the surplus. It was allowed in arguing this case, that, in a conveyance where no use is declared \* as to the surplus, it may result to the heir; but whether the same in case of a will, or † whether devisee shall take to his own use, was not resolved. 2 Vern. 247. Mich. 1691. Callingham v. Mellish.

S. C. by name of Coningham v. Mellish.—Abr. Equ. Cases, 273. pl. 8. cites S. C. as decreed, and that it was affirmed in parliament.—Vid. 2 Vern. 133. Hill. 1690.—† 2 Vern. 644. Hill. 1709 Hobart v. Maynard.—In case of † CROMPTON v. NORTH, where a particular legacy was devised to the heir, there the devisee was to take the surplus. 2 Vern. 248.—9 Mod. 73. Arg. says, it was so adjudged lately at the rolls, where a shilling was devised to the heir, in case of Bethel v. Bethel.—Ibid. 78. Atcherley v. Vernon.—† S. C. Ch. Cases 196. Hill. 22 and 23 Car. 2.—9 Mod. 188. cited per Prat Ch. J.

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4. It was a question when lands are given in trust, and money is raised by sale, of them, and there is an overplus, whether that shall be a resulting use for the heir at law, or for the trustee? See BROWN v. NORTH in Bridgman's time; it was a question again, and it was held the trustee should have it; per Trevor Ch. J. 12 Mod. 596. Mich. 13 W. 3. B. R. in case of Shaw v. Bull—He said there had been cases both ways.

§

5. Per

5. Per Cur. though land is *devised to trustees and their heirs to sell*, and thereout to pay legacies therein mentioned, and among the rest a legacy to the heir at law of 100 l. yet the land shall not be turned into personal estate \* nor more sold than is necessary for payment of the legacies, and the heir shall have the surplus. Pasch. 1701. 2 Vern. R. 425. Randall v. Bookey.

Ch. Prec. 162. S. C. and per Lord Wright, the devise of the land as above, was

but in nature of a security; and for the legacy to the heir; it is as if a man devises lands to his heir for life, yet he shall have the reversion too. — \* 9 Mod. 171. Roper v. Radcliff.

6. The equity, that an heir has to have the *personal estate applied in exoneration of the real estate*, is only for the sake of the real estate descended to him, that it may be clear to the family; so that when the heir has parted with the real estate, he has then no right to the personal estate, which before he might have demanded to have exonerated his real estate in case he had kept it. Mich. 1702. Ch. Prec. 206. Wood v. Fenwick.

7. A. devised lands to *trustees and their heirs to sell and dispose of the monies as he by a paper to be signed by him should appoint, but if he left no such paper, then to his four nephews*, and if any appointees died before sale and payment, such share to resort to his nephews. A. appointed accordingly several sums to several persons, but not near the value of the land, the surplus shall result as undisposed of to the heir at law; per Cowper K. Hill. 1706. 2 Vern. 571. City of London v. Garway and al.

Cowper C. said that the case of Roper v. Radcliff had settled this point. See Ch. Prec. 542. — Ch. Prec. 541.

Mich. 1720. Emblyn v. Freeman, S. P. — But where the heir is not concerned, but the dispute is between the executors and the legatee, the legatee shall have it. See Executors, Martin v. Douch. Pasch. 23 Car. 2.

8. Devise was of real estate to *executors to be sold for payment of debts, and the surplus, if any be, to be deemed personal estate, and go to the executors*, to whom he gives 20 l. a piece; yet the surplus decreed a trust for the heir, and affirmed in Dom. Proc. Hill. 1709. 2 Vern. 645. Countess of Bristol v. Hungerford.

2 Vern. 677. Mich. 1711. in case of BALL v. SMITH cites the

case of HUNGERFORD v. REPPINGTON, S. P. and seems to be S. C.

9. A. devised lands to *two strangers and their heirs, in trust to be sold by them or the survivor of them for the best price, and with the money to pay his debts, legacies and funerals so far as the same will extend*; and he gave 40 l. to B. and 10 l. to C. who were his cousins and co-heirs, and made the devisees executors (giving them nothing by way of legacy) but gave 100 l. to the children of one of them; the surplus proved to be 500 l. and for the devisees, was cited the case of CROMPTON v. NORTH, Chan. Cases 196. as a case in point; lord C. Cowper said, that in case of this nature, the circumstances must govern, and took notice of the several clauses that they should sell (for the best price) and that they should (apply the money in payment of debts, &c.) which implies the whole money, and that it was to be sold by them (and the survivor of them) by which the trust was intended to follow the estate, he decreed the devisees to account for the surplus. Wms's Rep. 390. Hill. 1717. Starkey v. Brooks.

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Ibid. 171.  
in case of  
Roper v.  
Radcliffe.  
—S. C.  
ibid. 185.

10. Where lands are devised to one and his heirs *to be sold in aid of the personal estate for payment of debts, and legacies*, and the lands are not sold, for that the personal estate is sufficient to discharge the whole, it is plainly an *implied trust* in the devisee for the heir at law and he is intitled to come into this court to have a *re-conveyance* and an *account* of the profits. Hill. 11 Geo. 9 Mod. 122. Buggins v. Yates.

## (U) What the Executor must do in favour of the Heir.

And if he is forced to pay the debt of his ancestor, he shall recover against the executor as far as personal assets come to the executor's hands. Pasch. 18 Car. 2. Chan. Cases 74. Armitage v. Metcalf.—Gibb. 41. Hill. 2 Geo. in Scacc. Lucy v. Bromley. S. P.

1. **THOUGH** the heirs land ~~was~~ liable to pay debts, yet he shall be relieved against the executors so far as the personal estate will extend. 18 Car. 1. 1 Chan. R. 155. Smith v. Hopton.

2. *Rent or pension is in arrear*; tertenant dies, and leaves an executor; though the person of the tertenant was not chargeable with the rent at law, but only the land by way of a distress; yet forasmuch as the testator held the land, and did not pay the rent, it was said, that thereby the personal estate of the testator was augmented; and so the Master of the Rolls decreed the executor to pay the arrears as far as he had assets of the testator's estate. Chan. Cases 121. Hill. 20 & 21 Car. 2. Eaton College v. Beauchamp and Riggs.

See Chan. R. 156. Smith v. Hopton. S. P. 18 Car. 1.—Chan. Cases 156. Hill. 21 & 22 Car. 2. DENNIS v. BADD. S. P. in case of a guardian.

3. If executor has assets, he is compellable to *redeem mortgages* for the benefit of the heir; so if the heir be charged in debt where the executor has assets, the heir may compel the executor in equity to *pay the debt*; but a creditor may sue either of them, and shall have the benefit of his security; per Hale. Trin. 21 Car. 2. Hard. 512. in case of Woolstan v. Aston.

4. *Land was devised for payment of debts and legacies*; the personal estate shall be first applied. Hill. 28 & 29 Car. 2. 1 Chan. Cases 297. Ld. Grey v. Lady Gray.—See Payment.

S. C. cited Ch. Prec. 477.

Where debts by specialty, which are a lien on the heir at law on the real estate are discharged out of personal assets in case of

5. Where the heir is indebted by mortgage made by his father, or by other means, as heir to his ancestor, the personal estate in the hands of the executor shall be employed to pay that debt; but if there are *not assets to pay other creditors*, or [answer any] other end of the testator on [as to] his *legacies*, the heir shall not turn his charge on the personal estate; in this case here was sufficient to pay the debt by the mortgage, &c. and the legacy out of the personal estate, and *when both can be satisfied, both shall be satisfied*; and the contrivance to make the personal estate liable to the legacy to go towards satisfaction of the mortgage looks like a fraud and shall



shall not prejudice the legatee, but she shall have recompence against, or upon the mortgage, though originally not liable to her; per Lord Chancellor. Mich. 32 Car. 2. 2 Chan. Cases 5. Anon. 117. Trin. 34 Car. 2. Culpepper v. Aston. S. P. decreed accordingly.

the lands, creditors by simple contract shall stand in place of the cre-

ditors by specialty and be paid out of the lands. 9 Mod. 151. Charles v. Andrews, Trin. 11 Geo.

6. Lands mortgaged are devised to A. in this case A. who is only a *hæres factus* as devisee shall have the personal estate applied in case of the real. Hill. 33 & 34 Car. 2. 2 Chan. Cases 84. Popley v. Popley.

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Vern. R.  
36 S. C.  
and by  
Lord Chan-

cellor, any ordinary devisee shall have that benefit. Ut ante, 37.—But he must be *hæres factus* of the whole estate and not devisee of a particular part; per Rawlinson Commissioner. Ch. Prec. 3. Hill. 1689. in case of Gower v. Mead.—Pin. R. 401. Mich. 30 Car. 2. Starling v. Wilford & al.—Chan. Cases 271. CORNISH v. MEW. Contra per Finch K. the devisee for life being executor and had assets sufficient to discharge the mortgage, yet held he was not bound. Hill. 27 & 28 Car. 2.—A. mortgaged his lands and by will appoints them to be sold for payment of the mortgage money, and after, in another part of the same will, devised a moiety to A. of the mortgaged premises; the personal estate shall be applied to pay off the mortgage in favour of the devisee, per Master of the Rolls, and affirmed per Commissioners. Mich. 1689. 2 Vern. 112. JOHNSON v. MILKSOPP.

7. A. purchased an equity of redemption and died; this not being the debt of the ancestor shall not be paid out of the personal estate for the benefit of the heir. Hill. 1681. Vern. 37. ut sup.—Ch. Prec. 458. Arg. S. P.

8. If there be no covenant in the mortgage deed for payment of the mortgage money and interest, the administrator is not obliged to discharge it. 35 Car. 2. 2 Chan. Rep. 275. Eyre v. Hastings.—2 Vern. 701. S. P. in the case of \* Howell v. Price.—1 Vern. 436. Hill. 1686. Contra per Master of the Rolls in case of the Earl of Winchelsea v. Norcliff.—Arg. Ch. Prec. 458.—Lord C. King said the executor has been decreed to pay it. 2 Wms's Rep. 455. Pasch. 1728.

\* See  
Charge (B)  
S. C. contra  
Ch. Prec.  
2. cites a  
case in the  
Exchequer  
contra be-  
tween  
TURNER  
and ZOUCH  
and Cook and Guayas,

9. Bond given by one parcener to pay to the other parcener, his executors or administrators, an annual sum during the life of J. S. for owelty of partition shall go to the executor and not to the heir. Hill. 1682. Vern. 133. Hulbert v. Hart.

10. Personal estate not specifically devised away ought to be applied towards payment of debts and legacies in case of the real estate. 1 Jac. 2. 2 Chan. Rep. 382. Middleton v. Middleton.

S. P. Gibb.  
41. Hill.  
2 Geo. in  
Scacc. Lucy  
v. Bromley.

11. A. makes his will and gives the executor 20 l. legacy and his real estate to C. paying his debts and legacies, and in default of payment in three months, the legatees and creditors to enter and hold till satisfied, and says nothing of the surplus of the personal estate; per Commissioners, the personal estate shall go in case of the real. Hill. 1690. 2 Vern. 120. Mead v. Hide.

12. If lands are devised for payment of debts and legacies and the residue of the personal estate is given to the executors, after debts and legacies paid, the personal estate shall notwithstanding as far as it will go, be applied to payment of the debts, &c. and the land

be

be charged no further than is necessary to make up the residue.  
2 Vent. 349. Anon. Pasch. 32 Car. 2

13. A. gives some legacies, and after bequeaths the *residue of his personal estate to B.* his daughter and heir, *and devises his real estate to her and her heirs*; but if she died under 21, to C.—B. dies at 16, and by will gives all her personal estate to J. S. C. is heir at law to A. and B. there being a mortgage on the estate, whether the personal estate in the hands of J. S. shall go to discharge the mortgage in favour of C? Mich. 1704. 2 Vern. 469. Bishop v. Sharp.

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14. A. in his will mentions his having *computed that the surplus of his personal estate, his debts and funerals being thereout first paid,* would amount to 5800 l. and so distributes the 5800 l. into several pecuniary legacies, and wills, if the surplus fell short, or exceeded, they should abate or benefit in proportion; he devised to two others *lands in mortgage* for 1400 l. per Wright K. it being mentioned that he computed the surplus would be 5800 l. after debts and funerals paid, implies he *intended* his debts of which the debt by mortgage is one, and decreed it to be paid out of the personal estate. Hill. 1704. 2 Vern. 477. Hawes v. Warner.

Fin. R.  
414. Hill.  
31 Car. 2.  
Marshall v.  
Fowke &  
al.—S. P.

15. An *express devise* shall not be defeated by applying the personal estate to pay off a mortgage, even for the sake of an heir, much less of a *heres factus*; per Wright K. Hill. 1704. 2 Vern. 477. Hawes v. Warner.

by Ld. C. Talbot, who said that this point had been so far determined that it seems quite settled and clear. Cases in Chan. in lord Talbot's time, 54. Mich. 1734. Lutkins v. Leigh.

16. A. by will *subjected both his real and personal estate to the payment of his debts*; decreed that the heir should pay the debt by such a time, or in default thereof the real estate to be sold, and liberty given to the heir to sue for the personal estate. M. S. cites 23 Feb. 1705. Stydolph v. Langham.

17. A. by deed *conveyed lands to trustees for payments of debts,* and afterwards by will *directed,* that his trustees should out of his trust estate *pay his debts, legacies and funerals,* and *devised all his personal estate,* not otherwise disposed of, to B. *whom he made executrix.* Lord Wright, and now Lord Cowper, were both of opinion, that the *devise being in the same clause in which she was named executrix,* and not *said free and exempt from debts,* she must therefore take it as executrix, and be applied to the payment of debts. Hill. 1706. 2 Vern. 568. French v. Chichester.

a Wms's  
Rep. 597.  
S. P.—  
a Ch. R.  
275. Eyre  
v. Hastings  
contra—  
\* After  
such mort-  
gage and  
no covenant

18. If A. mortgages lands and *covenants to pay the money and dies*; the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage; so it is if there was *no covenant* if the mortgagor had the money; because it was his debt, and he is bound to make it good, though the land be a defective security; but † *if grandfather mortgages and covenants to pay,* and the lands descend to his son, and his son dies, having a personal estate and a son, the *son's personal estate* shall not go in aid

aid of this mortgage; but this exoneration is not to be allowed, unless there are *personal assets sufficient to answer all legacies*, for the mortgage shall be paid out of the land in such case; and if by such payment *assets fall short*, the legatees may make such mortgagee *refund*. 2 Salk. 449, 450. in Canc. Cope v. Cope.

to pay, the mortgagor bequeaths his personal estate among his relations; yet

it shall be applied to discharge the mortgage. Trin. 1696. Ch. Prec. 61. Meynell v. Howard. —So where such a mortgage was made, and the mortgagor afterwards raised a term in other lands for payment of his d.bts, the mortgage money was held to be a debt payable out of that trust. Ch. Prec. 61. cites it as Sir Edward Moore's case.—† S. P. Hill. 1731. 2 Wms's Rep. 596. per Ld. C. King, Ld. Ch. J. Raymond, and the Master of the Rolls, in case of Evelyn v. Evelyn.

19. A mortgage in fee was made *redeemable at Michaelmas*, or at any other Michaelmas after, on 6 months notice, and *no covenant to pay* the money; the mortgagor continued in possession and paid the interest and by will *devised his personal estate* to his wife and daughter; per Cowper C. the personal estate is not liable to discharge the mortgage in case of the real; here is no covenant either expressed or implied. Mich. 1715. 2 Vern. 702. Howell v. Price.

Ch. Prec. 423, 477. S. C.

20. If the *ancestor contracts for the purchase of lands and dies before the conveyance*, the heir may compel the executor to pay for it out of the personal estate. Arg. 10 Mod. 528. cites it as the opinion of Harcourt C. in the case of Woodheir and Greenhill. —Ch. Prec. 323. S. C. and P. Hill. 1711.

21. If *vendee of lands of inheritance dies before all the purchase money paid*, the vendor may come against the executor for the money, though the heir is to have the benefit of the purchase; per Ld. C. King. Sel. Chan. Cases in Lord King's time. 30. Trin. 11 Geo. 1. in case of Coppin. v. Coppin. So if vendee after payment of part of the purchase money dies, leaving an executor, and the *vendor is heir at law*, yet the vendor will have the residue of the purchase money against the executor, though it be so much for his benefit; per Ld. C. King. Sel. Chan. cases in Ld. King's time. 30 † Trin. 11 Geo. 1. in case of Coppin v. Coppin.—The principal case was exactly the same, only that the same person was vendor, heir, and executor to the vendee, and so his lordship decreed the residue of the purchase money to him and not to the legatees. Ibid. 28. 30.—\* 2 Wms's Rep. 291. S. C.

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22. *Hæres natus or factus* may have the personal estate applied in exoneration of the real; *but not a remainder-man*; for the first comes to discharge the estate which descended to him, or was given him by the same person who owned both real and personal estate; but in the other case the remainder man is a stranger, and does not claim the estate from the same person who owned the personal estate. Sel. Chan. Cases in Ld. King's time; 80. Mich. 1730. Evelyn v. Evelyn.

## (U. 2) Heir and Executor. Remedy for the Heir against the Executor, &c. for Things belonging to the Heir.

1. **I**F the executor, after testator's death, *gets the evidences*, the heir may enter into the land and *take the charters out of his possession*. Br. Chartres de terre, &c. pl. 49. cites 39 H. 6. 15, 16. per Markham.

See (S. 2)  
pl. 3.

(W) Heir a Parte Materna. Take in what Cases.

1. **I**N assise, land was given to R. and J. his feme, and to the heirs of R. who had issue a daughter C. and the baron died, and after C. died without heir of the part of the father, but she had heir of the part of the mother. It was held, that if the daughter had purchased land, and died without issue, the heir of the part of the father shall have the land if there is any, if not, the heir of the part of the mother. But as here it is descended to the daughter by the father therefore the heirs of the part of the mother shall not inherit, but the land shall escheat. Nota. Br. Discent, pl. 15. cites 39 E. 3. 30.

2. If the father purchase, and his eldest son be attainted of felony, and he dies, the heir of the part of the mother shall not have the land, but it shall escheat; for there is one of the part of the father who is corrupted. Contrary where there is none of the part of the father; per Persey. Br. Descent, pl. 7. cites 49 Aff. 4.

S. P. Co.  
Litt. f. 4.  
—Br.  
Discent, pl.  
38. cites  
12 E. 4. 14.  
—\* S. P.  
and so it is

3. If the father purchase land, the heir of the part of the mother shall inherit, if there be none of the part of the father; \* contrary of land descended in the line of the father once; for there, if the heir, who enters by descent of the part of the father, dies without heir of the part of the father, it shall † escheat; note the diversity. Br. Descent, pl. 7. cites 49 E. 3. 11.

of the heir of the part of the mother, of land descended to the mother; and so see the diversity; where a man purchases lands or tenements in fee simple, and where he comes to them by descent on the part of his mother, or on the part of his father. Co. Litt. f. 4.

If there be no heir of the part of the father, viz. of the grandfather, who was the father's father, then the heir of his father's mother, viz. of his grandmother, shall inherit; for he that ought to inherit to the father ought to inherit to the son. Br. Discent, pl. 38. cites 12 E. 4. 14.

† For the heir of the part of the mother is not of the blood of him in whom the original possession commenced, viz. of the blood of the father. Ibid.

4. But where a man purchases and dies, his son enters and dies without heir of the part of the father of his name, yet the heir of the grandmother of the part of the father shall inherit; for he is an heir of the part of the father, and the cousins of the mother of his father shall be his heirs of the part of the father, because his father had a mother as well as a father. Br. Discent, pl. 7. cites 12 E. 4.

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5. If a man had been seised of a manor, as heir on the part of the mother, and before the statute of quia emptores terrarum had made a feoffment in fee of parcel, to hold of him by rent and service; albeit they be newly created, yet for that they are parcel of the manor, they shall, with the rest of the manor, descend to the heir of the part of the mother; quia multa transeunt cum universitate quæ per se non transeunt. Co. Lit. 12. b. (o)

6. If a man hath a rent-seck of the part of his mother, and the tenant of the land grants a distress to him and his heirs, and the grantee dies, the distress shall go with the rent to the heir of the part of the mother, as incident or appurtenant to the rent; for

now

now is the rent-seck become a rent-charge. Co. Litt. 12. b. 13. a.

7. If a man has a *seignior* as heir of the part of his mother, and the *tenancy escheats*, it shall go to the heir of the part of the mother. Co. Litt. 13. a. (q.)

8. If a man gives lands to a man, to have and to hold to him and his heirs on the part of his mother, yet the heirs of the part of the father shall inherit; for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are void. Co. Litt. 13. a.

9. A man has issue a son and dies, and the wife dies also; lands are letten for life, the remainder to the heirs of the wife; the son dies without issue, the heirs of the part of the father shall inherit, and not the heirs of the part of the mother; because it vested in the son as purchaser. Co. Litt. 13. a.

10. A. has a *seignior* in fee, and afterwards land descends to him on the part of the mother; in that case the *seignior* is not extinguished, but suspended; for if the lord to whom the land descends dies without issue, the *seignior* shall go to the heir of the part of the father, and the *tenancy* to the heir on the part of the mother. Godb. 4. in C. B. Hill. 23 El. per Windham and Mead J.

11. There is a difference between *advantages in gross*, and *advantages*, which by the grant are made *appurtenant or incident to another thing*. As if baron be seised of a house in right of his wife, and J. S. grants *estovers to baron and his heirs to burn in the house*; this is appurtenant to the house, and shall descend to the issue of the baron and feme. Mich. 6 Jac. 8 Rep. 54. in Syms's case.

So if one has a house of the part of his mother, and J. S. grants to him and his heirs competent

house-boote to be burnt in the same house. This is appurtenant to the house; and though it be a new purchase, yet it shall go with the house to the heir of the part of the mother. 8 Rep. 54. Syms's case.

12. Where the same estate is devised to the heir of the part of the mother, which he would have taken by descent, he is in by descent, notwithstanding a condition of payment of 200 L. was annexed on a contingency, which never happened. 1 Salk. 241. Hill. 10 and 11 W. 3. C. B. Clerk v. Smith.

13. A. seised in fee as heir of the mother's mother, devised the land to trustees to pay annuities, &c. and the residue to A.'s right heirs of his mother's side for ever. The heir of the mother's mother's side is intitled to the estate and surplus of the profits after the annuities, &c. paid. 2 Wms's Rep. 135. Pasch. 1723. Harris v. the Bishop of Lincoln.

(W. 2) Heir a Parte Materna. What shall be said a *new Purchase*, or such Alteration of Estate as to carry the Land, &c. to the Heirs of the Father.

S. P. Br.  
Feoffment  
al. Uses, pl.  
10. cites  
14 H. 8.  
4. per  
Brooke.—  
• S. P. Co  
Litt. 12 b.  
(m) that if  
he had  
made a

1. A man seised of land by descent, of the part of the mother, gives in tail reserving rent, and dies without issue, the rent shall be to the heir of the part of the father, and the reversion to the heir of the part of the mother; per Newton; to which it was said, that the contrary is law; and therefore it seems that all shall go to the heir of the part of the father, till it falls in demesne, as in the case above; nevertheless by several, \* all shall be to the heir of the part of the mother. Br. Discent, pl. 11. cites 7 H. 6. 4.

gift in tail, or a lease for life reserving a rent, the heir of the part of the mother shall have the reversion; and the rent also, as incident thereunto, shall pass with it.

2. Land, parcel of a manor, given by the lord of the manor, to hold, &c. who had it as heir to his mother; there if he dies without issue, the seignisry reserved shall go with the manor to the heirs of the mother, and not to the heirs of the father. Br. Descent, pl. 68.

3. A man seised as heir on the part of his mother makes a feoffment in fee to the use of him and his heirs; the use being a thing in trust and confidence shall insue the nature of the land, and shall descend to the heir on the part of the mother. Co. Lit. 13. a. (p)

See inf.  
the cases of  
Godbolt  
and Free-  
stone.—and  
Abbot &  
Burton  
contra.  
And this  
case is de-  
nied to be  
law per  
lord Mac-  
clesfield.  
Pasch.  
1723. 2  
Wms's  
Rep. 139.  
in case of Harris v. Bishop of Lincoln.

4. If I convey lands which I have on the part of the mother, or in borough-english to J. S. and his heirs, without consideration, the use shall be void, and so the land shall return again to me, and to my heirs of the mother, or in borough-english as before; for the law doth construe the use of the same in state and quality as the land was. But if I do declare the use to me and my heirs, or, upon such feoffment, reserve a rent to me and my heirs, it shall go to my heirs at common law; for it is not within the custom, but it is a new thing divided from the land itself. Trin. 4 & 5 P. & M. D. 162. and that is the reason of another difference. 9 H. 7. 24. SHELLIE's case, that land by descent falling upon one, shall be taken from him by a nearer heir born. Hob. 31. in case of Counden v. Clerk.

Ibid. 446.  
b. S. C.  
cited in  
case of  
Clere v.  
Brook.—  
consequence of a

5. Where a fine of the lands of the wife was with grant and render to her and her husband in tail, remainder to the right heirs of the wife; if they have issue which dies without issue, the land shall go to the heir of the part of the mother. Pl. C. 295. Carril v. Cuddington.

fine sur grant and render of lands a parte materna has an estate, and his render makes it a new purchase, so that now the lands shall descend to the heir of the father. Show. 92. Pasch. 2 W. & M. Price v. Langford.—1 Salk. 337. S. C.



*Fine with grant and render* is tantamount to a feoffment and re-feoffment, and creates a new estate. 1 Salk. 337. Pasch. 2 W. & M. B. R. Price v. Langford.—Carth. 140. S. C. by the name of Rice v. Langford.—6 Mod. 45. in case of FORD v. LORD GREY, but says it is otherwise of other fines.

In the argument of the case it was agreed by all, that if the *fine* had been levied generally without any render, or without any uses declared, the resulting use, which would have devolved on the conusor would have been the old use in the same quality as it was before. Carth. 140. Trin. 2 W. & M. B. R. Rice v. Langford.

So if the use of this fine had been declared to the conusor and his heirs, the quality of the estate would not have been altered thereby, but the lands would have descended in the same manner as if no fine had been levied, (viz.) if it was ex parte materna, then to the heirs ex parte materna, and not to the heirs ex parte paterna, and so converso. Agreed. Carth. 141. in the case of Rice v. Langford.

6. Baron and feme covenanted to levy a fine of lands descended to the feme from the mother, and declared the uses to the conusees and their heirs, to make them tenants to the præcipe for suffering a common recovery, which by the same deed was declared to be to the use of the baron for life, and to the feme for life, and to the first, &c. son of their two bodies in tail, remainder to the right heirs of the wife, with a proviso for the wife to dispose of the remainder in fee as she should think fit. It was objected that this was not an immediate conveyance, as a feoffment to one in fee, but that by this conveyance, not only the legal estate but the use also passed to the conusees both in law and equity; so that when a recovery was suffered; this use in fee must arise out of the estate of the conusees; but it was held, that all made but one conveyance, and that the estate moves originally from the conusor, and that what he has not parted with is still in him, and therefore so much as is not declared upon the recovery shall be still to the old use. The nature of the common recovery being but as an instrument for raising of the use. And, as to the power reserved to the feme, though it was objected that it had altered the estate, it being subjected and subservient to a new power; because she might now dispose of it otherwise than she could do had it been only her old interest, yet it was held that this was only a new qualification of the old estate, and not an alteration of it, until such new qualification be executed. 7 Annæ, C. B. 11 Mod. 181. Abbot v. Burton.

[ 289 ]

2 Salk.  
590. Trin.  
7 Annæ,  
C. B. S. C.  
—Arg.  
S. C. 9  
Mod. 174.  
in the Lord  
Derwent-  
water's  
case.—  
9 Mod.  
190. 197.  
S. C. cited  
per Pratt  
Ch. J.—  
S. C. cited  
per Ld.  
Maccles-  
field, who  
held ac-  
cordingly.  
2 Wms's  
Rep. 139.  
Pasch.  
1723. —  
3 Lev. 406.  
—S. P.  
Arg. be-  
cause the

law carries the use, and that is always to the owner and proprietary of the land. Goldib. 69. per Windham J.—If conusor was tenant in tail, and declares no uses of the fine and recovery, it shall be to the heirs a parte materna; but if he was tenant in fee, it is otherwise. Arg. 9 Mod. 179. Hill. 5 Geo. in Ld. Derwentwater's case.

7. Heir a parte materna makes feoffment on condition, and dies without issue; if the heir of the part of the father enters, the heir of the part of the mother shall oust him; per Mountague Ch. J. Pl. C. 57. in case of Wimbish v. Talboys.

P. 9 H. 7.  
24. per  
Cur. and  
Fo. 25. per  
Wool —  
Co. Litt.

l. 4. 13. says, the heir of the part of the mother shall not take advantage of a condition annexed to the same; because it is not incident to the reversion, nor can pass therewith.

8. A man seised of lands a parte materna devises them for 16 years to his executors for payment of his debts, and after to J. S. who is the heir a parte materna. J. S. shall take by descent, and not by purchase. 3 Lev. 127. Trin. 35 Car. 2. C. B. Hedger v. Row.

9. A. seised

1 Rep.  
100. b. (d.)  
—S. C.  
cited per  
Trevor Ch.  
J. and held  
to be law.  
11 Mod.  
183. in case  
of Abbot v  
Burton.—  
S. C. cited  
per Lord  
Maccles-  
field. 2  
Wms's  
Rep. 139.  
Pasch.

1723. and held by him accordingly.

9. A. seised a parte materna, makes a *feoffment of all to uses*, viz. of Black Acre to himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his right heirs—and of White Acre, to the use of himself, for 99 years, if he shall so long live, remainder to trustees for his life, remainder to his wife for life, remainder to his first and tenth son in tail, *remainder to A. and his heirs*—In both cases the ancient fee remains in A. nor was it ever out of him; and neither the estate for life or years are *merged*, but both are preserved by the mesne remainders over. Mich. 6 W. & M. C. B. 3 Lev. 406. Godbold v. Freestone.—and whether the use is *by express limitation*, or *implied by law* without express limitation, it is *all one*, and in both cases the ancient fee remains in the donor. Ibid. 407.

10. Where a man seised a parte materna *takes estate to him for years, remainder to his heirs*; this is a new estate in him, and not the ancient reversion; but it is otherwise, where he takes an *estate for life, remainder to his heirs*. Arg. Mich. 6 W. & M. C. B. 3 Lev. 406. cites Co. Litt. 13. 23. But adjudged that there is no difference, and that in both cases the fee is the old reversion, and shall go to the heirs a parte materna. 407. Godbold v. Freestone.

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11. A *feme purchased a church lease to her and her heirs*, for three lives, and dies, leaving M. her daughter an infant. Two of the lives die. The *guardian renews the lease*, and then the *infant dies*. It was insisted that if the infant had died before the renewal, living the surviving cestuy que vie, there had been no question, but the lease had gone to the heir of the part of the mother, and that so ought this new lease, being renewed out of the profits of the old lease. But, per the Master of the Rolls, and affirmed per Lord Harcourt. This new lease is a *new acquisition*, and vested in the daughter as a purchaser, and shall go to the heirs of the part of the father; *this renewal by the archbishop being spontaneous and gratuitous, and not like a copyhold*; for there the lord is only a trustee for the heir, and his admittance of him, though it be original, yet is only in virtue of the trust reposed in him by law for that purpose, and decreed accordingly; by the Master of the Rolls, and Lord Keeper coming into court, being asked his opinion, said he was of the same opinion. Mich. 1711. Ch. Prec. 319. Mason v. Day.—G. Equ. R. 77. S. C. Hill. 9 Annæ.

(W. 3) Heir a parte Materna. Of what the Heir a parte Materna shall take *Advantage*, or be *bound* by what.

\* The  
mesne  
bound her-  
self and her

1. I F there be lord, \* *feme mesne, and tenant*, and the *feme takes baron*, and has *issue a son*, and the *tenant releases, or grants to the baron*, that neither he nor his heirs shall be bound to acquittal, and

and the *baron and feme*, who were bound to the acquittal by their feignory, die, and the tenant brings *writ of mesne against the son, who pleads the grant as heir to his father*; this shall not serve, for he is to be bound as heir to his mother, and not as heir to his father. *Quod nota.* Br. Grants, pl. 147. cites 38 E. 3. 10. and cites Fitzh. tit. Mesne 27. [but it should be. pl. 24.]

heirs by her deed to the acquittal of the tenant, and then took husband, &c.

The issue being bound as heir to the mother shall not take benefit of the said grant of discharge; for that extends to the heirs of the part of the father, and not to the heirs of the part of the mother; and therefore the heir of the part of the mother was bound to the acquittal. Co. Litt. 13 a. (s.)

2. The *warranty* shall descend upon the heir of the part of the mother, if there be none of the part of the father, and therefore he shall be heir to the land in such case also. Per Tanke. Br. Descent, pl. 7. cites 12 E. 4.

If the heir of the part of the mother of land whereunto a warranty is

*annexed*, be impleaded, and vouches, and judgment is given against him, and for him to recover in value, and he dies before execution, the heir of the part of the mother shall sue execution to have in value against the vouches; for the effect ought to pursue the cause, and the recompence shall ensue the loss. Co. Litt. 13. a. (q)

## (A) Heir-Loomes.

[ 291 ]

1. **NOTE**, that heir-loomes, chiefs or principals, are those *things which have continually gone with the capital mesuage by custom*, which is the best thing of every sort, as of \* *beds, tables, pots, pans and such like*, of dead chattels moveable. Br. Descent, pl. 43. cites 1 H. 5. 5. & Fitzh. Execution 180.

\* S. P. Co. Litt. 18. b. — And heir-loomes that have gone with the house.

from heir to heir cannot be devised away, but such devise will be void; for by the death of such devisor, the heir-looms by ancient custom are vested in the heir, and the law preferreth the custom before the devise. Co. Litt. 185. b. — And the heir may have action for them at the common law, and shall not sue for them in the ecclesiastical court. Co. Litt. 18. b.

2. And the \* *ancient crowns and jewels of the realm* cannot be devised by testament; therefore are heir-loomes of the king as it seems. Br. Descent, pl. 43. cites 1 H. 5. and Fitzh. Execution, 180.

\* Co. Litt. 18. b. S. P.

3. An heir-loom is called *principalium* or *hereditarium*. And it is *due by custom*, and not by the common law. Co. Litt. 18. b.

4. A lady brought a bill in the King's Bench against a parson *quare unam tunicam vocatam a coat-armour & pennons* with the arms of Sir Hugh Wiche her husband, and a sword in the chappel where he was buried; and the parson claimed them as oblations, and therefore that they did belong to him; and there it is holden, that if one use to sit in the chancel and hath there a place, the parson cannot claim his *carpet, livery and cushion* as oblations; neither ought he to have the said things; for that they were *hanged there in honour of the deceased*; and therefore by the same reason, though a grave-

S. C. cited Godb. 200. in case of Garven v. Pym. — Co. Litt. 18. b. S. P. and that the heir and his heirs may have action

for taking  
them away,  
or defacing  
them.

*a grave-stone*, coat of armor, *tomb*, &c. are annexed to the freehold of the parson, yet, in regard the church is free to all the inhabitants for burying, the parson cannot take them. And the Ch. J. said, that the lady might have a good action during her life, in the case aforesaid, because she herself caused the said things to be set up there, and after her death, the heir to the deceased shall also have his action, because (as the book says) they were hanged there for the honour of his ancestor, and therefore they are in nature of heir loomes, which by the common law belong to the heir, as being the principal of the family. The like law of a gravestone, tomb, and the like. 12 Rep. 104. in Corven's case.—cites it as 9 H. 4. 14. Dame Wiche's case.

5. And this agrees with the laws of other nations. Bartho. Casaneus, fol. 13. Concl. 29. Action. dat. si aliquis arma in aliquo loco posita, debeat sine, &c. and in 21 Ed. 3. 48. in the bishop of CARLISLE's case, it appeared, that the *ornaments of the chappel of a preceding bishop* do belong to the succeeding bishop, and are merely in succession, although other chattels, in case of a sole corporation, do belong to the executors of the deceased party, and shall not go in succession; so in the other case, things erected in the church for the honour of the dead person, shall go to his heirs, as heir-loomes, as in manner of an inheritance. 12 Rep. 105. in Corven's case.

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6. Trover by plaintiff administrator cum testamento annexo of the late lord Petre against the wife of the first executor for a *necklace of pearl*, said to have been in the family for many generations, and worn as a personal ornament by the lady Petre for the time being, or for default of such, by lady dowager pro tempore; and to prove the property, *an antient inventory* made by the defendant's husband, being executor of the lord Petre now intestate, being *found among the ancient evidences of the family*, was allowed; for the mentioning this necklace in it shews he did not claim it in his own right, and none but a mad-man will inventory more assets than he has; and though if the question were, whether my lord Petre were proprietor, or not he himself could not, be witness; yet the executor, by inventorying it, has charged himself with it as assets, and there it shall be taken as such; and per Holt Ch. J. the wearing of a pearl is a conversion; and goods in gross cannot be an heir-loom, but they *must be things fixed to the freehold*, as old benches, tables, &c. Pasch. 13 W. 3. B. R. 12 Mod. 519, 523. Lord Petre v. Heneage.

## (A) Herald.

4 Inst. 126.  
—\* He was  
allowed to  
be a com-  
pleat officer  
by the very  
letters patents

[ 1. **T**HE king may make a herald by patent, though he was not any *pursuivant* before according to the ordinance of heralds; for it is not of the essence of a herald. H. 5 Jac. B. per Curiam between Penson alias Chester and Redhead. ]  
Noy. 150. Penson v. Redhead.—

By

† By the law of arms and heraldry, every one who is made king of arms before he receives his dignity, ought to be led betwixt two officers of arms by the arms before the earl marshall of England, or his deputy, and before him are to go 4 officers of arms, whereof the one is to bear his patent, another his collar of SS, the third a coronet of brass double gilt, fourthly, a cup of wine; and his patent shall be read before the earl marshall; and afterwards his coronet shall be set upon his head, and the collar of SS. about his neck, and afterwards the wine poured upon his head. Le. 248. 33 Eliz. B. R. Dethick's case.

2. The heralds are attendants upon the court of chivalry; of these heralds there are *three kings*, viz. *Garther king of arms*, *Clarenceux king of arms* of the south part, *Norroy king of arms* of the north part, and six other heralds. These English heralds are *messengers of war and peace*, skilful in descents, pedigrees, and armories; they *marshall the solemnities at coronations*; they *manage combats* before the constable and marshall, and upon request they *solemnize the funerals* of noble, honourable, reverend, and worshipful personages; they were *first incorporated by king R. 3.* and afterwards *newly incorporated by king Philip and queen Mary.* 4 Inst. 125, 126.

3. These heralds are *discharged of subsidies, tolls, and other charges* of the commonwealth, by letters patents of E. 6. anno 3. of his reign. 4 Inst. 126.

4. The words of the patent are *creamus coronamus & nomen imponimus de Garther rex heraldorum*, and therefore in *all suits against him he is to be named by this name*, and for not being so named the defendant was discharged of an indictment. Cro. E. 224. Pasch. 33 Eliz. B. R. Dethick's case.

Le. 248. S. C. and reports that it was so held by Fenner, Wray and

Clench, but that Gawdy was of opinion it was but a name of office, and therefore the indictment good.

## \* Herbage.

### (A) What Grantee may do.

1. **H**E that hath herbage of a forest by patent may have trespass for the grafs, but not for trees or the fruit of them; and he may take beasts damage feasant, and have quare *clausum fregit*, and by such grant may *inclose* the forest. D. 285. b. pl. 40. Trin. 11 Eliz.

2. Grantee of herbage may *inclose*, and may have action of *trespass quare clausum fregit*. Arg. Trin. 21 Jac. B. R. 2 Roll. R. 356. cites D. 285.—But though he that hath herbage may *inclose*, yet he that hath *reasonable herbage* cannot. Ibid. Arg. cites Cro. R. 159. [293] Co. Litt. 4. b. (b)

3. Grantee of herbage of a park cannot *dispark* it. Arg. Godb. 419. Trin. 21 Jac. B. R. in case of Lord Zouch v. Moor.

### (B) Who

\*See Forest (E) pl. 28. —Trespass (H)— words. (Herbage.)

## (B) Who shall have it.

1. **A** lease was made of a manor with all gardens, orchards, yards, &c. and with *all the profits of a wood, excepting to lessor 40 acres*, to take at his pleasure; per Dyer, the wood is not comprised within the lease, but the lessee shall only have the profits as pawnage, herbage, &c. 21 Eliz. in C. B. 4 Le. 8. Anon.

• See  
words He-  
reditament.

## \* Hereditament.

## (A) Hereditament. What is.

1. **A** condition is without question an hereditament. 3 Rep. 2. b. (l) Trin. 25 Eliz. in the Marquis of Winchester's case.
2. *Writ of error* is an hereditament, but by the common law cannot be forfeited or escheat. 3 Rep. 2. in the Marq. of Winchester's case.
3. *Uses* were hereditaments; for of this shall be *possessio fratris*; but condition or use were not forfeitable at common law. 3 Rep. 2. b. (m) (n) in the Marqu. of Winchester's case.

## (A) Heretick and Heresy.

1. **B**y the 1 Eliz. 1. which erected the high commission court, having restrained the same from adjudging any points to be heretical, which have not been determined to be such, either by scripture, or by some one of the four first general councils, or by some other council, by express words of scripture, or by the parliament, with the assent of the convocation, it has been since generally holden, that these rules will be good directions to ecclesiastical courts in relation to heresy. Hawk. Pl. C. 4. cap. 2. s. 2.
2. At this day the *diocesan hath jurisdiction* of heresy, and so it hath been put in use in all queen Elizabeth's reign; but without the aid of the act of 2 H. 4. 15. the diocesan could *imprison* no person accused of heresy, but was to proceed against them by the *censure of the church*, for the bishop of every diocese might convict any



any for heresy before the stat. 2 H. 4. as appears by the preamble of it, but could not imprison, &c. and now, seeing that not only the said act of 2 H. 4. but 25 H. 8. 14. are *repealed*, the diocesan cannot imprison any man accused of heresy, but must proceed against him as he might have done before those statutes by the censures of the church, as it appears by the said act of 2 H. 4. 15. likewise the supposed stat. of 5 Rich. 2. 5. and the statutes of 2 H. cap. 7. 25 H. 8. 14. 1 & 2. P. and M. 6. are all repealed, so as no statute made against hereticks stands now in force, and at this day no person can be indicted or impeached for heresy before any temporal judge, or other that has temporal jurisdiction, as upon perusal of the said statute appears. 12 Rep. 56. 43 Eliz. case of heresy.

[ 294 ]

3. By 29 Car. 2. 9. the writ *de heretico comburendo* is taken away.

Yet by the common law an

obstinate heretick *being excommunicate* is still liable to be imprisoned by force of the writ *de excommunicato capiendo*, till he make satisfaction to the church. Hawk. Pl. C. 4. cap. 2. §. 11.

4. Stat. 9 and 10 W. 3. cap. 32. §. 1. *If any person having been educated in, or having made profession of the christian religion within this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or shall assert or maintain that there are more Gods than one, or shall deny the christian religion to be true, or the holy scriptures of the Old and New Testament to be of divine authority, and shall upon indictment or information be thereof lawfully convicted upon the oath of two witnesses, such person shall for the first offence be incapable to have or enjoy any office or employment ecclesiastical, civil, or military, or profit by them; and the offices, places and employments, enjoyed by such persons at their conviction, shall be void; and being a second time convicted of any of the aforesaid crimes, shall be disabled to sue, prosecute, plead, or use any action or information in law or equity, or be guardian of any child, or executor, or administrator of any person, or capable of any legacy, or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, and shall suffer three years imprisonment, from the time of such conviction, without bail.*

As serjeant Hawkins takes this act under the head of heresy, I chuse to follow so good a guide, and considering the great apostacy of too many among us who set up for persons of uncommon parts and learning, by publicly asserting the tenets herein prohibited and

who perhaps have very little other title to either but thinking their wit must be looked upon as extensive as their profaness, they, with the most daring impiety, ridicule all revealed religion; it may not be an unfriendly office to remember them of the incapacities and punishments human laws (which may more sensibly affect them at the present) threaten them with, if by that means they may be induced to act more prudently at least in this life, whatever their notions are as to another.

5. Among protestants heresy is taken to be *a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the christian faith, or at least of most high importance.* Hawk. Pl. C. 3. cap. 2. §. 1.

It is an opinion repugnant to the orthodox doctrine of the

christian faith, obstinately maintained and persisted in by such as profess the name of Christ. Godolph. Rep. 561. cap. 40. §. 4.

See (B)

(C) —

• Fleta.

212. cap.

18. says,

that præ-

statio he-

rietti magis

fit de gra-

tia quam de

jure. The

action was

brought by

C. and the

court held

clearly that

he should

not have it,

because A.

was not

tenant of

C. who had

the 1000

years but of

B. who had the 99 years but they were not clear that B. should have it, though Barkley thought

B. should have it and Jones hæsitavit, and they were the only judges in court; and the reason

of the doubt was, that *eo instante* that A. the tenant for life died, *eodem instante* the estate of B. the

grantee for 99 years determined. Mar. 23, 24 S. C.

†[295]

• Orig. (Si  
per le cus-  
tome sur un  
copyhol-  
der morust  
se: sic il  
paiera un  
heriot, &c.)

[ 2. \* If by the custom a copyholder dying seised shall pay a heriot to the lord, and after the *copyholder is disseised and dies during the disseisin*, yet he shall pay a heriot within the custom; for he was tenant in right notwithstanding the disseisin. In the said case of Norris and Norris, per Berkley. ]

## \* Heriot.

### (A) [Payable to whom, and by whom.]

[ 1. ] F A. be a *copyholder for life* of land which ought by custom to pay a heriot, if he dies seised, and the lord grants the *franktenement of the copyhold to B. for 99 years*, if A. the copyholder *so long live*, the remainder to A. for 1000 years, and after A. assigns over his lease for 1000 years to C. and after A. makes F. his executor and dies seised; in this case C. the assignee of the 1000 years shall not have any heriot; because at the time of the death of A. when the heriot became due, he was not lord but had *only a future interest*. P. 15 Car. B. R. between Norris and Norris adjudged upon † a special verdict, this being a Dorsetshire case. Intratur Hill. 11 Car. 673. But the court said that if any heriot was to be paid, the executor of A. or the lord in fee should have it. ]

### (A. 2) The several Sorts.

1. **MESNALT**Y may be held by heriot as well as the very land. Br. Heriots, pl. 1. cites 44 E. 3. 13.

2. Heriot after the death of the tenant for life is *heriot custom*; for heriot service is after the death of the tenant in fee simple. Br. Heriots, pl. 5. cites 21 H. 7. 13. & 15.

S. C. Br.

Avowry,

pl. 81.—

Heriot

service may be reserved upon lease for lives or years determinable upon lives, if such heriot be reserved payable during the term; as if lease be made for 99 years determinable upon the death of A. B. and C. reserving heriots upon the death of every of them; if A. dies living B. or C. a heriot is due, and this is heriot service, because the lease is not determined, but there is a reversion, to which the heriot service may be incident; agreed by 3 justices. Lutw. 1367. Trin. 2 Jac. 2. C. B. Osborn v. Sture.

### (A. 3) Payable

(A. 3) Payable. *In what Cases, and what shall be said a Payment.*

1. **T**HE lord demands a heriot, and the *heir delivers a beast of his own*, to the lord, in which he himself has a property in his own right this amounts to a gift. 10 Rep. 53. in LAMPET's case, cites 7 E. 3. 50. b.

2. A. made a lease to J. S. for 99 years, if B. C. and D. should so long live, rendering an heriot after the death of each of them successively, as they are all three named in the deed. D. who was the last named died first, and if an heriot should be payed was the question? it was urged that it should not; because the reservation is the lessor's creature, and therefore to be taken strongly against him, and that the heriot being reserved if B. C. and D. die successively, the lessor is contented to trust to that contingency; but as to this point the court gave no opinion but judgment was given for the plaintiff upon the pleadings. 2 Mod. 93. Trin. 28 Car. 2. C. B. Ingram v. Tothill.

Mod. 216. pl. 4. S. C. and argued that an heriot not being due of common right the words of reservation ought to be pursued, but the court delivered no opinion.

3. Heriot service reserved upon a lease must be reserved payable during the term; but where a tenant in fee holds of his lord by heriot service, such service is incident to the tenure which is ancient, and must be supposed to be before the statute of quia emptores terrarum, &c. and these are seisable by the lord either on or out of the lands. 3 Salk. 332. pl. 3. cites 2 Lutw. 1366.

(A. 4) Payable. *In what Cases. By Custom.* [ 296 ]

1. **I**N trespass a custom was pleaded, *that all the tenants who hold of the manor of D. at every alienation shall make surrender*, and that the lord shall have his *best beast* in name of a heriot; Strange said, at the time of the surrender the property of the beast was not in him who surrendered, and the others e contra, and admitted a good custom \* to surrender the *franktenement*; quod nota. Br. Customs, pl. 2. cites 3 H. 6. 45.

\* S. P. Br. Customs, pl. 17. cites 14 H. 4. 1.

2. In replevin the defendant avowed that J. S. held of him by homage, fealty, rent, and that, *at every alienation of his tenant*, he and his ancestors have used to have the *best beast if the alienee does not give notice to the lord in the life of the alienor*; and that his tenant aliened to the plaintiff and died, and the plaintiff did not give any notice in the life of the other; and the best opinion was, that this is a good prescription; for it may have lawful commencement, as by condition or reservation at the making of the tenure. Br. Prescription, pl. 58. cites 8 H. 7. 10.

See Refer-  
vation (P)  
pl. 1.

### (B) Payable. *By whom.*

S. C. cited  
D. 199. b.  
Marg. pl.  
58. by  
name of  
Perkins v.  
Comber-  
ford.

So where  
the feme  
was seised  
in fee and  
died, and  
her hus-  
and be-  
came te-

nant by the curtesy, Frowike thought that a heriot was due, but that the time to demand it was not till after the death of the tenant by the curtesy, but to this it was said, that the heriot shall have respect to the goods of the tenant and that the tenant being a feme covert could not have goods and so the lord must lose his heriot. Kelw. 84. a. b. 21 H. pl. 8.

1. **H**ERIOT is not payable on the death of *tenant by the curtesy*; per Frowike Ch. J. Kelw. 84. b. Pasch. 21 H. 7.

2. A custom of a manor was, that the lord should have the best beast or thing *of every one dying within the manor* in the name of a heriot, which is found within the manor, and to seise and retain them as his proper goods; this was held not a good custom; for between the lord and a stranger it cannot have a reasonable beginning, though between the lord and his tenants it is otherwise; for it may be intended to begin with their tenures by their agreement, and so they had their lands upon reasonable fines; but between the lord and a stranger it is merely extortion. Cro. E. 725. Mich. 44 Eliz. B. R. Parker v. Combleford.

3. If the custom of the manor be, that every tenant at his decease shall pay his best beast for a heriot; if a *feme sole*, who is *tenant for life* of this manor, *takes husband and dies*, *whether the lord shall have a heriot?* this was a case put by Coke Ch. J. to which Dodderidge the king's serjeant said he should not, because the *wife had no goods*. Mich. 7 Jac. C. B. 4 Le. 239. Anon.

4. If a copyholder *sells off any part of his copyhold*, and retains the rest, the heriot shall be multiplied afterwards, but the heriot due on this alienation shall be paid by the *alienor*, because he continues tenant; and upon every alienation made by the alienees afterwards, the alienees shall pay it. Palm. 342. Hill. 20 Jac. B. R. Snagg v. Fox.

### (C) Payable. *To whom.*

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1. **A** bishop seised of the manor of S. *leased 20 acres, part of the manor to B. for the life of C. D. and E. rendering 20s. rent a year. And also paying and delivering to the bishop and his successors, two best beasts, upon the death of every one of the cesty que vie.* Afterwards the bishop *leased all the manor to W. R. rendering the ancient rent.* D. died. W. R. seised two of the cattle for a heriot. It was held, that the heriot, thus reserved, shall go with the reversion, and though it should not go with the reversion to the lessee of the manor, yet the plaintiff (successor of the bishop) shall not have the heriots, and then though W. R. the defendant had not good title to the heriots, yet if the property of the heriot do not appertain to the plaintiff, he shall have a trover and conversion; for the defendant had the first possession, and (Hobert and Winch only present) the defendant had judgment, nisi causa. Winch. 46. 57. Mich. 2 Jac. Gloucester (Bishop) v. Wood.

(D) Payable.

(D) Payable. *At what Time, and when the Property shall be said to vest.*

1. *AVOWRY* for heriot, and alleges *prescription*, that his ancestor had been seised by the hands of the tenants, &c. of all tenements, &c. and that his father was seised of a heriot, after the death of a then tenant, &c. the plaintiff, not confessing that the tenement is heriotable, said, that the *tenant and his feme, and his son purchased jointly, &c. and the feme and son survived, &c. and are yet living.* Judgment, if avowry, and good. And so see that jointenants are only one and the same tenant in the law, and therefore the lord shall not have heriot, 'till *after the death of the last of them.* Br. Heriot, pl. 4. cites 24 E. 3. 72.

2. It hath been anciently said, that the heriot shall be paid *before the mortuary*; wherein the lord is preferred; for that the tenure is of him. Co. Litt. 185. b.

3. If two *jointenants* be of land, holden by heriot service, and *one dies*, the other shall not pay heriot service; for there is no change of the tenant, but the survivor continues tenant of the whole land. Owen. 152. Pasch. 36 Eliz. Butler v. Archer.

*But if A. seised of land in fee, makes a feoffment to the use of*

*himself and wife, and the heirs of their two bodies begotten, the remainder to the right heirs of the husband, and the husband dies, a heriot shall be paid; for the ancient use of the reversion was never out of the husband.* Owen. 152. Butler v. Archer.

4. A. leased to B. for 40 years, and during that lease, made *another lease for 99 years to commence after the term of 40 years, rendring rent from the time that the second lease should commence, and then, in another render, he reserved three capons, and then followed, and also yielding and paying at the death of every tenant 3l. in the name of a heriot.* The second lessee died before the end of the first lease. Keeling Ch. J. held, that a heriot was due on the death of the second lessee by the express words, though he could have no benefit during the first term. But the other three justices contra, and that the words, *and also, &c.* shew that the heriot should not be payable but when the rent should be payable; and adjudged accordingly by those three. Lev. 294. Trin. 22 Car. 2. B. R. Langan v. Carne.

*The second lease was for 99 years, if 3 lives so long live, and judgment accordingly. Sid. 437. S. C. by the name of Hangan v. Carne. —The words are copulative, and wills,*

that both begin together, and here cannot be rent during the interesse termini, and both are of the same nature, viz. created by the reservation, and consequently if this was due, distress would lie for the rent too. Ibid. —adjudged accordingly. 2 Saund. 165. S. C. by name of Lanyon v. Carne. —Adjudged accordingly. Vent. 91. S. C. by name of Lion v. Carew.

5. A heriot is not *due* on the decease of *cesty que trust*, but of him that has the legal estate. Hill. 1686. Vern. 441. Trinity College, Cant. v. Brown.

6. A lease was made for 99 years if *A. or B. should so long live, reserving a yearly rent and a heriot or 40 s. in lieu thereof after the death of either of them, provided that no heriot shall be paid after the death of A. living B.* A. survived, but is since dead. The question was, whether, upon this reservation, the beast of any per-

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*Two of the justices held, that the seizure was good,*

because it was heriot-service, and the heriot due immediately upon the death of A. and at that instant of time there was

son being on the land might be *distraigned* for a heriot? It was argued that it could not, because the lease was determined by the death of A. the survivor, and that heriot service, as this is, is of the same nature of all other services reserved upon leases, viz. that it must be payable during the term granted. But the judges of B. R. being divided in opinion, it was adjourned, into the exchequer chamber. Vid. 3 Mod. 230. Trin. 4 Jac. 2. B. R. Osborn v. Steward.

a reversion in the lessor, and then the seizure shall have *retrospect* to that time. But the other two justices were of a contrary opinion; for by the words of the reservation, the heriot is not due 'till *post mortem*, ~~that~~ that there was no reversion at the time when it became due, and to make it heriot service, it ought to be incident to a reversion. 2 Lutw. 1366. S. C. by name of Osborn v. Sture.

S. P. Br. Heriots, pl. 2. cites 38 E. 3. 7.

7. Immediately on the *decease* of the tenant a property is vested in the lord, and that is the reason that he may seize the heriot. Arg. 3 Mod. 231. Trin. 4 Jac. 2. B. R. in case of Osborn v. Steward, als. Sture.

6 Mod. 68. S. C. Mich. 2 Annæ, B. R.

8. If A. who is copyholder of a manor for his own, and the lives of B. and C. where the custom is to grant for three lives, and the survivor, *habend' successive sicut nominantur in charta & non aliter*, and that the lord is to have a heriot on the death of every tenant dying seised. A question was started, if A. the *tenant in possession*, become a bankrupt, and the estate assigned, and the tenant in possession die, what was to be done as to the heriot? and Holt Ch. J. as to that, thought that the assignee would have the estate determinable on the death of the copyholder, and then the heriot would be due, and not by the death of the assignee; for so it was originally, and cannot be altered by any act of the copyholder. But per Cur. this is a supposal not in the case, and therefore it was not determined. 1 Salk. 188. Hill. 13 W. 3. B. R. Smartle v. Penhallow.

### (E) Remedy for them.

S. P. and for heriot-service esloigned, he may distrain. Br. Heriots, pl. 6. cites 27 Aff. 24.

1. **P**RESCRIPTON to *distrain* for heriot custom, if it be *esloigned*, is not good; for he may have an action against whomsoever esloigned it; and by this it seems, that he may have an action of *detinue* against him who detains it; for he has a property in the thing, and therefore, because it is *transitory*, the law adjudges *possession without seisin*, as of the body of a ward, Br. Heriots, pl. 9. cites 13 E. 3. and Fitzh. Prescription 29.

2. Trespass of beasts taken and carried away; the defendant said, that J. held of him by heriot of the best beast when any tenant died, and J. died tenant, and had an ox that was the best beast, and it was *esloigned*, and the land descended to one G. and he died tenant, and had a horse that was his best beast, and was esloigned, and because he *found the beasts within the land*, he took them for the heriot's esloigned, &c. and adjudged a good answer. Per Shard, if beasts are manuring the land, the lord may take them for heriot if it be esloigned, and so it seems, that if the best beast was



was there, that then he may seise it, and when it is esloigned then *distrain*. Br. Heriots, pl. 6. cites 27 Aff. 24.

3. By 13 Eliz. cap. 5. *All fraudulent deeds made to avoid debts, &c. heriots, &c. are utterly void, and the whole value thereof to be forfeited.* [ 299 ]

*conveyed away* \* so that the lord is prevented by any fraud, then this statute has provided remedy, but where there is nothing of which a heriot may be rendered at the time of the death, there even the king must lose his right. Hutt. 4. Mich. 14 Jac. in case of Shaw v. Taylor.——\* As if given away by tenant just before his death. 2 Le. 8.—See Fraud (K) pl. 1.

4. For heriot service, if the tenant will not render it, the lord may *distrain* for it; for he may come to the land and *distrain* what beasts he finds there, and put them in pound 'till he be satisfied his heriot. Arg. Pl. C. 95. b. in case of Woodland v. Mantell and Redsole.——cites 27 E. 3. Lib. Aff. pl. 24. F. tit. Avowry, 177. Br. Heriots, 6.

man's beasts that are upon the land, and retain them 'till the heriot be satisfied. Arg. Cro. C. 260.——\* D. 199. b. pl. 57.——Ow. 146. S. P. per Anderson.

5. Heriot service lies not in render but in *prendre*, and the lord is to have the best beast, and it is at his election which he will take for the best, and it is inconvenient to put him to *distrain*, when he may seise. per Wray. Trin. 26 Eliz. B. R. and he said, it had been so adjudged. Cro. E. 32. Peter v. Knoll.

*rendering annually his best beast*; for in the first case it is in the tenant's election, what he will render, but in the last the lord hath election what he will *prendre*, (or take) Cro. E. 590. Odiham v. Smith.——And. 298. S. C. in C. B.——And therefore Popham said, that if one at this day makes a gift in tail, or a lease, *rendering* annually his best beast, the lessor or donor may seise which he thinks to be best. As if I give my best horse in my stable, he may take him without my delivery. Ibid.

6. Precedents were produced of damages and costs given in avowries for heriots. Vid. Cro. E. 329. Trin. 36 Eliz. B. R. in case of Haselop v. Chaplin.

an heriot, no doubt but costs shall be paid. Cro. J. 28. Pasch. 2 Jac. B. R.

7. The lord has election to \* seise or *distrain* without prescription one way or other for heriot service; adjudged in B. R. in error, whereby a judgment in C. B. was reversed. Mo. 540. Odiham v. Smith.—But for heriot custom, he can only seise. 3 Bull. 325.

82, pl. 2, Contra. 84. b. pl. 5. Contra.——Pl. C. 96. b. Trin. 7 E. 6. Woodland v. Mantel.

8. A held land of B. by rent and heriot, and *infeoffed* R. his son and heir, who made a lease back to A. for 40 years, if he should so long live, to the intent that Joyce, whom he intended to marry, should not have her dower during his life. R. died possessed of an ox, and B. took it for a heriot. The jury found this, and the statute of fraudulent conveyances, &c. and it was adjudged, that for as much as the feoffment was not found by the jury to be fraudulent, the court could not adjudge it fraudulent, though the jury had found circumstances, and inducements to prove the fraud. Arg. Bridgm. 112. cites the case of Tyrer v. Littleton.

9. In Litt. Rep. 33, 34. Pasch. 2 Car. C. B. is an argument of Davenport, that where there is a *disjunctive reservation of a best beast, or 5 l. for an heriot at the election of the lessor*, the lessor cannot distrain without first declaring his *election*. But that though in this case the lessor himself might, yet, however the bailiff cannot justify for an arbitrable thing in avowry, without express command, but nothing that I observe was said by any of the court, or by any besides Davenport. Beare v. Hodges.

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10. Either heriot custom or heriot service is *seisable off the manor*, because it lies in prender. An heriot service is founded in ancient tenure. A *suit-heriot* reserved by deed cannot be taken off the manor; per Holt Ch. J. Mich. 1 W. & M. Show. 81. Parker v. Gage.

D. 351. b.  
pl. 23. it  
was so  
held; per  
Harper  
and Dyer.  
But Man-

11. Where the tenant makes a *fraudulent* deed to deceive the lords or creditors, *every lord* shall have the value of the beasts, though he should not have but one for his heriot. 3 Lev. 354. Pasch. 5 W. & M. C. B. in the case of Sands v. Child.—cites D. 351. a. b.

wood e contra. And that every lord should have a several action. Harper said, that all the lords should join in one action; but reporter says, quære hoc.—He shall only recover the *value of the best beast*. 2 Le. 8. 19 Eliz. C. B. in case of Creswell v. Cook.

S. P. Br.

12. The lord may *seise* either for heriot custom or service *any where*; but one cannot *distrain* for them out of the manor. 1 Salk, 2. cites 38 E. 3. 7.—356. Pasch. 5 W. & M. B. R. Austen v. Bennet.

Ibid. pl. 7. cites 8 H. 7. 10.—Vid. 3 Mod. 231. Osborn v. Steward.—Agreed by all the justices. Goldsb. 97. pl. 15.—The lord cannot seise for heriot *service* within his fee, nor out of it; but if he distrain it must always be within his fee. But for heriot *custom*, he may take it where he can find it, as well out of as within his fee. Kelw. 82. a. pl. 2.—Bendl. 20. pl. 47. Pasch. 37 H. 8.—But for heriot custom he cannot distrain. Kelw. 167. a. pl. 1. Pasch. 5 H. 8. Anon.—Because the *property* is in the lord immediately, *but for heriot service*, he shall distrain and not seise, because the property is not in him, and this is by the tenure. Br. Heriots, pl. 7. cites 8 H. 7. 10.—For if the tenure be to have the best beast, he cannot seise it, but may distrain for it. Ibid. And if the tenure be that if the tenant alien and does not give notice to the lord, that the lord shall have the best beast of the tenant, in the name of a heriot, yet the lord may distrain upon the land for this beast, though it runs upon the alienor, who has nothing in the land, and this by reason that it is the tenure of the land, and therefore the land is chargeable to the distress of it. Ibid.

See (G)

### (F) Remedy for the Owner of Beasts wrongfully taken.

1. IF a beast is taken for a heriot, *where none is due*, the owner may have either *trespass* or *trover*. Cro. J. 50. Mich. 2 Jac. C. B. Bishop and Jordan v. Ld Mountague.

### (G) Pleadings.

M. 6 E. 3.  
36.—  
H. 38 E. 3.  
7, b.

1. IN *replevin* brought against an abbot for a horse wrongfully taken, the abbot *shewed* that W. father of the plaintiff, whose heir he is, *held* certain tenements of him, by certain tenure, and after the death of the tenant, *to have the best beast in the name of a heriot*.

a heriot, and alleged seisin in his predecessor, and because this horse was the best beast at the time of his death, he took it as his own beast in name of a heriot; and the plaintiff said, that the place where, &c. was out of his fee, and there it was said, that it was no plea, because he avowed as for his own beast. For he may avow to take his own beast, where he could find it, as well out of his fee as within; by which the plaintiff relinquished this plea, and travers'd the seisin of the heriot; prist, &c. And upon this the issue was joined. And thereupon they intend that this was proof, that the lord might well enough seise the best beast; for there the abbot justified the taking of the beast, and did not avow, the which he could not if he had not the property in him. And there out of his fee was no plea, which had been a good plea, if he had avowed and not claimed the beast as his own. Pl. C. 96. in case of Woodland v. Mantell and Redsole. cites 6 E. 3.

2. A man may make avowry for two heriots after two descents in one and the same avowry, when it is for one and the same feignory. Br. Avowry, pl. 138. cites 27 Ass. 24.

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3. In replevin, the defendant avowed for heriot of one John, who died his tenant heriotable. Belknap. This same John we enfeoffed in fee, absque hoc, that he died seised of the land; Prist. Caund. he died our tenant; Prist. And it was awarded that the issue should be taken, whether he died his tenant or not, and not whether he died seised of the land; for it was said, that it might be, that there is lord, mesne, and tenant, and that this John was mesne, and so see that mesnalty may be held by heriot as well as the very land. Br. Heriots, pl. 1. cites 44 E. 3. 13.

He shall say, absque hoc, that he died his tenant; for it may be that he had made a lease for life, or a gift in tail. Br.

Avowry, pl. 142. cites S. C.—Br. Entre Cong. pl. 20. cites S. C.

4. In trespass the defendant prescribed in him and his ancestors tenants of the manor of D. to have heriot, scilicet, the best beast that his tenant has, when the tenant surrenders his land, &c. and that he surrendered such land, and the horse now taken was his best beast, &c. and the plaintiff said, that the property of the horse was not in the tenant, who surrendered, at the time of the surrender; and so see that for heriot custom, the lord claims a property in the beast, and may seise it. Br. Heriots, pl. 8. cites 3 H. 6. 45.

5. In replevin, the defendant avowed, because all the tenants for life have used to pay a heriot after their death, which is repugnant and impertinent, to pay after their death, and therefore ill avowry, but if he had said that he and all those, whose estate, &c. have had a heriot after the death, &c. of every tenant for life, it is a good avowry, and it is heriot custom, and not heriot service, for this is after the death of tenant of fee simple; note the diversity. Br. Avowry, pl. 81. cites 21 H. 7. 13.

6. In trespass, the defendant justified the taking by a custom within the manor of B. &c. that the lord of the manor for the time being habuit & habere consuevit the best beast of every tenant dying seised of any mesuage held of the same manor, upon that mesuage after his death, without saying pro heriotto, or nomine heriotti.

This plea was held not good for the form. D. 199. b. pl. 57, 58. Pasch. 3 Eliz. Parton v. Mason.

S. C. cited by Bramston Ch. J. and said, that such seifure is not good, because thereby the property is altered.

But that a

*custom to distrain* the cattle of a stranger for a heriot is a good custom; because the distress is *only as a pledge*, and means *to gain the heriot*. Mar. 164, 165. S. C. cited. 2 And. 153. Dal. 61. pl. 17. S. P. This case was agreed by Anderson. Ow. 146. S. C. adjudged, and the pleadings. Bendl. 110. Mo. 16. S. C. and says, that the like was adjudged. 1 Eliz. Rot. 459. in trespass by Henly v. Taylor. S. C. adjudged, and the pleadings. Bendl. 302. pl. 294. by the name of Lyne v. Bennet.

The avowry was for heriot service, but did not set down in certain what the heriot should be, viz. whether beast or other thing. Hob. 176. S. C.

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7. And he pleaded another *custom*, that if the best beast be *esloigned before seifure* thereof, that then the lord had used to *seife the best beast of any other levant and couchant*, upon the said tenure, and shewed that the best beast of the tenant was esloigned before seifure, and therefore, &c. And this was held not a good prescription. D. 199. b. pl. 57. 58. Parton v. Mason. And S. P. cited there to have been adjudged. M. 3 & 4 Eliz. between Wilson and Veife. Ibid. 200. Marg. cites it as \* Wilson v. Wife, and that the S. P. was so adjudged. 18 Eliz. † Pyne v. Bennet.

8. In replevin, defendant made *conusance as bailiff, &c. for a heriot due* on the death of J. S. tenant of the manor of D. and that the heriot not being delivered, he distrained in the place where, &c. as within the fee. The plaintiff pleaded *in bar to the avowry*, and takes the whole tenure by protestation, and for plea says, that J. S. *had no beasts at the time of his death, whereof a heriot* might or could be rendered. It was resolved, that the cognizance was not good; for it *ought to be certain*, (viz.) for the best beast, or two best beasts, and not generally for one heriot, and not *shewing what thing in certain*. And also that the bar was not good; because the *issue is tendered to a thing not alleged*; for the avowry made no mention of any beasts, but generally of one heriot which is not certain. And therefore awarded that the plaintiff recover, and have return, &c. and damages. Hutt. 4. Mich. 14 Jac. Shaw v. Taylor.

9. So defendant avowed the taking *nomine heriotorum, &c.* and laid the *custom* of the manor to be, that upon the death of every free tenant, the lord for the time being *hath used to have a heriot for every parcel thus held*, and that the plaintiff's father held several parcels, &c. and died seised. Exceptions were taken, because the taking is said to be *nomine heriotorum*, and not *shewn particularly for what*, as what he took for the one, and what for the other, nor did he shew of *what estate he died seised*. But it was answered, that he need not do so; for the law says, that he takes them for heriots, and that it is a duty presently and an interest settled, and the shewing that he took them *nomine heriotorum* is good, and so it was held by the court, and adjudged for the defendant, and a return awarded. 1 Bull. 101. Hill. 8 Jac. Syliard's case.

Jo. 300. S. C.

10. It was insisted that an avowry for a heriot was not well made, because he did not *shew what beast he should have* for the heriot, nor of *what value*, the return being irreplevisable; nor can the plaintiff know what to offer to have his cattle again. But all the four justices present agreed that the avowry was good enough; for perhaps the avowant knows not what was the best  
beast,

beast, and the plaintiff having done wrong by his *eloignement*, he at his peril ought to tender sufficient recompence. Cro. C. 260. Trin. 8 Car. B. R. Major v. Brandwood.——And there were shewn two precedents, the one Trin. 18 Eliz. Rot. 506. Dicker v. Higgins.——And another Trin. 13 Jac. Rot. 1148.

11. If the lord seises the best beast for a heriot, it must come on the other side to *shew that it was not the tenant's beast*. Mod. 63. Trin. 22 Car. 2. B. R. Jordan v. Martin.

12. A leased to B. for 99 years, if C. D. and E. should so long live, rendering an heriot or 40s. to A. and his assigns at his and their election, after their several deaths successive as they are named in the indenture. E. died, and then C. died. In an avowry for a heriot, the court agreed it was faulty, because the *avowant did not shew that D. was living, when the distress was taken*, and if he was not, the distress was not lawful, because in such case the lease was determined. Mod. 216. Trin. 28 Car. 2. C. B. Ingram v. Tothil.

And in this case, it was said, by North Ch. J. that though D. were alive, yet the avowant who was the devisee of A. could

not distress for the heriot, because the reservation was to him and his assigns, and though the election to have the heriot or 40s. be given to A. his heirs or assigns, yet that will not help the fault in the reservation. And Ellis J. said, that there was another fault in the pleading; for it says, that A. made his will in writing, but does not say, that A. died so seised; for if the estate of the devisor were turned to a right at the time of his death, the will could not operate upon it.—Also it is said, that the avowant made his election, and that the plaintiff *habuit notitiam* of his election, but it is not said by whom notice given. And for these reasons judgment was given for the plaintiff. Ibid. —The avowant set forth was that one of them was seised, and being so seised died, but doth not say that he died thereof seised, and this was held an incurable fault. 2 Mod. 93. S. C.

## (H) Extinguished.

1. *UNITY* of possession by the lord of the land, who ought to have heriot by custom is an extinguishment of the heriot custom; for it is a custom that *runs with the seignior*; contrary of a custom that runs with the land, as gavelkind, borough english, and such like. Br. Heriot, pl. 8. cites 14 H. 4. 5.

2. If there be lord and tenant by fealty and *heriot service*, and the lord purchases part of the land, the heriot service is extinct, because it is entire. Co. Litt. 149. b.

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There is a difference between heriot custom, and heriot service, as to the extinguishment thereof, by the lord's purchasing parcel of the tenancy; for by such means the heriot service is extinct; but if the custom of the manor be, that upon the death of every tenant of the manor, dying seised of any land held of the same manor, the lord shall have heriot, though the lord purchase parcel of a tenancy, yet he shall have a heriot by the custom of the manor for the residue; for he remains tenant to the lord, and the custom extends to every tenant. 8 Rep. 106. Trin. 7 Jac. the fourth resolution in Talbot's case.—als. Chapman v. Pendleton.—2 Brownl. 293. S. C. that in such case it is paid in respect that he is tenant, and custom shall not be drowned by unity of tenancy and seignior.

There is a difference

## Himself.

### (A) *What Things a Man may do to Himself.*

1. **A** man makes a *gift in tail, remainder to himself for life, remainder over in fee*, the second remainder is good, nevertheless it seems to be otherwise of the first remainder to himself. Br. Done, &c. pl. 35. cites 7 E. 3. 317. and Fitzh. tit. Formedon, 37.

2. A town has conuſance of pleas, and to levy fines coram ballivis dictæ villæ, and that always there have been *two bailiffs* of the ſaid town, and that J. S. *conuſee was one of the bailiffs* coram quibus at the time of the levying it, and ſo party and judge, and the error was allowed. D. 220. b. Marg. pl. 14. cites Hill. 12. R. 2. B. R. Rot. 33. The town of Shrewsbury's caſe.

3. If a man gives land by *fine to W. S. for his life, the remainder to himself in tail*, it is a void remainder; for the fee was never out of him. Br. Done, &c. pl. 32. cites 14 H. 4. 32.

Br. Fines,  
pl. 52. cites  
8 H. 6. 21.

4. A *justice*, or other person *being cogniſee* in a fine may not take cognizance thereof himſelf; for if he do, the fine thereupon levied is void. Weſt Symb. 17. cites 8 H. 6. 21.

5. If a fine be levied to *one of the justices*, he ſhall be named in the coram, &c. and among the juſtices by the conuſance now uſed, yet albeit he be named, (as I think) the fine is good. Denſh. R. of Fines, 4. 5.

If the re-  
cognizance  
had been  
taken gene-  
rally in the  
chancery,  
coram ipſa

6. A *recognizance* was made to Sir N. Bacon *Lord Keeper* of the great ſeal, and to two others, and this was *acknowledged before Sir N. Bacon*, keeper of the great ſeal. It was held, that this was void as to Sir N. Bacon, but good enough as to the other two. D. 220. b. pl. 14. Sir Nich. Bacon's caſe.

*regina*, as other recognizances are, it would be good, unleſs it be ſpecially averred that no one was preſent in court but himſelf, to whom the recognizance was made. per Cur. D. 220. b. pl. 14. Marg. cites 35 Eliz. B. R. Holland v. Franklin.

7. *Recognizance to B. to the uſe of the judge, before whom* it was acknowledged is good, and the other juſtices agreed it to be ſo. D. 220. b. Marg. pl. 14. cites 41 & 42 Eliz. in the argument of the caſe of Erifh v. Rives.

8. A. makes a leaſe for life, *remainder to himſelf for years, remainder over in fee*. This is void as to himſelf; but if it had been to his executors it might be good, if he makes executors and dies before the leſſee. D. 309. b. pl. 77. Paſch. 14 Eliz.

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A ſheriff  
cannot do  
an aſſiſe to  
himſelf, as

9. *Sheriff* may *ſummon* himſelf. Arg. Cro. Car. 416. Mich. 11 Car. B. R. Done v. Smethier. — But per Cur. it is doubted in the books, if the ſheriff as plaintiff may *execute a writ for himſelf*, and as defendant may *execute a writ upon himſelf*. Ibid.

is plain by the caſe in Dyer. But *for himſelf* he may, as was yielded by the other ſide; for if he be *deſcendant*, he may *ſummon the tenant to the preſent*. Skin. 117. Trin. 35 Car. 2. B. R. in caſe of the King v. Pilkington Chute,

10. If



10. If a *recognizance* be taken before one who has power to take a recognizance, and he takes it to himself, *and to another*; this recognizance is void as to himself, and good as to the other. Jenk. 90. pl. 84.

11. A man *by fraud* may *disseise* himself. Jenk. 46. pl. 88.

12. In what cases a man may *have aid* of himself. See Aid of a common person. (S) pl. 6. (Y) pl. 10, 11, 12. 20.—In what cases he may *vouch* himself. See Voucher (D) pl. 1. (S) pl. 12, 13. &c.—Where one may be *tenant* to himself. See Grants (G. a. 10)——Where a man may *take by livery made* to himself. See Feoffment (C. a.)——In what cases or how far one may *act as judge where himself is party*. See Judge (A) Conusance (H) (I) Amercement (C).—See other proper titles.

## (B) Acting under a *double Capacity*.

See Grants  
(G. a. 10)

1. **A** *burgess* of a corporation had *laid out money for the use of the corporation*, and after, *being mayor*, took the *bond* of the corporation for it to him in his natural capacity, and held void. 12 Mod. 619. Hill, 13 W. 3. in case of City of London v. Wood.

2. A *bishop* of a diocess has *two capacities*, one as bishop, the other as T. S. But he cannot do an act in one capacity to enure to him in another capacity; as he cannot make a lease for years, as he is bishop, to himself as he is J. S. nor vice versa. 12 Mod. 688. in case of City of London v. Wood.

## Holding over.

### (A) Holding over a Term, &c.

See Statutes (A. a)  
Execution.

1. **L**ANDS were devised to A. till 800 l. raised. Resolved that if the *heir at law*, or he in reversion, or remainder, in case of lease or limitation of a life, *enters upon A.* or on him to whom the lands are devised or limited, and expells him, it is in the election of him so expelled, either to bring his action and recover the mean profits which shall be accounted parcel of the sum, or he may re-enter, and hold over till he shall levy the entire sum, not accounting the time of his expulsion. But otherwise, if the expulsion was *by a stranger*, 4 Rep. 82. Mich. 41 & 42 Eliz. Corbet's case.

S. C. cited  
per Bridgman Ch. J.  
Cart. 76.  
in case of  
Thomassin  
v. Mackworth.

2. There is a difference between an *elegit* and a *statute merchant*; for in an *elegit* he cannot hold over; but upon a *statute merchant* he may, because the extender is to have his charges and expences over

S. P. 2  
Inst. 68a.

over and above the debt, which are not to be recovered upon the elegit. Arg. Mich. 1656. Hard. 80. cites 4 Rep, 67. b. Fulwood's case.

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## Homine Replegiando.

(A) *What it is, and How considered.*

1. **W**HERE one man conveys away secretly or keeps in his custody another man against his will; then upon oath made thereof, and a petition to the lord chancellor, he will grant a writ of replegiari facias, with an alias and pluries, upon which the sheriff returns an elongatus, and thereupon issues out a capias in withernam, made by the filazer, and when he is thereupon taken, the sheriff cannot take bail for him: but the court where the writ is returnable, may, if they think fit, grant an habeas corpus to the sheriff to bring him into a court and bail him, or else remand him. 2 L. P. R. 23.

• It was argued that this is not a civil action for damages, and to have the

party enlarged, but is such a prosecution, in which, the defendant if convicted shall be fined and pilloried: and that the very command of the writ is, that the defendant lie in goal till the party be suffered to be replevied by him: but Holt Ch. J. held, that so it is not a prosecution: for the king cannot have it, and damages are always given and so. And Gould J. said, that *habeas corpus* ad id est, *habeas corpus*. 12 Mod. 424. 425. Mich. 12 W. 3. B. R. More v. Watts.

(B) *Lies in what Cases, and by whom it may be brought.*

1. **I**n common law, if sheriff had arrested any man by the king's writ, the prisoner could not be delivered but by a homine replegiando. 2 Saund. 60. Hill. 21 & 22 Car. 2. in case of Postern v. Hanton.

2. As the law enables a man to sue this writ by friends, it will of consequence enable them to make an attorney for him. 12 Mod. 424. Mich. 12 W. 3. in case of More v. Watts.

3. **Q**uestion is, whether the plaintiff, being an infant, shall sue by himself, or by an attorney? Ad quod non fuit responsum. 12 Mod. 424. Mich. 12 W. 3. in case of More v. Watts.

4. **Q**uestion is, whether a writ of homine replegiando can be brought either by the king, or by a subject, or by a corporation? For the king; and the

answer

nature and proceedings in the writ shew it to be so. Pasch. 1718. Ch. Prec. 492. Atwood v. Atwood.

(C) *Proceedings, Pleadings and Returns ; and in what Cases the Party shall be bailed ; and of the Difference between this Writ and a Common Replevin.*

1. UPON an information for *spiriting away a youth to Jamaica*, the defendant was found guilty, and the next term fined 500*l.* and to lie in prison till paid. The defendant got a promise of pardon \* as to the fine, whereupon the court directed the father to bring a homine replegiando, and thereupon an *elongatus* was returned, and the defendant charged in prison with it, who got a letter from the Treasury, signifying the king's inclination to pardon the fine, if the judges of B. R. could advise that the pardon might discharge the imprisonment. They met, but thought it not reasonable to bail the prisoner upon the withernam, but proposed that he should bring 1000*l.* into court, and then would give him his liberty; but on not producing the child in six months the 1000*l.* to be forfeited. It was objected, that if an *elongatus* est returned be *conclusive*, so as defendant cannot traverse it, he has no remedy; but it was answered, first, that defendant may bring an *action on the case for the false return*, and if found for him in that action, he may be bailed in this. 2. Should the *sheriff die before the issue tried, or the action brought*, then the king may issue out a *commission to inquire the truth of the return*, which *inquisition* taken by virtue of such commission may be *traversed by the defendant in the homine replegiando*, and if the *issue upon that traverse be found for him*, he shall be bailed; and the *capias in t withernam* is no execution. But unless defendant will confess the taking and having the youth in custody, he cannot be bailed, as appears by several cases there cited. Kaym. 474. Mich. 34 Car. 2. B. R. Designy's case.

2 Show. 221. to 232. S. C. argued by the reporter, and 2 ancient precedents set forth at length, one in Hill. 16 R. 2. Rot. 16. where bail was taken, and a *superedeas* to a *capias in withernam* upon a surmise of bail put in here above, and the other Mich. 5 H. 4. by which record it is plainly in the power of the court to bail one taken in withernam, after an *elongatus*

returned, and that the court inclined he might be bailed, and that it was in the power of the court so to do; and the last day of Hilary term after, he got off the fine, and on giving security to bring home the boy in six months, death and perils of the sea excepted, he was discharged on bail; after which the boy came home, and being brought into court was delivered to his father, but they never proceeded. But in all this, the judges still seemed of opinion, that the sheriff could not return a *non cepit*; for that would falsify the supposal of the writ itself. Turbit v. Desfigney.

† The court denied withernam to be an execution; for that cannot be before judgment, and they held it only to be a *mesne process*. 2 Salk. 582. Mich. 12 W. 3. B. R. Moor v. Watts. — 12 Mod. 415. S. C. — S. P. Arg. and that it is only process, and a means to try a title to liberty, and says that it is not as he can find in any of the entries awarded by the court, but a writ sued out of course, and not so much as a fiat breve entered. In most other particulars withernam is as a common replevin, and as in the one, so in the other, there must be pledges found to prosecute with effect. Cites Br. tit. Replevin 66. and 49. 8 H. 4. 2. it ought to be *before you have a writ to the sheriff to deliver, &c.* In a common replevin, the sheriff may return a claim of property; and so here he may return a claim of the plaintiff as his villein; and an *impotence* lies in this action as in a common replevin. 2 Show. 224. in case of Turbet v. Daffigney. — ‡ 3 Salk. 186. Contra.

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2. Upon an homine replegiando issued, and an *esloignment* returned by the sheriff, he, against whom the writ issued, coming upon process cannot plead 'till he bring in the body. Skin. 61. 76. Mich. 34 Car. 2. B. R. Ld. Grey's case.

3. The *esloignment* is a contempt, for which the court will commit 'till the body be brought in; and the sheriff's return of the esloignment a sufficient foundation, and not traversable, but if the party will gage deliverance, the court may let him to mainprize. Skin. 62. 76. Ld Grey's case.

4 Mod.  
183. S. C.

4. An homine replegiando was brought against the defendants; for the wife of the plaintiff, and *elongat.* was returned; the defendants before the return appear and enter plea with the filazer of *non ceperunt*, but upon a mistake, a *capias in withernam* was awarded upon which the court was moved for a *superfedeas*, the which was awarded; for the party might appear at the return of the replegiare, and plead *ut supra*, and then no withernam ought to be awarded, and the return of the elongat. shall not prejudice; for the sheriff cannot return *non cepit*, because this would be against the supposal of the writ, but he ought to return the body, or such matter, which consists with the writ; but the party is at liberty to traverse the supposal of the writ, and try the matter. Skin. 337. Pasch. 5 W. & M. B. R. Du Bardele and Reynel & Ux.

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5. A. brought from the Indies a man monster, having the perfect shape of a child growing out of his breast (as an excrescency) all but the head, and shewed him for profit. This man turned christian, and was baptized, and detained from A. who brought a homine replegiando. The sheriff returned, that he had replevied the body, but does not say, the body in which A. claimed property; whereupon he was ordered to amend his return, and then the court of C. B. bailed him. 3 Mod. 120. Hill. 2 & 3 Jac. 2. Sir Tho. Grantham's case.

Skin. 337.  
Du-Bardele  
v. Reynell.  
S. C.——

4 Mod.  
183. S. C.

——S. P.  
and the  
sheriff must  
either return  
a *d. liberari*  
*fecit*, or an  
excuse

6. Where an *elongavit* is returned, and the defendants offer to appear and plead *non ceperunt*, it shall stay the withernam, because the end and intent of the writ is only to bring in the defendants to appear and plead; and this the other side agreed to; and only prayed, that the defendants might gage deliverance before it was granted. Holt, there is \* no difference between a replevin and a homine replegiando; for as the sheriff can return nothing but an *elongavit*, where he cannot find the thing to be replevied, in one case, so neither can he in the other. 12 Mod. 36. Pasch. 5 W. & M. De la Bastile v. Reignald & Ux.

thereof, viz. that no body came to shew him the cattle, or *elongata*; but he cannot return, that they were not taken; for that goes to the point of the writ, which the defendant is to falsify, and not the sheriff. 2 Salk. 582. Mich. 12 W. 3. B. R. Moor v. Watts.——But if one declares in a replevin for cattle, with an *adhuc detinet*, and judgment is against the defendant for damages; by payment thereof, the property of the distress shall be vested in him. But in homine replegiando, though he pleads *non cepit*, and it be found against him, and judgment be for damages, yet the liberty of man is such, that thereby he cannot gain property in him, but a *capias* shall go against him, and he shall be kept in withernam. per Holt Ch. J. and he said, that the precedents in Rastal upon this head, are not to be depended upon. 12 Mod. 428. in case of Moor v. Watts.

12 Mod:  
423. to 431.  
S. C.——

7. Habeas corpus was returned, That W. was in custody by *capias in withernam*. The case was, that upon a homine replegiando, the

*the sheriff returned an inquisition, finding that the party was esloigned, whereupon a withernam issued returnable octab. Martini, which was not yet come; but the defendant was taken upon it. It was objected, that he could not be bailed upon the withernam; for that it was an \* execution, and he had no day in court, and the plaintiff could have a new withernam. That which seemed to be the sense of the Chief Justice, to which the rest agreed, was, (among other things) that after elongata returned, and withernam also awarded, the defendant is not concluded to plead non cepit to the action, because he cannot falsify the return, and that upon pleading non cepit he shall be bailed. And they † disliked the case in Raym. 474. [See sup. DESIGNY'S CASE,] and the LD. GRAY'S CASE, [supra] but affirmed the case in the Register 79. a. and cited Kelw. 71. a. F. N. B. 74. adding this farther reason, that hereby the supposal of the writ is denied, and balanced, and the matter stands indifferent, according to the rule of bailing laid down by Ld Coke, upon Westm. 1. cap. 15. The court held, that there might be a ‡ new withernam; for the || bail must be in a sum certain with condition, that he appear de die in diem, and if judgment be against him, that he render his body in withernam, ibidem remansurus quousque he render the party, and permit him to go at large; and therefore if he be rendered again, he is in custody as before. And the court held, that before the withernam returned the defendant cannot be bailed. 2 Salk. 581. Mich. 12 W. 3. B. R. Moor v. Watts.*

*The plaintiff's counsel seeing that by the opinion of the court, the defendant could not be bailed, unless he pleaded non cepit, would not deliver a declaration. But the Chief Justice said, that the return day of all returnable-writs is a day to both parties to appear, and though the writ be returned not served, the defendant may appear to prevent any ill*

*consequence; and though the plaintiff be absent, he may make an attorney; and hereupon the plaintiff was called and nonsuited; for otherwise the defendant might lose his liberty for ever by such contrivance. Ibid. 582, 583.—A pluries replegiando gives a day in court. 12 Mod. 430. S. C.—\* See supra Turbet v. Designey.—† 12 Mod. 425.—‡ 12 Mod. 429.—|| 12 Mod. 426.*

8. The writ being against three, whereof one only was brought in, it was doubted by the plaintiff how to declare; to which it was answered that they must do as if it were in appeals, viz. declare against him that appeared, and continue process against the others. And Holt said, it would be a question, whether the plaintiff should not be put to find pledges. 12 Mod. 431. More v. Watts.

9. If the defendant comes before elongata returned, and enters an appearance, and afterwards an elongata be returned, there ought to be no withernam; and if one be, it ought to be superseded, upon pleading non cepit, without any bail; per Holt Ch. J. 12 Mod. 425. Mich. 12 W. 3. in case of More v. Watts.

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10. If after an elongata returned he comes in gratis, and pleads non cepit, he shall not be put to find bail, (the reason seems to be, because the withernam is estopped or suspended) but if he comes in in \* custody, upon a capias in withernam, he must give bail, and cannot be admitted to that 'till he call for a declaration, and plead non cepit. 2 Salk. 583. Mich. 12 W. 3. B. R. Moor v. Watts.

\* Holt Ch. J. cited 12 E. 4. 4. and said, the words of the book are, *he must continue*

*in custody, viz. in bail.* 12 Mod. 426.

11. The defendant pleaded in abatement, want of addition in the pluries, as to place, vill or hamlet. The plaintiff demurred; Holt Ch. J.

1 Salk. 3 S. C.

Ch. J. at first, inclined strongly; that the plea was good, and *would distinguish this from other writs of replevin*; for here, he said, the process of outlawry issues immediately upon the pluries homine replegiando, which he affirmed to be a withernam in itself; but in common replevin, the process of outlawry is not upon the pluries replegiari, but upon the capias in withernam, which issues upon the sheriff's return of averia elongata upon the pluries; and upon the sheriff's special return of the capias in withernam, that is, upon his return of nulla bona on the withernam, a capias shall go against the person, and so to outlawry. *But by Powel J.* There is no difference; for *in both cases, the process of outlawry is upon the withernam, and not upon the original writ*; for in a homine replegiando, there shall go no withernam 'till return of the homine replegiando. And as the first withernam in common replevin, must be de averiis, so the first in a homine replegiando shall be of the person. And at another day the whole court awarded a respondeas ouster; for process of outlawry lies in a homine replegiando, yet there ought not to be any addition. For the pluries, on which we held plea here, is not the original in replevin; but the original writ of replevin is it, which writ is vicontiel; so if the replevin be removed by recordare, though upon withernam thereon there will lie process of outlawry, yet there is no addition according to the statute. So that it is not the original and therefore out of the statute. 2. There being no addition to the first replevin, the pluries, (which indeed is the original to us) must have none; because it must not vary from the first writ. And Powel said, that there never is an addition to a writ that is vicontiel. 6 Mod. 84. Mich. 2 Annæ, B. R. Ld. Banbury v. Wood.

## [An] Honour.

(A) [An] ‡ Honour. *What [it is.]*

† Sir  
Henry  
Spelman in  
his Glossary  
300. verbo  
Honor  
says, this  
word passed

[ † I. A N honour in itself comprehends divers manors and lands, and some are in demesne, and some in service. 14 H. 4. 9. ]

came into England with the Normans. And though in an ancient inquisition, it is said, that Wigod of Wallingford, held the honour of Wallingford in the time of king Harold, as if that appellation had been received under the English-Saxons, yet he says he does not find it otherwise than used in after times, as in this place. — † S. P. and many knights fees, regalia, &c. and it was anciently called here *banficium*, or *feodum regale*; and was always held of the king in capite. Spelm. Gloss. 300. verbo, Honor. — Though an honour consists of many manors, yet all the manors are distinguished, and have several copyholders. And though there is for all the manors, but one court, yet they are, quasi, several and distinct courts. And it was usual in the time of the abbeyes, that they kept but one court for many manors. Cro. C. 367. Trin. 10 Car. B. R. Seagood v. Hume.

\* [309]

2. When



[ 2. When the *king grants* an honour *with the appurtenances*, it is more high than if a manor were granted with the appurtenances; for to an honour, by common intendment, appertain *franchises*, and by reason of those liberties and franchises, it is called an honour. In itinere in the time of E. 3. Kell. 151. per Scroop. For a manor and honour are not of one condition. ]

3. An honour ought to *consist* of lands, liberties, and franchises. 1 Bull. 197. Pasch. 10 Jac. the King v. Levett.

(B) *How it commences.*

[ 1. ] F I am *seised of a manor*, and I *enfeoff*\* divers persons, of *\*Fol. 73.*  
divers parcels severally *in tail*. To hold of me, by certain  
*services, by name of honour*. This makes the honour. 14 H.  
4. 64. ]

[ 2. A forest may be appendent to an honour. 26 Ass. pl. 60. ] Jenk. 29.

3. The king cannot *create* an honour, but by act of parliament; Pl. 55.  
per tot. Cur. 1 Bull. 196. Pasch. 10 Jac. the King v. Levett. The manor  
of Amptbill,  
with several manors, lands, &c. thereto perpetually annexed, was created and enacted by 33 H.  
8. cap. 37. to be called an honour.—And the like of the manor of Grafton, by 33 H. 8.  
cap. 38.

4. At this day the Earl of *Arundel* only hath his earldom by *prescription*, the beginning of which is time out of mind, not within the memory of any one; so that his earldom is the most ancient in the realm. 1 Bull. 196. the King v. Levett.

5. The king granted to a subject a great manor called an honour, and passed it by the name of an honour; and well. Jenk. 277. pl. 99.

(C) *Grants of an Honour. What passes thereby, and How, &c.*

1. [ F the king grants land, parcel of an honour, reserving rents, and after grants the honour, the rent shall pass to the grantee; because the rent was parcel of the honour, it arising by reservation out of the land parcel of the honour. Arg. Mo. 161. cites 26 Ass. 60.

2. The king has a forest belonging to the honour of Pickering, and the forest passes by grant of the honour. Arg. 2 Roll. R. 151. Arg. 2 Roll. R. 278. it passes by  
cites 26 Ass. pl. 16. 60. grant of the honour \* *cum pertinentiis*. But then it passes only as a chase.—\* Jenk. 218. pl. 63.

3. If the king has lands held of an honour and other land, and gives all, tenend' in socage, the land of the honour shall be held of the honour, not in capite, and the other land in capite. Arg. Mo. 258. Mich. 26 & 27 Eliz.

See Prerogative.  
(A. a.)

## (A) Honours.

1. **I**T is illegal to purchase honour, (as a dukedom) for money. Pasch. 1681. Vern. 5. E. of Kingston v. Lady Eliz. Pierrepont.

See Avowry (X.)

## Hors de son Fee.

### (A) Who shall have such Plea.

Br. Assise,  
pl. 195.  
cites S. C.

1. **M**Ortdauncester of meadow and rent; the defendant, as to the rent, pleaded hors de son fee; judgment *if without specialty, &c. & non allocatur*; because he was tenant of the rent; and so see, that *none shall have this plea but he who is tenant of the land, out of which, &c.* Br. Hors, &c. pl. 7. cites 12 Ass. 38.

2. So, in *assise of rent-charge*, the defendant pleaded hors de son fee, judgment *if without specialty shewn, &c.* and he was forced to take the tenancy of the demesne upon himself before that he could have the plea; quod nota, that *none shall plead it but tenant of the freehold.* Br. Hors, &c. pl. 8. cites 14 Ass. 14.

3. It is said in BASSET's Recordare, that *a stranger to the avowry, as the prayee in aid, &c. shall not plead any plea but hors de son fee, or a thing which tantamounts*; quod nota; and therefore note, that he may well plead hors de son fee; and herewith agrees M. 14 H. 8. fo. 5. and that therefore where there is lord, mesne, and tenant, and the lord distrains the tenant paravaile, he may plead a release made to the mesne; because this amounts to this plea, hors de son fee. Br. Hors, &c. pl. 14. cites 2 H. 6. 1.

4. He who holds in frankalmoigne cannot plead against the lord, who is donor, that the land is out of his fee, by the best opinion; for if the tenant be distrained by the, Ld. paramount, he shall have writ of mesne, and if the foundation be dissolved, the lord shall have the escheat, & contra formam collationis, and therefore there is a tenure and a fee, but he cannot distrain. Br. Hors, &c. pl. 17. cites 7 E. 4. 11.

See Avowry (Y.)

### (B) In what Actions.

1. **F**Ormedon of rent; the tenant vouched R. to warranty; the demandant said, that his demand is rent-service, judgment; and the tenant said, that the land is hors de son fee; & non allocatur,

catur, but he was compelled to say, that it is not rent-service, and so to issue; quære the reason, whether because hors de son fee is but argument in this case, or because the writ comprehends title in itself? For by Finch. if the rent was recovered against the father of the tenant by default, yet the tenement, as to the rent, is hors de son fee, and yet he ought to demand it as rent-service; and it seems clearly, that if the rent be within his fee, or out of it, yet if this rent was given in tail, and the land charged of it, hors de son fee cannot be any plea; because the title is good, though the land be out of his fee; for it is good if it be rent-charge or rent-seck. Br. Hors, &c. pl. 2. cites 44 E. 3. 19.

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2. It was said arguendo in formedon, that in writ of entry in the quibus, in nature of assise of a rent, hors de son fee is a good plea, because this writ does not comprehend title; for it is of his own possession; but otherwise it is in \* formedon of a rent; there, hors de son fee is no plea; for the gift in the writ is a title; but in writ of entry, in the quibus of seisin of his father of a rent, hors de son fee is a good plea; for the demandant claims title by his father. Br. Hors, &c. pl. 18. cites 12 H. 7. 30

\* Formedon of a rent-charge against the tenant, who pleaded hors de son fee; judgment if without specialty

stren, &c. Finch. ordered him to answer, quod nota; and so see that it is † no plea. Br. Hors, &c. pl. 3. cites 45 E. 3. 14. —† S. P. Br. Hors, &c. pl. 10. cites 5 E. 4. 6. — Hors de son fee is no plea in formedon in descender or remainder. Br. Hors, &c. pl. 9. cites 5 E. 4. 80.

3. In replevin; a man seised of a manor gave it in tail, reserving the reversion, and after distrained a tenant of the manor for rent and services; he [the tenant] shewed the gift in tail, and that the donee had issue alive, and so hors de son fee, and the issue was allowed. But by the reporter it is ill; for he has fee there in reversion, and therefore ought to have concluded, and so not held of him; for he \* cannot disclaim nor plead hors de son fee. Br. Hors, &c. pl. 4. cites 11 H. 4. 10.

Br. Avowry, pl. 129. cites S. C. and 10 H. 6. — \* It is said, that in replevin, the tenant shall not plead hors de son fee,

because he may disclaim, nevertheless it is said at this day, that this is not law. Ibid. pl. 15. cites † 5 E. 4. 2. — He shall plead hors de son fee, or something which is tantamount. Br. Avowry, pl. 76. cites 37 H. 6. 25. —† S. C. cited Arg. and says, that 2 H. 6. 1. and many cases afterwards were against that book of 5 E. 4. 2. and that a man might plead hors de son fee as Brooke held; as if there be lord and tenant, holding by fealty and rent, and he [the tenant] makes a lease for years, and the lord distrains the cattle of the lessee, though the tenant hath paid the rent, and done fealty; there if the lessee alleges that his lord was seised of the tenancy in his demesne as of fee, and held it of the lord, by services, &c. of which services the lord was seised by the lands of his lessor, as by his true tenant, who leased the lands to the plaintiff, and the lord, to charge him, hath unjustly avowed upon him, who hath nothing in the tenancy, it is well enough; cites † 9 Rep. case of avowries; and Arg. says, that the reason given in 5 E. 4. 2. about disclaiming, will not hold now; for that course is quite altered, and is taken away by 21 H. 8. 19. which enacts, that avowries shall be made by the lord upon the land, without naming his tenant. 2 Mod. 103, 104. Trin. 28 Car. 2. in case of Sherrard v. Smith. —† 9 Rep. 20. 2.

4. In writ of entry of rent in nature of assise, hors de son fee was admitted for a good answer in this action; and the reason seems to be, because this action does not comprise in it any title, as formedon, or such like. For there, as it appears elsewhere, hors de son fee is no plea. Br. Hors, &c. pl. 1. cites 35 H. 6. 40.

5. In writ of entry sur disseisin made by the defendant, of a rent to the predecessor of an abbot plaintiff, the tenant took the tenancy and pleaded as tertenant, and pleaded hors de son fee; judgment if

5 E. 4. long quinto 50. 91, &c.

\* So in writ of entry sur disseisin made to the ancestor of the demandant of a rent. Br. Hors, &c.

without title shewn, &c. and per Cur. the plea is a \* good plea in this action; for the *seisin nor disseisin of the predecessor is no title*; for it may be that the predecessor was disseised, and then the successor is not in by the predecessor, as the heir is in by the ancestor; for the successor is in by the house, and continued the first tort, therefore it is no plea any more here than in assise. Br. Hors, &c. pl. 9. cites 5 E. 4. 80.

pl. 10. cites 5 E. 4. 6. — In entry sur disseisin of rent, he in reversion was received, and said that hors de son fee, the plaintiff shall not say that he held of him, and so within his fee, but shall say generally, that within his fee, prist; and so he did. Br. Hors, &c. pl. 13. cites 10 E. 4. 10.

§ Not held of him is a good plea in assise. Br. Avowry, pl. 76. cites 37 H. 6. 25. — † In assise of mortdaunce,

6. But in § assise of † mortdaunce, ayel, cosnage, and writ of entry sur disseisin by the heir, of disseisin done to his ancestor, there this is no plea, for those writs comprehend title in these cases; † and in writ of intrusion brought by an abbot, this is no plea; for there is sufficient title || and in cui in vita, and writ of ingressu sine assensu capituli by an abbot, Hors de son fee is no plea; quod nota. Br. Hors, &c. pl. 9. cites 5 E. 4. 80.

tenant pleaded hors de son fee, which was admitted a good plea, and yet the writ comprehended title, in a manner; quare inde; for it is only a praying that certain points may be inquired, and the plaintiff demurred if he should shew other title, and it was adjourned, and at the day the demandant would have shewn specialty, and was not suffered; because it was adjourned upon a point certain. Ibid. pl. 16. cites 14 All. 17. — † Orig. (mes.) — || Orig. (mes.)

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\* Br. Avowry, pl. 51. cites 8 H. 6. 16. S. P.

7. In avowry \* not held of him is no plea for a stranger to the avowry; for he shall answer to the seisin; but he may say that he does not hold of him, and so hors de son fee, and the other may say that he holds of him, and so within his fee; quod nota. Br. Avowry, pl. 76. cites 37 H. 6. 25.

Br. Trespass, pl. 376. cites S. C. — \* Not held of him is a good plea in this action, and in trespass. pl. 76. cites 37 H. 6. 25. — † The year book is, (ought to shew of whom it is held, and so, &c.)

8. In \* rescous quare cum the same plaintiff distrained in [his] fee for customs and services, &c. the defendant said that hors de son fee, &c. and per Cur. it is no plea in this action, nor in trespass, but he † may say that he holds of such a one, and so hors de son fee, and so he did. Br. Hors, &c. pl. 11. cites 6 E. 4. 4. and as to the trespass cites M. 10 H. 7. fo. 2. agreeing therewith.

9. Hors de son fee is a good plea in writ of mesne, quod nota. Br. Hors, &c. pl. 5. cites 9 E. 4. 27, 28.

Not held of him is a good plea in cessavit of rent.

10. In cessavit, hors de son fee is no plea, but he shall say, that he does not hold of him, or such like; quod nota. Br. Hors, &c. pl. 12. cites 10 E. 4. 1.

Br. Avowry, pl. 76. cites 37 H. 6. 25.

In trespass quare clausum fregit, and taking his goods, the defendant justified by command of

11. If a stranger claims a seignior, and distrains and avows for the service, the tenant may plead, that the tenancy is extra feodum, &c. of him, (that is) out of the seignior, or not holden of him who claims it; but he can not plead extra feodum, &c. unless he takes the tenancy (that is) the state of the land upon him. Co. Lit. 1. b.

of the lord of the manor, of which the plaintiff held by fealty and rent, and for non-payment, thereof he took them nomine districtionis. The plaintiff replied, that the locus in quo is extra, absque hoc that it is infra

*infra feodum*; defendant demurred specially, because the plaintiff, pleading hors de son fee, should have taken the tenancy upon him, and cited 9 Rep. BUCKNAL'S CASE, 22 H. 6. 2, 3. Kelw. 73. 14 Aff. pl. 13. 1 Inst. 1. b. where this is given as a rule by my Lord Coke. It was agreed by the counsel for the plaintiff, that in all cases of assise hors de son fee is no plea without taking the tenancy upon him; but otherwise in trespass, in which never was any such thing objected; for what tenancy can the plaintiff take upon him? he cannot say, that he is tenens liberi tenementi; for this is a bare action of trespass, in which, though the pleading is not so formal, yet it will do no hurt; for had it been *extra feodum*, without the traverse, it had been good enough, and of that opinion was the court in the following term, and judgment for the plaintiff (absente Scroggs) and the Chief Justice said, that the rule laid down 1 Inst. 1. b. viz. that there is no pleading hors de son fee without taking the tenancy upon him, is to be intended of cases in assise, and that so are all the cases he there cites for proof of that opinion, and therefore is so to be understood; but this is an action of trespass brought upon the possession, and not upon the title. 2 Mod. 103, 104. Trin. 28 Car. 2. C. B. Sherrard v. Smith.

(C) Pleadable. In what Cases. And How. And what may be replied.

1. **P**RIOR of Spalding holds of the king's grantee certain land in B. in frankalmoign, and the lord distrains for services, and the tenant brings replevin, and he avows; the tenant cannot plead hors de son fee, and if the tenant in frankalmoign makes feoffment, there the feoffee shall hold of the donor, per Littleton. Br. Patents, pl. 61. cites 7 E. 4. 11.
2. If one plead hors de son fee, the other shall not shew a tenure, & issint deins son fee, but deins son fee, prist, &c. Heath's Max. 82. cites 10 Ed. 4. 10.
3. If the avowant gives in evidence seisin of rent without a fealty, it is not sufficient. Heath's Max. 82. cites 27 H. 8. 20.

(D) Pleading it contrary to the supposal of the Writ. [ 313 ]

1. **I**N avowry it is held that where the taking is supposed in 12 acres, and not in any acres certain, and the defendant avows generally, the plaintiff cannot say to one acre hors de son fee, and to 11 not held of him; because the taking is not supposed in any acre certain. Br. Avowry, pl. 76. cites 37 H. 6. 25.
2. And if the taking be supposed in an acre certain, and the defendant avows, because this acre and 11 others are held of him, there the plaintiff cannot say hors de son fee generally to the whole; for this shall refer only to the acre where the taking is alleged, and therefore shall plead specially. Br. Avowry, pl. 76. cites 37 H. 6. 25.
3. But if the taking is supposed in 12 acres, and the defendant avows, and the plaintiff says hors de son fee, it shall have relation to the whole; because no acre certain is limited, quod nota diversity. Br. Avowry, pl. 76. cites 37 H. 6. 25.

See Charitable uses.

## (A) Hospitals.

1. *STAT. 2 Hen. 5. cap. 1.* enacts that as to hospitals which be of the patronage and foundation of the king, the ordinaries, by virtue of the king's commissions, shall enquire of the manner and foundation of the said hospitals, and of the governance and estate of the same, and of all other matters requisite, and the inquisitions thereof taken shall certify in the chancery. And as to other hospitals, the ordinaries shall inquire of the manner of the foundation, estate and governance of the same, and of all other matters necessary and upon that make correction and reformation after the laws of holy church.

2. *21 H. 8. cap. 13. §. 7.* enacts that masters of hospitals, &c. having lands of 800 marks yearly value or under may use and occupy so much thereof for the maintenance of their houses, as they or any of their predecessors have done within 100 years last past, notwithstanding this act.

3. *Stat. 14 Eliz. cap. 14.* enacts that all gifts devises, and assurances, to be made of lands and tenements, by will or otherwise for relief of the poor, in any hospital now being, and employed to the relief of the poor, shall be as good in law according to the meaning of such donor, as if the corporation were rightly named; any misnaming of the corporation notwithstanding, saving to all persons, other than such donor, all right, &c.

4. By *31 Eliz. cap. 6. §. 2.* If any person who shall have the election or nomination of any person to have room or place in an hospital, shall have or take any money, reward, or profit, directly or indirectly, or promise of money, reward, or profit, then such room and place shall be void, and another be preferred to the place, by those who have authority to elect.

5. *8.* Directs the penalty for resigning or exchanging a place for a reward.

6. *35 Eliz. cap. 7. §. 27.* impowers persons to give or devise lands to the use of the poor.

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\* These words extend to all such bodies politick and corporate as may alien; as mayors and commonalties, bailiffs and burghesses, and to all other persons whatsoever; but not to such bodies poli-

7. *39 Eliz. cap. 5. §. 1.* \* Every person + seised of an inheritance in fee simple shall have power during † 20 years by ‡ deed enrolled in chancery to erect, found, and establish one or more hospitals, *maisons de Dieu*, abiding places, as well for the sustentation and relief of the maimed, poor, needy or impotent people, as to set the poor to work, to have ¶ continuance for ever, and from time to time to place such heads and members, and such numbers of poor therein as the founder, his heirs or assigns shall think fit. And the said hospitals or houses \*\* so founded, †† shall be incorporated and have perpetual succession and be called by such name as the founder, his heirs, executors, or assigns shall appoint, and ‡‡ shall have power to purchase and take as well goods and chattles, as manors, lands, tenements, and hereditaments being freehold, so as the same exceed not 200*l.* per ann. above reprises to any one such hospital, &c. and be not holden of the crown in chief, or by knight's-service without licence, or writ of *ad quod dampnum*,



*dampnum, the statute of mortmain, or any other law notwithstanding. And such hospital, &c. and the person incorporated, shall have power to sue and be sued, and shall have one common seal to be appointed by the founder, and shall be directed, and visited, placed or displaced, by such persons as the founder shall appoint, according to such rules and statutes as shall be established by the said founder, in writing under his hand and seal, not being repugnant to the laws of this realm. And it shall be lawful for the founder, his heirs and assigns, upon the death or removal of the head, or any member of such corporation, to place others in their room successively for ever.*

tick as are restrained by any act of parliament. 2 Inst. 722.—  
† The estate in the lands whereof the indowment is made must be in fee simpl., either abso-

lute, conditional or qualified; and must be freehold. 2 Inst. 722.

‡ Made perpetual by 21 Jac. 1. cap. 1.—But by 9 Geo. 2. cap. 36. §. 1. No manors, lands, advowsons, or other hereditaments, nor any money, or other personal estate to be laid out in funds, &c. shall be given to any bodies politic or otherwise, or any ways charged in trust for charitable uses, unless such gift (other than stocks in the publick funds) be made by deed indented, in presence of two witnesses, twelve calendar months before the death of such donor, and be inrolled in chancery within six calendar months after execution; and unless such stocks be transferred six calendar months before the death of such donor; and unless the same be made to take effect in possession immediately from the making, and be without power of revocation.

S. 2. Nothing herein relating to the sealing and delivery of any deed, twelve calendar months before the death of the grantor, or to the transfer of stock six calendar months before the death of the grantor, shall extend to any purchase for a full and valuable consideration.

S. 3. All gifts of lands, &c. or of any charge affecting lands, or of any stock or personal estate to be laid out in funds, &c. for charitable uses, which shall be made in any other manner shall be void.

S. 4. This act shall not make void dispositions of any lands to either of the universities; or the colleges or houses within either of them, or to the colleges of Eaton, Winchester or Westminster, for the better support of the scholars upon the foundation.

¶ If done any other way than by deed inrolled in chancery, it will not be good; but such deed may be inrolled at any time as well after as within 6 months, nor need it be by indenture, but if by deed poll is sufficient; and may be in paper, but must be inrolled in parchment. 2 Inst. 722, 723.

¶ So that the founder cannot erect, &c. any of these for years, lives, or any other limited time, but for ever. 2 Inst. 723.

•• Viz. by deed inrolled in chancery. 2 Inst. 723.

†† This is added by reason that the hospital, &c. is not properly incorporated but the persons therein placed are to be incorporated; so as the persons to be incorporated by this act must be placed there and named when the founder gives them their name of incorporation; for the parliament incorporates them, and the founder gives them only their name. 2 Inst. 723.

‡‡ They must be of the clear yearly value of 10 l. and not exceeding 200 l. but if upwards of 10 l. a year and under 200 l. they are capable of taking so much more as will make up such deficiency without any licence of mortmain; and if the same shall afterwards happen to increase in its yearly value beyond 200 l. a year yet the same will continue good. And as to goods and chatties (real or personal) they may take of what value soever. 2 Inst. 722.

S. 2. No leases to be of above 21 years.—The right of all persons except the founders, their heirs and successors, is saved.—Ten pounds per ann. laid to each hospital.—Lands not to be aliened from the hospital.

7. 43 Eliz. cap. 2. §. 14, 15. directs how hospitals shall be relievable by quarter sessions.

## House.

See Tref-  
pals (H. a.  
2)

(A) How far it is Privileged against *Entry*, or in what Cases an Entry is lawful by *Common Persons*.

1. **I**F 2 men are *fighting* in a house, a stranger may *enter* to part them, because it is in preservation of the peace. Kelw. 46. b. Mich. 18 H. 7.

2. An abbot was *owner of a house*, and upon a lease of land *reserves rent payable there*; the abby is dissolved and is in the king's hands; the tenant may *justify entry* to pay the rent there; for he has interest in the house, as to this purpose, by the assent and reservation of the owner, and the statute of dissolution reserves all rights, and it seems the patentee of the lands might come to the house also (which was granted by patent to another) to receive the rent; for his interest is like to that of the lessee. Pl. C. 71. Hill. 4 & 5 E. 6. Kidwelly's case.

\* Ow. 114:  
Gresham v.  
Ragg.—But  
to pay a debt  
due on bond  
to the owner  
he may jus-

3. A man cannot *justify entry* into another's house to demand a debt, and a *servant's licence* to enter is to no purpose; but Gawdy J. conceived, if it had been averred, that the master was within the house, the plea had been good. Cro. E. 876. Pasch. 44 Eliz. B. R. \* Holdringshaw v. Ragg.

tify entry, because no place being appointed for payment, the obligor is bound to seek the obligee and find him where he can. Pl. C. 71. Kidwelly's case.

4. *Executor* may *enter* to take goods left there by the testator. Cro. E. 909. Mich. 44 & 45 Eliz. B. R. in case of Seyman v. Gresham.

5. *Domus sua cuique tutissimum est refugium*. 5 Rep. 91. b. Mich. 2 Jac. B. R. Semain's case.

6. One takes a *distress of goods*, but *shews no cause why* he took it, and he put it into a close pound, viz. a house; the *owner brake the house* where the goods were, and took them away, and it was held lawful in this case of tortious taking; for such it was for any thing that did appear; per Hendon and Vernon J. Clayt. 64. Anon.

7. Let a man's possession be rightful or wrongful a *forcible entry* on the house, *though with a lawful pretence*, is a riot. 2 Show. 149. Hill. 32 & 33 Car. 2. B. R. the King v. Stroude.

8. If a man *convicted of murder* has goods in a *tenant's house*; though in the case of the king an entry for a forfeiture may be with force, yet if the *king grants bona felonum* to another, the *grantee cannot enter by force*; for it is a personal prerogative and not communicable, but he ought to bring *trover*. 2 Show. 150. the King v. Stroude.

(B) In

(B) In what Cases it may be broken to enter. By See Sheriff  
'Officers, &c. (B) Trespass (H. a)

1. **I**F *A. wounds B. so that he is in danger of death, and A. flies, and upon this hue and cry is made and A. retreats into the house of J. S. the pursuers may lawfully break the house, if it be defended against them with force.* 5 Rep. 91. b. (h) cites 7 E. 3. 16. and observes that this proves that request ought to be made.

Hawk. Pl. C. 86. cap. 14. f. 7. — 4 Inst. 177.

2. In bill of trespass it was not denied by the plaintiff, but that the sheriff, by *capias awarded upon an indictment of \* trespass*, may break the house to serve the arrest. Br. Trespas, pl. 248. cites 27 Aff. 35. [ 316 ]

if in such case he breaks the house, when he *can enter without breaking it*, viz. upon request made or by opening the door without breaking it, he is a trespassor. — \* Or upon indictment for any crime whatsoever. 2 Hawk. Pl. C. 86. cap. 14. f. 3.

3. In case of *felony*, or \* *suspicion of felony*, the king's officer may break the house to take the felon; because it is for the good of the common wealth to take felons, and because in every felony the king has interest; and *where the king has interest, the writ of itself † is a non omittas propter aliquam libertatem*, and so the liberty or privilege of a house shall not hold against the king. 5 Rep. 92. (d) cites 9 E. 4. 9.

ed, it seems the better opinion at this day; that no one can justify the breaking open doors to apprehend him. 2 Hawk. Pl. C. 86, 87. cap. 14. f. 7. cites H. P. C. 91. — † See Gilb. Hist. of C. B. 22, 23. for the original of this notion, that the king's process is a non omittas of course.

4. It is not lawful for any cause except felony or treason to break a house in the night. Cro. E. 741. Hill. 42 El. C. B. Smith v. Smith.

5. In case of a contempt sheriff may break the house. See Cro. E. 909, Mich. 44 Eliz. at the end of the case of Seyman v. Gresham.

6. Upon a *capias utlagatum* sheriff may break open the house. Yelv. 28. in case of Semayne v. Gresham.

— S. P. Agreed. Cro. E. 908. Mich. 44 Eliz. B. R. in case of Seyman v. Gresham. — S. P. For this process is in law at the suit of the king. 4 Le. 41. pl. 111. Mich. 19 Eliz. C. B. Kemp v. Windsor.

7. A. and B. were joint-lessees of a house. A. was bound in a statute to J. S. and died. J. S. sued extent. The sheriff returned him dead. J. S. sued another writ to extend all the lands which he had when he acknowledged the statute, or after, and all goods which he had at his death. Whereupon the sheriff and jury came to the house, the door being open (there being goods of A. there) and offering to enter B. shut the door against them. It was resolved, 1st. That every man's house is as his castle, as well to defend him against injuries as for his repose. 2. Upon recovery in any real action, or ejectment, the

\* As where the sheriff has cap. against one to find sureties *de se bene garando*, he may break the house to arrest the party. Agreed by all the justices of B. R. and of Serjeant's-Inn in Fleet-street. Mo. 606. pl. 837. Trin. 42 Eliz. Anon. — If a constable or other officer has a

warrant to levy monies adjudged by justices of peace to be levied according to a penalty in an act of parliament, he may, upon demand and refusal, break the house to execute the warrant; for the king being intitled to the part of every forfeiture by such act, the law has given him such prerogative for the recovery of his duty. [2] Jo. 233, 234. Trin. 35 Car. 2. Resolutions of the judges upon the 22 Car. 2. 1. of Conventicles.

[ 317 ] 8. A bailiff having process against B. who lay in the house of J. S. knocked at the door, whereupon the wife of J. S. came and opened the door a little to see who was there, and presently he with others rushed in with drawn swords upon her whether she would or no, and broke open the chamber door where B. lay. It was held in the Star Chamber by Hobart Ch. J. and the Ld. Ch. B. that the first entry was unlawful; for the opening the door was occasioned by them by craft, and because they used great violence in that and the adjoining house, and hurt several persons, they were fined 200 l. a piece. Hob. 62. Park and Percival v. Evans.

9. Though bailiffs cannot break open a house to make execution, yet if they enter, the door being open, and afterwards the defendant imprisons them there, the sheriff may justify breaking open the door to free his bailiffs. 2 Roll. R. 137. Mich. 17 Jac. B. R. White v. Wiltshire.

to be S. C. — But if the sheriff be in one room, he may break open another room upon refusal to let him in; per Doderidge and Haughton. Palm. 54. S. C. — But where the sheriff made use of a sham cap. utlag. in order to break open the house, had it been shut, and so to serve a latitat, but finding the door open, he entered with six bailiffs, and he and two of the bailiffs with swords drawn ran up to the chamber, where the man and his wife were in bed, and the doors locked, and knocking a little without telling who they were, or for what reason they came, broke open the door, and took him, and a bond for his appearance to the latitat, &c. the sheriff was fined for the unnecessary outrage and terror of this arrest, and for not signifying that he was sheriff, that the door might have been opened without violence; and the creditor was also fined for using the king's process and prerogative in that sham manner, and by such indirect means defrauding the plaintiff of his liberty of defence of his house against his private debt. Hob. 263. Pasch. 17 Jac. in the Star Chamber. Waterhouse v. Saltmarsh.

10. Commissioners of bankrupt cannot break open a house to search for the bankrupt's goods, unless it be the bankrupt's goods in the

the house of the bankrupt. 2 Show. 247. Mich. 34 Car. 2. B. R. Anon.

11. If bailiff touched the defendant, and then he had retreated into his house, this being an *arrest*, bailiff might have pursued and broke open the house, or might have had an attachment or a rescous against him. 1 Salk. 79. Trin. 3 Annæ B. R. in case of Genner v. Sparkes. 6 Mod. 173, 174. S. C.

12. If a person authorized to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify the breaking open the doors upon a *capias* from the King's Bench or Chancery, to compel a man to *find sureties for the peace or good behaviour*, or even upon a warrant from a justice of the peace for such purpose. 2 Hawk. Pl. C. 86. cap. 14. s. 2, 3.

13. So where a *forcible entry or detainer* is either found by inquisition before justices of peace, or appears upon their view. Ibid. s. 6.

14. So where one known to have committed *treason* is pursued either with or without a warrant, by a constable or private person. Ibid. s. 7.

15. So where an *affray* is made in a house in the view or hearing of a constable; or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case. 2 Hawk. Pl. C. 87. cap. 14. s. 8.

16. But it hath been resolved, that where *justices of peace* are, by virtue of a statute, authorized to require persons to come before them, to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors of the persons who shall be named in any warrant made in pursuance of such statute, in order to be brought before the justices to take such oaths; because *such warrant is not grounded on a precedent offence*; neither does it appear, that the party either is or will be guilty of any. Ibid. s. 11.

(C) *Stealing out of Houses, Shops, Outhouses, &c.* [ 318 ]  
How punishable. And what shall be said such Stealing. See Master and Servant.

1. 10 & 11 W. ENACTS that all persons who by night or day shall in any shop, coach-house, ware-house, stable privately and feloniously steal any goods, wares or merchandizes of the value of 5 s. or more, though such shops, &c. be not broke open, and though the owner, or any other person be not in such shop, &c. or that shall assist, hire or command any person to commit such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof, shall stand mute or challenge above 20 of the jury, shall be excluded from the benefit of the clergy. A. the owner of a shirt, left it in the shop of B. to be sent to a seamstress to mend, and J. S. stole it out of the shop. The judges were of opinion that this was not felony within the statute, to exclude the offender from his clergy; for the statute was

was made as a remedy for the owners of shops to preserve their own goods, which might be left there by way of trade, but did not extend to goods casually left there, and consequently the stealing of such goods, to the value of 5s. was not felony without benefit of clergy, and the jury on an indictment gave a verdict accordingly. 8 Mod. 165. Trin. 9 Geo. 1724. Anon.

Serjeant Hawkins says, that this statute is defective in neither mentioning persons outlawed, nor accessories, and that it is not helped by the 3 & 4 W. & M. 9. because it is subsequent to it. 2 Hawk. Pl. C. 350. cap. 33. f. 68.

\* 4 & 5 P. & M. 4. is, command, hire or counsel to do robbery in a dwelling-house.

Serjeant Hawkins says, that this statute (like the 10 & 11 W. 3. 23) seems defective as to persons outlawed and accessories. 2 Hawk. Pl. C. 350. cap. 3. f. 68.

2. 12 Anne, cap. 7. enacts that every person who shall feloniously steal any money, goods or chattles, wares or merchandises of the value of 40 s. or more, being in a dwelling house, or out-house thereunto belonging, although such house or out-house be not actually broken by such offender, and although the owner of such goods, or any other person or persons be not in such house or out-house, or shall assist or aid any person or persons to commit any such offence, being thereof convicted or attainted, by verdict or confession, or being indicted thereof, shall stand mute or will not directly answer to the indictment, or shall peremptorily challenge above the number of 20 returned to be of the jury, shall be absolutely debarred of and from the benefit of the clergy.

Provided that nothing in this act shall extend to apprentices under the age of 15 years, who shall rob their masters as aforesaid.

See (E)  
pl. 1.

### (D) What passes by Name of a House.

1. **A** Grant was made per nomen mesuagii five tenementi; per Dyer Ch. J. neither the garden nor land do pass by this grant; for by this word (mesuagium,) nothing passes but the house and the circuit of the house; a garden is a thing distinct; for in a præcipe quod reddat, the writ shall say de uno mesuagio & uno gardino, which proves them to be several. Quod alii iustitarii concesserunt, and by this word tenementum, as it is here put, no land passes, because this is but the name of the house; for the deed is five tenementum, but if it was et tenementum, it would be otherwise. Brown J. was of a contrary opinion, but Weston J. said, that this passes by the name of the mesuage with an averment that they have been occupied together. Mo. 24. pl. 82, Pasch. 3 El. Anon.——Dal. 26. pl. 5.

[ 319 ]

### (E) What is Parcel of it.

1. **E**xecutors cannot take a furnace set up by the testator, nor boards fixed to the house as cieling, or testours of board fixed to the house, or any thing fixed to the land with mortar or stone, or tables dormant which are set into the ground. Kelw. 88. pl. 3. Hill. 22 H. 7.——Trin. 21 H. 7. 26. b. 27. pl. 4. S. P.

Contra;  
that a  
house in a

2. A house will pass in a lease or feoffment by name of all his lands in D. because the words of a grant are to be taken most strongly against



against a grantor; but it is otherwise in a will. 2 And. 123. Pasch. will, will  
41 Eliz. Heydon's case. pass by the  
words, all  
my lands, but that lands will not pass by the word house. Mo. 359. Ewer v. Heydon.

3. *Handmill, brewing-lead* (suppose a cooler) and *washing-fatt* were objected to be things always fixed to the house, and to go to the heir, and not to the executor, as 20 H. 7. . . . . is. Sed non allocatur, because the executor having declared that he was possessed of them, as *de bonis suis propriis*, it shall be intended that they were severed from the freehold and so lying by, and especially nothing appearing to the contrary by the defendant's plea. Cro. J. 129. Mich. 4 Jac. B. R. in the case of Wood v. Smith.

4. The \**curtelage* is parcel of the house, and doth pass with the same; and the farmer or tenant cannot take away the *pavement* from the curtelage; because it is parcel of the same. Per Coke Ch. J. 2 Bull. 113. Trin. 11 Jac. B. R. in case of St. John v. Pyott. \* S. P. and shall pass without saying cum pertinentiis, as a

*stable or dove-house*, but they doubted of a *garden* being a place of pleasure. But the garden being inclosed with the house and curtelage by a brick wall, adjudged it passed. Cro. E. 89. Hill. 30 Eliz. B. R. Curden v. Tuck.

5. *Shelves* are parcel of the house not to be taken away; per Coke Ch. J. 2 Bull. 113. Trin. 11 Jac. B. R. in case of St. John v. Piott. And shall be intended to be fixed, and judgment affirmed in B. R. Cro. J. 330. Pyott v. St. John.

6. A miller takes a *millstone* out of the mill to pick it, that it may grind the better, though it be actually severed from the mill, yet it remains parcel of the mill, as if it had been lying on the other stone, and by demise or conveyance of the mill shall pass with it. 11 Rep. 50. b. Mich. 12 Jac. in Lyford's case.——cites 14 H. 8. 25. b. Wistow's case.——Br. Distress, 23. 6 Mod. 187. in case of the Queen v. Wheeler. —Fin. Law. Octav. 39.

7. *Doors, windows, anvils* and *keys*, though they are distinct things, yet shall pass with the house. 11 Rep. 50. b. in Liford's case.

8. The *faggot stack* is part of a man's house, and therefore action lies for setting the stack on fire, by which damages ensue. per Holt Ch. J. Comb. 459. Mich. 9 W. 3. B. R. in case of Turbervill v. Stamp.

9. Though *pictures* and *glasses* generally speaking are part of the personal estate, yet if put up *instead of wainscott*, or where else wainscott would have been put up, they shall go to the heir; the house ought not to come to the heir maimed and disfigured; per Wright K. Trin. 1705. 2 Vern. 508. Cave v. Cave.

10. *Wainscott* put up with *screws* shall remain with the freehold; per Wright K. 2 Vern. 508. Cave v. Cave.——cites 4 Rep. 64. a. Herlackenden's case. If fixed by the lessee, may be taken down during the term, if the freehold be not thereby weakened. Salk. 368. Mich. 2 Annæ, Poole's case.

(F) Where there are *several Owners of several Parts.*

6 Mod.  
312. Arg.  
S. C. cited,  
but 314. the  
case of  
Kelw. 98.  
is doubted

1. **I**F a man has the upper rooms in a house, and another has the foundation and lower rooms, and the *upper rooms* are out of repair, the owner of the *lower-rooms* shall have an action against him that has the upper-rooms; and so it shall be vice versa for not *repairing* of the foundation. Kelw. 98. b. pl. 4. Pasch. 23 H. 7.

where it is held that the owner of the lower-rooms of the house is bound to repair the foundation. There is indeed in F. N. B. 127. a writ to a mayor to command him that has the lower rooms to repair *the foundation*, and him that has the garret to repair *the roof*, but that is founded on a *custom*. Per tot. Cur. in case of Tenant v. Golding.——Saund. 322. S. P.——11 Mod. 7. Pasch. 1702. B. R. S. P. Anon. But the reporter makes a quære.

2. A. has the *upper-chamber* in fee, and B. the *lower* part of the house in fee. A. pulled down his.—Per the Justices he may build it up again, if he does it within *convenient time*. It was said, it had been a question, if a man might have a freehold in an upper-chamber? Godb. 44. Mich. 28 & 29 Eliz. C. B. Marsh v. Palford.

3. The plaintiff shews by his bill that his house and the defendant's are joining together, and *supported by one main wall, standing partly upon the freehold of either* of the said parties, and the plaintiff having also an entry, garret and other necessary rooms standing upon the kitchen of the defendant; he the *defendant, went about to pull down the said wall, and thereby to overthrow the said garret*; the defendant made title to some of the upper-rooms, and hath pulled down part of the walls; an *injunction* is awarded to stay the defendant, to pull down any more of the wall, or any part of the said house, whereby the said upper rooms may be overthrown, or impaired *until the matter be heard*. Cary's Rep. 128, 129. cites 22 Eliz. Bush v. Field.

(G) *Division of Houses.*

1. **O**N E house, *originally entire* and undistinct, may become several and distinct, by dividing it into distinct partitions, and allotting them *distinct avenues*, so as the several inhabitants have no communication with one another. And in that case, if the *owner lives in one* of the separate apartments himself, and an inhabitant of another separate apartment goes away, that tenement which he occupied is not now an *empty tenement*, but the possession of it devolves upon the owner, and that with the tenement in his possession before, make one entire tenement now, for which he is *rateable to the parish*; but if there be *two several tenements originally*, and they become inhabited by *several families*, who make but *one avenue* for both, and use it promiscuously, yet in respect of the original severalty, they continue severally rateable; per Holt Ch. J. 6 Mod. 214. Trin. 3 Annæ. B. R. Tracy v. Talbott.

(H) *Disputes*

(H) *Disputes between Neighbours. Where Houses are contiguous.* Stopping  
Lights.

1. **A**CTION on the case lies for *nailing boards to the plaintiff's house.* 2 Roll. R. 238. 241. Mich. 2 Jac. B. R. Gwinn v. Dampport.

2. Case for *stopping* a gutter, through which water descended to, &c. The declaration was, that he was *possessed of a house and yard, and that he and all, &c.* counsel excepted to it, because he lays himself but in possession, of &c. and alleges not a seisin in fee, (as he ought to do) in the person in whom he prescribes; but he granted that it would have been good if he had *laid a possession of the gutter*, but this he does not neither, so that it comes within neither of the rules. Judgment was staid 'till moved of the other side. 2 Show. 81. Mich. 31 Car. 2. B. R. Pepyn v. Bustin.

3. If A. has two houses, and the house of office of the one is contiguous to the cellar of the other, but defended by a *wall*, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office; for he whose dirt it is, must keep it, that it may not trespass; per Holt Ch. J. 1 Salk. 361. Tenant v. Goldwin. 6 Mod.  
314. S. C.  
Mich. 3  
Annæ.  
B. R. S. C.

4. If the plaintiff make a *new cellar under defendant's old privy*, or in a vacant piece of ground which lay next the old privy before; in such case, the plaintiff must defend himself; per Holt Ch. J. 1 Salk. 361. in case of Tenant v. Goldwin. 6 Mod.  
314. S. C.

5. If A. has a *house and cellar contiguous* to it, and *one wall* serves for both, and he sells the cellar. Who shall repair the wall? per Holt Ch. J. 6 Mod. 313. in case of Tenant v. Goldwin.

6. If the house of *one* is *likely to fall* to the prejudice of another man's house, a writ de domo reparando will lie; and it is no matter, whether it be an ancient house, or a new one: but if the one was an old ruinous house, and a new house be built near, it will not lie; because the word *debet* in the writ would exclude him, and the word *solet* in the writ may be left out. 6 Mod. 312. Mich. 3 Annæ, B. R. in case of Tenant v. Goldwin. 1 Salk.  
360. S. C.  
and P.—  
Every man  
of common  
right ought  
so to sup-  
port his  
own house,  
as that it

may not be an annoyance to another man's; per Holt Ch. J. Pasch. 1702. 11 Mod. 8. Anon.

## House of Correction.

### (A) *Erected How, and for what Purposes.*

1. 39 Eliz. **E**Nacted that *the justices of peace of any county, &c.* \* See 7  
Jac. cap. 4.  
Inf.—  
† The ge-  
cap. 4. *assembled at any quarter-sessions of the peace, or the  
major part of them, may make order for the \* erecting of one or more  
houses*

general word *houses of correction, and may make orders for the doing thereof, and* (offenders) *for providing a stock and things necessary, and for punishment of + of-* is by the *fenders, as they shall think fit, from time to time.* statute of

7 Jac. cap. 4. in the first branch, explained to be *wandering or idle persons*, and by many other branches of that act to be *idle or disorderly persons*; and especially by the branch, whereby the authority of the justices \* to commit to the house of correction is warranted, all *idle or disorderly persons* may be committed by them to the house of correction and work-house. And it was resolved by all the judges of England, for instruction of the justices of peace for the due execution of this act, that *able-bodied persons, though not wanderers abroad out of the parish, refusing to work at such wages as are taxed or commonly given in those parts*, are, notwithstanding, not to be sent to the place of their birth or last dwelling by the space of a year, but to the house of correction upon consideration had of both the statutes of the poor and rogues. But if they have any *lawful means to live by*, then they are not to be sent to the house of correction, though they are *able-bodied*, and refuse to work. 2 Inst. 730.

But by the statute of 7 Jac. enacted long after the resolution of the judges, *though they have lawful means to live by, yet if they are idle or disorderly persons*, the justices of peace have power to commit them; and this is a general power without excepting any person. And their *mittimus* may be more safely upon the statute of 7 Jac. *Quia otiosa inordinata persona*, or *quia otiosa persona*, or *quia inordinata persona*; according to the words of this act, (which in S. 5. are in the disjunctive) than upon the 39 Eliz. 2 Inst. 730.

See Hospitals. (A) and the notes there.

S. 4. Enables every person seised of an estate in fee simple, by deed inrolled in Chancery, to erect, found, and establish one or more hospitals, abiding places or houses of correction, as well for sustentation of the poor, as to set poor on work, &c.

\* Many of the former laws made for punishment of rogues, vagabonds, and sturdy beggars, were repealed by 1 E. 6. 3. and all the rest were repealed by 39 Eliz. 5. 2 Inst. 728.

2. \* 7 Jac. c. 4. Enacts, that in every county + where a house of correction was not before that time provided, there shall be + erected, built, or otherwise provided, one or more convenient house, or houses, with a backside adjoining, with mills, turns, cards, and necessary implements, to set idle persons on work, in some convenient place, or town of the county; || which shall be purchased, conveyed, or assured to such persons, as the justices of peace in sessions shall think fit, in trust to be employed, &c. for the keeping, correcting, and setting to work the said rogues, vagabonds, and sturdy beggars, and other idle and disorderly persons. Or else every justice of peace was to forfeit 5 l. to be employed for the erecting, procuring, &c. such house.

39 Eliz. 5. 2 Inst. 728. —† Upon a question, whether justices of peace could cause a house of correction to be erected in a county which had one already, it was objected, that this power of the justices was by the 39 Eliz. cap. 4. which statute is expired. But per Holt Ch. J. The 39 Eliz. is continued by 3 Car. 1. and all acts continued by 3 Car. 1. are likewise continued 'till it be otherwise ordained, and this stands upon the same foot, which is no otherwise continued. 1 Salk. 362. Pasch. 1 Annæ, B. R. The case of the hundred of Black-heath. — And justices of peace may by 39 Eliz. 4. increase the number of work-houses if necessary, but it must be at the charge of the whole county; because the house of correction must be for the whole county, and cannot be erected for a particular precinct, unless in boroughs and corporations; and Holt Ch. J. held, that this could not be done by any authority at common law, because it was no charge at common law. Where the common law creates a charge upon any precinct, as to repair bridges, ways, churches, &c. the common law gives them the method of answering that charge; otherwise where no charge is by law laid upon them, as in this case; therefore a majority cannot bind the rest, but all must agree; which Powell and Gould justices agreed. 1 Salk. 362, 363. Pasch. 1 Annæ, B. R. the hundred of Blackheath's case.

† 39 Eliz. used only the word (erected) but that included the two other words of this act (built and provided.) For if they caused a house already built, to be provided or purchased, and converted the same to a house of correction, this is an erection, within the statute of 39 Eliz. Because as to the house of correction it was newly erected. 2 Inst. 730. — || So that this act enables the doing it without licence or offence of any former law; and these may be incorporated by the statute 39 Eliz. cap. 5. and it is not only a house of correction, but of safe keeping and setting on work. 2 Inst. 730.

## (B) Supported. How.

1. 39 Eliz. **D**irected that all fines and forfeitures by that act cap. 4. s. 3. (except such as are thereby otherwise disposed of) shall be employed for reparation of the houses of correction, and stock and store thereof, or for the use of the poor of the parish, as the justices of peace shall think fit.

The Lord Chancellor or Lord Keeper, may from time to time grant commissions, to enquire by oath of persons, as by witnesses and examination, of monies collected for maintenance of houses of correction, &c. which money shall be collected or employed for erecting or maintenance thereof. That act is continued by 3 Car. 1. 3 & c. 7. Ca. 1. c. 4.

2. 7 Jac. cap. 4. s. 6. The justices at their sessions may appoint a yearly allowance to the master of the house of correction, to be paid quarterly beforehand by the treasurer appointed by 43 Eliz. 2. the master giving security for continuance and performance of the service, which if the treasurer shall not do, the master may levy it, as the treasurer might have done.

[ 323 ]

## (C) Governor, appointed How. His Power and Duty.

See Hospitals (A.)

1. 7 Jac. **E**NABLES the justices of peace in their sessions cap. 4. s. 4. to elect and appoint one or more persons to be governor or master of the house of correction, who shall have power to set rogues, vagabonds, and idle and disorderly persons to work and labour, being able; and to punish them, by putting fetters or givings on them, and by moderate whipping of them; which persons shall not be chargeable to the county, but shall have such allowance as they deserve by their labour.

S. 9. If the governor shall not every quarter-sessions, yield a true and lawful account to the justices, of all persons committed to their custody; or if the persons committed be troublesome to the country, by going abroad, or shall escape away, before they be lawfully delivered, the justices may in sessions set down such fines and penalties on the master, as they shall think fit, which shall be paid to the treasurer.

2. It was moved to quash an order of sessions for removing the keeper of the house of correction, it being to discharge him for divers and sundry crimes, not specifying what crimes in particular; and it was said, that place is not at the will of the justices, neither by the common law, nor by the statute; per Cur. the justices have power to turn him out for misbehaviour, but not arbitrarily; they ought to have specified the cause in their order; and it was therefore quashed. 11 Mod. 165. Hill. 1707. B. R. the Q. v. Apsey.

• See Vagrants.—  
See Work-houses.—  
So as if she will discharge the parish of the keeping of the bastard, she cannot be punished—

### (D) What \* Offenders may be sent thither.

1. 7 Jac. cap. 4. f. 7. **E**NACTS that the justices of peace, shall commit to the house of correction every lewd woman, who shall have any bastard, which may be chargeable to the parish, there to be punished and set on work for one year; and for such \* second offence, then to commit her as aforesaid, and there to remain 'till she put in good sureties for her good-behaviour not to offend *ſc* again.

ed by this statute, but by that of the 18 Eliz. 3. 2 Inst. 733.—\* A. had a bastard, but she was not questioned for it, no proceeding being had against her upon the statute of 18 Eliz. 3. She had afterwards a second bastard. Jones J. at Shrewsbury assises, 19 Mar. 7 Car. was of opinion, that she should not be punished upon this statute of 7 Jac. 4. as for her second offence, unless she had been before questioned for her first, but that this second offence shall now be deemed her first offence, and to be punished accordingly. 2 Bull. 348, 349.

S. 8. Persons able to labour, running away and leaving their children to the charge of the parish, shall be deemed and punished as incorrigible rogues. And such as threaten to do so, the same being proved by two witnesses upon oath, before two justices of P. of the same division, shall be by the same justices sent to the house of correction to be punished as sturdy rogues, (unless they put in sureties to discharge the parish,) and not to be delivered, but at the meeting (by the said act directed) or at the quarter sessions.

[ 324 ]  
Trial (F.c)  
pl. 6. &c.

## Hundred.

### (A) Hundred. [What is.]

Fol. 73.

[ 1. **A** Hundred and a wapentake are all one. Polycron. 49. b. ]  
[ 2. Selden in his notes upon Fortescue, cap. 24. fol. 25. 17 E. 2. Attaint. 69. In an attaint a challenge was taken, because no knight was returned, and the sheriff there said, that there are not any knights in the wapentake, where the land lies. 2 E. 1. Rot. Finium membrana 2. a wapentake in the beginning is called a hundred in the end. ]

3. Hundred is to have jurisdiction or power to administer justice in 100 vills or of 100 men or of 100 parishes. Br. Court Baron, pl. 8. cites 8 H. 7. 3. per Rede.

4. Every ward in London is as an hundred in a county, and every parish in London as a vill in an hundred. 9 Rep. 66. b.

5. Hundreds were either parcel of the counties, and there the sheriff did constitute bailiffs, (viz. those hundreds which were  
anciently



sufficiently parcel of the farm of the sheriffs, that the statute 2 E. 3. cap. 12. speaks of) or else they were *such as were granted out, which the lord of the hundred sometimes held at farm, and sometimes in fee* called hundreds in fee, liberties of hundreds, franchises of hundreds. per Hale. Ch. B. Vent. 405. Hill 22 & 23 Car. 2. in case of Atkins v. Clare.

6. In king Alfred's time, the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the king's relations had the government of them, and therefore they were called *consanguinei*, and so are the earls, lord-lieutenants, &c. at this day; and then when the office became troublesome, there were ordained *vicecomites*, which name remains to this day, and the others continue to be called *consanguinei*, but have no power in the county, having only the honorary name of earls or *comites* of such or such a county, &c. And for the better government of these counties the *vicecomites* had two courts; but out of those the king granted petty leets and courts baron; but the turn of the sheriff had yet a superintendant power, they being derived out of the sheriffs turn, as in Dyer, 13. And then afterwards the king granted away some hundreds in fee-simple, and some franchises, and the last excluded the king utterly, but the hundreds granted in fee were not wholly exempt.—On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of 9 Edw. 2. *That sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the king and country, and that bailiffs and farmers of hundreds should be sufficient men.* And at this time hundreds were grantable for years.—Then came the statute of 2 Ed. 3. cap. 4 & 5. *That sheriffs should continue but for one year.* But this took not away the whole inconvenience; for the crown still granted away bailiwicks and hundreds, for lives, at rents on such excessive dear rates, that made them endeavour to make up their money by unlawful means; and thereon came the statute of 2 Ed. 3. 11. and 14 Ed. 3. 9.—By the first it was enacted, *That all hundreds and wapentakes granted by the king shall be again annexed to the county, and not severed.* And by the other statute, *that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer and no more should be granted for the future.* And one reason of this was, because the king granted away hundreds, and abated not the sheriffs farm. Arg. 2 Show, 98, 99. Pasch. 32 Car. 2. B. R.

7. A hundred is only a franchise consisting of a court, called the hundred court, and probably has the return of writs; and by such grant, the franchise passes, but not all the grantor's lands in the hundred; per Ld. C. King. 2 Wms's Rep. 400. Mich. 1726. Bays v. Bird.

[ 325 ]

## (A. 2) Cur. [or, why so called]

[ 1. **A** Hundred was called a *wapentake*; because the inhabitants of the towns of the hundred delivered a weapon at the coming in of the lord. Polycronicon, 49. b. Selden in his notes upon Fortescue, cap. 24. fol. 25. ]

See (D)

[ 2. A *leet* may be parcel of a hundred by prescription. 8 H. 7. 1. 3. b. ]

(B) *What Person may have it of common Right.*

Of old time hundreds were parcel of the crown belonging of common right to the king; per Hale Ch. B. Vent. 403. Hill 22 & 23 Car. 2. in case of Atkins v. Clare.

[ 1. **O**F common right, every hundred belongs to the king in right of the crown. 11 H. 4. 89. b. ]

(C) *Who may have it by other Means.*

Raym. 360.  
Cole v.  
Ireland.  
contra.

[ 1. **A** Common person may have it by grant immediately from the king. 11 H. 4. 89. b. ]

[ 2. A common person may have it by prescription in him and his ancestors. 11 H. 4. 89. b. ]

[ 3. A common person may have it by grant of *J.* who had it by prescription in him and his ancestors. 11 H. 4. 89. b. scilicet, the actual possession, and amerce, and do other such things. ]

[ 4. A common person may have it by *disseisin*, and amerce, and do other things as lord. 11 H. 4. 89. b. 13 H. 4. 9. b. ]

[ 5. 2 E. 1. Rot. Finium membrana, 2. The wapentake of Workelworth and Essenbury granted to farm to, &c. ]

[ 6. 11 E. 1. Rot. Finium membrana, 6. de hundredo commissio quamdiu regi placuerit, &c. membrana, 12. de hundredo commissio upon an ad quod damnum returned, &c. ]

[ 7. 9 E. 1. Finium membrana, 11. The bedelry of the hundred of Lastane leased to farm quam diu bene, & fideliter se habuerit. ]

[ 326 ]

\*See (A. 2)

pl. 2.

An hundred may be parcel of

a manor. Br. Court baron, pl. 23. cites it as admitted 27 H. 6. 2.—It may as well be parcel of a castle, as it may be of a manor. 4 Rep. 88. b. cites 8 H. 7. 1.

## (D) How. [And what is \* Parcel.]

[ 1. **A** Man may have a hundred as appurtenant to a manor. 11 H. 4. 89. b. ]

[ 2. 31 E.

[ 2. 31 E. 3. Rot. Chartarum membrana, 2, 22. grant of a hundred, and that which appertains, specified. ]

*not a real grant*; for it is but a jurisdiction, and is intire. Arg. Sti. 101. Pasch. 24 Car. in case of *Thyn v. Thyn*. A hundred cannot be demanded by

(E) *Exempt* from the Sheriff in what Cases; and Pleadings.

1. 2 E. 3. 12. ENACTS that *hundreds and wapentakes shall be again adjoined to the counties, and shall never hereafter be given or severed therefrom.*

2. 14 E. 3. 9. enacts, that *all wapentakes and hundreds which be severed from the counties, shall be rejoined to them again: the sheriffs also shall hold the same in their own hands, and put in such bailiffs and hundreders (having lands in the bailiwicks and hundreds) for whom they will answer.*

3. If the king makes a man *bailiff of a sheriff of a hundred*, it is void; for otherwise the sheriff should have a bailiff against his will, and yet he would be subject to answer escapes suffered by the bailiff. And it seems that all grants made of late times of such liberties, are void by the 14 E. 3. 9. Per Coke. Hill. 12 Jac. B. R. Roll. R. 119. in case of *Vill of Darby v. Foxley*.

4. In an action on the *case* against the under-sheriff of G. the jury found a *special verdict* to this effect; viz. that king E. 3. anno 17 of his reign, granted to the abbot, &c. of C. *certain hundreds, &c. with retorna brevium, &c. tanquam pertin. &c. which the abbot, &c. enjoyed till the dissolution, when it all came to the crown, and that 6 E. 6. the same was granted with tot talia, &c. libertates, &c. ratione vel pretextu hundred. prædict. virtute vel colore alicujus doni, chartæ prescriptionis, &c. to K. under whom the plaintiff claimed, and that the defendant entered into the said hundreds where, &c. and executed several writs, &c.* Two of the judges were of opinion that this grant was void, because by 2 E. 3. 12. it was ordained, that from thenceforth hundreds should not be severed from the counties, and by 14 E. 3. 9. those which were separated from the counties, should be rejoined to the counties. But Hale Ch. B. was of the contrary opinion, and held, that the grant to the abbot, &c. of *retorna brevium*, by reason of the words (*tanquam pertin.*) was good to annex it to the hundred; that this coming by dissolution to the king, remained in the crown unextinguished, and was not re-annexed to the county, but preserved by the stat. of 32 H. 8. in the same state it was before; that the grant to K. of *tot, talia, &c. ratione vel pretextu hundred. &c.* was good; for the *ratione vel pretextu hundredi, &c.* governs all, and is more large than *tot, &c.* that this liberty was effectually revived, the grant leaping over to the seisin which the abbot had, and so became again conjoined, and that there was no need of special words to revive it, the *tot, &c.* being sufficient; though had there been an *act of resumption*, as in *PAGET AND DARCEY'S CASE*; or if the thing was *meerly personal*,

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as in the ABBOT OF WALTHAM'S CASE; such *general words would not revive* and pass the same, because of the *ratio privata*, which intervenes; that the verdict was deficient in not finding, as it ought, the most effectual statute in aid of this case, which is 1 E. 6. 8. which enacts, that all letters patents, &c. of any honours, &c. liberties, &c. should be good, &c. notwithstanding misnaming, misreciting or non-recital of, &c. lastly, that the stat. 2 E. 3. 12 and 14 E. 3. 9. *extend only to those hundreds that were parcel of the sheriff's farm, and not to those which were divided; nor are they to be understood of hundreds, where a retorna brevium is granted; for in that case, the sheriff is not at any inconvenience; for the grantee must do all and be liable to escapes, &c. And therefore judgment was given for the plaintiff. Hill. 22 & 23 Car. 2. in Scacc. 1 Vent. 399. Sir Robert Atkyns v. Clare.*

5. *Grant of a hundred, and the offices and profits thereto belonging, with the execution of all writs within the same for 21 years, by letters patents does not exclude the sheriff from executing writs, but the grant is void. 2 Show. 98. Pasch. 32 Car. 2. B. R. Cade v. Ireland.*

Raym. 360. S. C. says that the stat. of 2 E. 3. 12. extends only to such hundreds as were let to farm, by the then king, and the stat. 14 E. 3. 9. is relative to the other.—

6. The question was, whether after the statute of 2 E. 3. 12. 14 E. 3. 9. the king might *lease hundreds for life or years*, or sever them from the counties, which were not out of the crown in fee at the time of those statutes? and the court after great deliberation were of opinion, that by those acts, hundreds *are annexed to the counties*, and that letters patents of them afterwards have been, and are void; wherefore they gave judgment for the plaintiff against Ireland the patentee, according to the opinion of Coke. 1 Roll. R. 119. 4 Inst. 267. and according to a resolution of the Exchequer, 19 June 1675. in the case of the same Ireland and Buckbury. Skin. 41. Pasch. 34 Car. 2. B. R. Cole v. Ireland.

Upon construction of both acts, all hundreds which were not granted in fee by the crown before, were joined to the office of the sheriff, and not such hundreds only as were granted by king E. 3. Pasch. 34 Car. 2. B. R. 2 Jo. 194. Cole v. Ireland.

7. *Quo warranto*, to shew cause why he executed the office of a bailiff of the hundred of B. The defendant *pleaded*, that *the hundred, the office of bailiff, and the hundred court, were ancient; and that the return of writs was an ancient liberty, and franchise; that K. Ch. 1. was seised of the said franchise in jure coronæ in fee, and granted the same to one North, habend. the said hundred to him and his heirs, which by several mesne assignments came to the defendant, and so justified to have retorna brevium.* Upon demurrer it was argued that this claim was not good; for it is a question whether the hundred court can now be separated from the county court; it hath been derivative from it formerly, when sheriffs let their hundreds to farm, and those farmers put in bailiffs errant to the great oppression of the people, which was the occasion of the statute of E. 3. whereby the hundreds were united to the counties, except such as were granted in fee by that king, or his ancestors, which was usually done to abbots, whose possessions by the dissolution of abbots were afterwards merged in the crown, and cannot be regranted since the statute; so neither has the defendant prescribed to have this office; for

for the *setting forth*, that it is an ancient office is not a prescription, but only a bare averment of its antiquity, but if he had *prescribed* he could not have done it by a *que estate* to have *retorna brevium*, because they are *matter of record*, and so judgment was given against the defendant. Pasch. 4 Jac. 2. B. R. 3 Mod. 199. the King v. Kingsmill.

8. A hundred, when it is granted out to a subject exempt from the county with a hundred court, is then a liberty, else it is not, but the sheriff is to *execute writs* there; if he direct a warrant it is his execution, unless he saith *cui executio brevis pertinet*. Per Holt Ch. J. Cumb. 403. Mich. 9 W. 3. B. R. Hicks v. Woodson.

## Hunting.

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See Game

### (A) Justification of Trespafs.

See Trespafs (L) (B. a)—Warren (I).

1. **A** Man may follow his hawk or his hound in pursuit of the game into another man's ground, being found in his own. cites 30 E. 3. 10.

If a man flies his falcon in his own land

at a pheasant, and he kills the pheasant in another man's ground, he may follow his hawk, and take the pheasant, and is not to be punished, but only for his entry into the other man's ground; per Doderidge. 2 Bull. 61. cites 12 H. 8. 10.

\* Br. Trespafs, pl. 110. cites 36 E. 3. 10. contra, per Knivet, where the pheasant flies into another's warren, and he kills him there, his entry and carrying him away is tortious. — You cannot justify your entry when your hawk has killed a pheasant in another man's land, and so for hares and conies in the freehold of another. But though the law permits and allows such entries as aforesaid, yet the law requires that such things shall be done in an ordinary and usual manner. Brownl. 224. Pasch. 11 Jac. in case of Geush v. Mynne.

2. A man cannot justify the entry into another's land to find vermine, and if he find a badger in his own land, and he earths in another man's, he cannot justify the digging out the badger, because he may get him out by other means. 2 Bull. 62. Pasch. 11 Jac. B. R. Gedge v. Mimms.

Brownl. 224. S. C. —Cro. J. 321. S. C. Geush v. Mynne.

3. It is not lawful at common law for any one to hunt for pleasure or profit, but otherwise where it is for the good of the common wealth; per Doderidge J. 2 Bull. 61. Gedge v. Minne.

The common law warrants the hunting

such ravenous beasts in another man's land, but it must be in an ordinary and usual manner. (viz. by hunting) Cro. J. 321. S. C.

4. A man started a fox in his own land, and his hounds pursued him into another man's land; and it was held, that he may hunt and pursue him into any man's land, because he is a noysome creature to the commonwealth; said to be adjudged in the time of Popham Ch. J. Poph. 163. Pasch. 2 Car. B. R. in case of Millen v. Fandry.

5. A deer comes into my land, I drive her out with my dogs, and the *dogs follow the deer into the park* and kill her there, and the owner of the park kills the dogs, and justifiable. 3 Lev. 28. Mich. 33 Car. 2. C. B. Barrington v. Turner.

Carth. 382. S. C.—5 Mod. 307. S. C.—1 Salk. 212. S. C.—In trespass on this statute. It is sufficient to lay in the declaration, that the plaintiff hunted, without concluding, *contra formam statuti*; for that should come in evidence; per Holt Ch. J. Carth. 383. Trin. 8 W. 3. B. R. Bennet v. Talbois als. Talbot.—See Game (A)—And it need not be laid, that defendant killed any game. Carth. 424. Shadow v. Painter.

7. A qualification to keep a gun or dog is only to hunt in a man's own ground. Arg. Cumb. 420. Hill. 9 W. 3. B. R. Bennet v. Talbois.

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## (B) Property gained by Hunting.

1. **I**F a forester follow a buck which is chased out of the park or forest, though he that hunts him kills him in his own ground, yet the forester or keeper may enter into his ground and retake the deer for the property and possession which he hath in it by the pursuit. Arg. Godb. 123. cites 12 H. 8.

Per Holt Ch. J. 12 Mod. 145. in S. C.—5 Mod. 376. S. C. & P. cites 12 H. 8. 10.—See Godb. 123. Arg.—Per Powel J. 11 Mod. 75.—But if A. starts a hare in his own close, and hunts her into B.'s and kills her there, yet the original property is still in A. and the coursing is a continuance of the property; per Powell J. 11 Mod. 75.

2. If A. starts a hare in my close, and kills her there, then it is my hare; but if A. hunts her into B.'s close, and kills her there, then it is the hunter's. 2 Salk. 556. Mich. 9 W. 3. B. R. in case of Sutton v. Moody.

## (A) Hypothecation.

By the maritime law every contract of the master implies an hypothecation; but otherwise by the common law, unless it be so expressly agreed. Per

1. **B**Y the common law, by which properties are to be tried, the master of the ship could not impawn the ship; for [he has] \* no property either general or special; nor is such power given to him by the constituting him master; but the defendant's counsel said, that by the civil law, the master may in case of necessity, and when he has no other means to provide necessaries for her. And Hobart J. held clearly, that the admiral law is, that † if the ship be in danger at sea, or wants necessaries, so as the voyage may be defeated, the master in such case of necessity, may impawn for money, &c. to relieve such extremities † by employing the money so; for he



is trusted with the ship and voyage, and so may reasonably be thought to have that power implicitly given him, rather than see the whole lost. Hob. 11, 12. Bridgman's case. Cur. & Salk. 34. Mich. & Annæ B. R. Justin v.

Ballam.—Note also, that the master may hypothecate either ship or goods; for he is intrusted with both, and represents the traders as well as the owners of the ship. Ibid.

\* Molloy. 229. S. P. —† Molloy. 235. says that in this case, the common law has thought the laws of Oleron reasonable. —‡ So though the money be not so employed. See Inf. Noy. 95. Scarborough v. Lyrius.

2. A. being in a ship on the sea, B. who was in it, and was *reputed an agent and factor*, borrows 100*l.* of A. upon bottomage (that is when the money is paid on the keel of the ship, and the ship obliged to the payment of it, and if it be not paid at the time, &c. that he that lends the money shall have the ship) and it was allowed to be a good and necessary custom by all; and it was agreed, that if the master, factor, purser, or he that is reputed owner of the ship, borrows money in such a manner for the *necessaries of a ship*, that binds the owner of the ship, although the *money be not so employed*, and the owner has his remedy against him that he so put in trust. And it is not a good allegation to have a prohibition, to say that the property was not in him that took such bottomage. Noy. 95. Scarborow v. Lyrius. Lat. 252. —Molloy 235. 6 14.

3. The master may freight out the vessel, take in goods and passengers, *mend and furnish the ship*, and to that end, if need be in a strange country he may *borrow money with \* advice of his mariners*, upon some of the tackle, or sell some of the merchandize. Molloy, 235. [ 330 ] \* The consent and advice of his mariners is necessary

when he hypothecates the vessel or furniture. But when the ship is well engaged, she is for ever obliged, and the owners are concluded thereby till redemption; though such obligation must be in foreign parts, where the calamity attending the ship is universal; and the master cannot, in every case of necessity, impawn the vessel or furniture. Treat. of Trade and Commerce, 106. cites Leg. Oleron cap. 1. 12. Molloy. 202. —And into whose hands soever the ship may come, it will still be liable; and the same of goods; per Powel J. 6 Mod. 13. in case of Frantor v. Shippin.

4. A master, for any *debt of his own*, cannot impawn or hypothecate the ship, &c. Nor can he *\* sell or dispose* of the same without authority or licence from the owner. Ibid. Hob. 12. in Bridgman's case. —\* He may

in some cases sell the ship, as in case of famine, &c. Jenk. 165. pl. 16. —Upon a question referred to, Ld. Ch. B. Hale, whether the master of a ship of a foreign kingdom may, without the owners, in case of *inevitable danger* sell the ship and tackling battered and torn, and no probability of saving any part, as well in respect of the tempest as of the barbarity of the inhabitants, who took away whatever was cast upon the shore; and Ld. Hale's opinion was in this case, the master could not without the owners sell the ship. Sid. 453. Pasch. 22 Car. 2. Tremehere v. Tresillian.

5. Nor can the master *on every case of necessity* impawn the vessel or furniture; for if she be freighted, and *he and the owners* are to *join in the laying in provisions* for the voyage, and he wants money, yet he cannot impawn the vessel or furniture any farther than his own share in her. Ibid. But in case of necessity, he may pawn the ship, though at land. Comb. 135.

Trin. 1 & 2 W. & M. B. R. in case of Corset v. Husley,

6. If the vessel happens to be *wreckt or cast away*, and the *mariners* by their great pains and care *recover some of the ruins* and lading, the *master* in that case *may pledge* the same, and *distribute the product* thereof amongst his distressed mariners, in order to the carrying *But if the mariners no way contributed to the salvage, then their re-*

ward is  
sunk and  
lost with  
the vessel ;

and the master by dismissing the mariners, without advice from the freighters, may be liable to damages. Treat. of Trade, &c. 107. cites Leg. Oleron. cap. 3.

1 Treat. of  
Trade, &c.  
107. cites  
Molloy  
203.

rying them to their own country. *But if there be any considerable part of the lading preserved, he ought not to dismiss the mariners till advice from the freighters.* Ibid. 236.

7. If a vessel be freighted at the merchant's own charge, and put to sea, and she enters into a harbour, and is there *wind-bound*, and the master delayed in his voyage, till he wants necessaries, he is not only to write home, but may pawn the ship or lading at his pleasure, rather than lose the whole voyage; and *if he cannot pawn the lading, he may sell so much as is necessary.* Ibid.

8. A ship was taken by an enemy, and, *there being no hopes of retaking, was ransomed by the master*; and the question was, whether this was good or not, to charge the owners, &c.? The court said, it seemed reasonable, that the master compounding for goods under these circumstances, should be satisfied by the owners, &c. and it is *so* in the case of *pirates*, a fortiori, in case of lawful enemies. But the merits of the cause not being before them, this point was not adjudged. 6 Mod. 13. Mich. 2 Annæ, B. R. Trantor v. Watson.

And where  
the libel in  
the admir-  
alty was a-

gainst the ship and the party, the court said they would send a prohibition as to the party, unless quatenus it is necessary to make him party towards condemnation of the ship. And so it was done. 6 Mod. 79. S. C. by name of Johnson v. Shepney.

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But if this  
be done at  
sea, where no  
treaty can be  
made with  
the owner,  
and the  
master im-

plies any person to do work on the ship, or to new rig or repair her, this, for *necessity and encouragement of trade*, is a lien on the ship, and in such case the master by the maritime law is allowed to hypothecate the ship. Ibid.

10. If money be laid out in repairing a ship in the river Thames, or in fitting new rigging or apparel of her; this is no charge on the ship, but resort must be for payment to the owner; and in case of a suit in the admiralty to condemn the ship for non-payment, a prohibition will be granted. And it was so decreed by the Master of the Rolls, and seemed admitted by the counsel on both sides. 2 Wms's Rep, 367. Trin. 1726. Watkinson v. Bernardiston.

## Identitate Domini.

(A) Lies. *In what Cases, How and when.*

1. 37 E. 3. 2. ENACTS that if the lands, goods or chattles of any person outlawed for want of a good declaration of his surname shall happen to be seised by any of the king's officers, he may

may have a writ of identitate nominis to discharge them, as hath been used in times past: and in such case, the officer shall take security without fee of the party to answer to the king the value of the thing so seised, if he cannot discharge them. And if the officer be attainted of doing otherwise, he shall pay double damages to the party grieved, and be also grievously punished to the king.

2. An exigent issued against J. N. upon an indictment of felony, and one J. N. came and said that he was of the same name, and prayed an addition to be put in the writ; & non allocatur; for the process is upon an indictment which cannot be changed without the jurors, and if he be grieved, he shall have identitate nominis. Br. Idempt. Nom. pl. 2. cites 9 H. 4. 3.

3. 9 H. 6. 4. enacts that a writ of identitate nominis shall be maintainable by executors as well as by the testator himself, if he were living.

4. The writ de identitate nominis lies, where a man is sued in a personal action, and upon the capias or exigent awarded another man who beareth the same name is arrested by force of the writ, then he who is so arrested shall sue forth this writ of identitate nominis; and this writ shall be directed sometimes to the escheator, if he or his goods be arrested by him, or unto the sheriff, if he be vexed or molested by him. F. N. B. 267. (E).

5. And so if a man be distrained by process out of the exchequer to account, &c. for another person who hath the same name which he hath, then he shall sue that writ to the barons of the exchequer and to the treasurer. F. N. B. 268. (A).

6. Note, that it was agreed by the court, that a man shall never have an identitate nominis where there are two of the same name of baptism, but it always lies of surnames, D. 5. b. pl. 4. Mich. 26 H. 8. Anon.

7. A bill was exhibited against R. H. supervisor of the last will of T. C. and one R. H. was served with process, who was no supervisor of the said C.'s will, and alleged that the said R. H. who was the supervisor, was dead; the court ordered the defendant to put in his allegation upon oath by way of answer, and then desire judgment, whether he shall be compelled to answer the said bill or not; and therein pray his costs for his wrongful vexation, which shall be thereupon allowed to him, Cary's Rep. 87. cites 19 Eliz. Harrison v. Haule.

8. Execution issued out for damages recovered against the bailiff of A. the name of J. S. of D. and there was J. S. the father and J. S. the son, and the father being dead the son sued this writ, and prayed to have a supersedeas, and Warburton J. demanded of Brownlow if he had any precedent to award a supersedeas in such case, who answered no; wherefore he and Hutton J. being only present, said they would advise. Winch. 6. Pasch. 19 Jac. Earl of Northumberland v. Earl of Devon.

Cro. J. 623. S. C. by the name of STUBBS v. COOK, and upon surmise that the suit was against J. S. the elder, and

execution being sued the sheriff had endeavoured to levy the damages, &c. upon the goods of J. S. the younger, he sued this writ to be discharged, and the writ was allowed, though after verdict, judgment, and execution awarded.——Hutt. 45. S. C. by name of WILSON v. STUBBS, and that upon the directing the writ of identitate nominis a supersedeas was awarded. But afterwards in proceeding upon the identitate nominis, the question was, if the supersedeas lies thereupon, it being only a surmise and matter in fact, and lies more properly,

perly, and more frequently, for preventing an arrest upon outlawry, and after the party is taken upon the outlawry, and is a thing not frequent in use, and is in nature of an *aud. quer.* and the party shall find surety to pay the debt if found that he be not another person; and the court inclined strongly, that it is no *superfedeas*, but much in the discretion of the court, cites *Lib. Intrat.* and 5 E. 4. 36. 51 and 53.—*Hob.* 330. S. C. and though precedents (there cited) were produced, yet the court was of opinion that the writ in the principal case, and the *superfedeas* thereupon, was not warranted, but that the defendant J. S. the younger might have action of false imprisonment; because the defendant being named J. S. without addition, shall never be accounted the younger, but always the elder of the two of that name; but to avoid duplicity of suits it was ordered that the plaintiff in the former action should appear to the *sci. fa.* in the *identitate nominis*, and plead, and go to trial, and if the defendant in the former action was found to be the same person, then the money remaining with the sheriff to be delivered to the now defendant, or if otherwise, then to the now plaintiff. *Hob.* 330. *Wilson v. Stubbs.* —The court took a great difference between the cases of outlawry and the principal case, which was upon a writ of *second deliverance* being only at the plaintiff's suit and not at the king's as in every outlawry the king is interested and of which principal case no precedent was or could be shewed, *Ibid.* 331. S. C. and cites L. 5 E. 4. 84.

### (B) Necessary. Or where he may be relieved by Plea.

Br. Addition, pl. 21. cites S. C.

I. IT was in a manner agreed, that where *trespass* is brought against J. S. and another of the same name comes before outlawry, and process determined, ready to answer, and the plaintiff says that he is not the same person; there process shall go against the defendant with addition, for safeguard of him who appears; but if he comes after outlawry, or process determined, there is no other remedy but an *identitate nominis*. Br. *Idempt. Nom.* pl. 3. cites 14 H. 4. 27.

2. Note, that where there are three of the name of J. S. yeoman in D, *capias* issues against one, and the sheriff arrests another of them, he has no remedy but by writ of *identitate nominis*. Br. *Idempt. Nom.* pl. 6. cites long 5 E. 4. 51.

3. In writ of *detinue* against J. C. son and heir of J. C. one J. C. is outlawed, who in truth is the son of W. C. and is taken by *capias utlag.* he shall say by plea upon the *capias*, that he is the son of W. C. and not the son of J. C. and shall not be put to his *identitate nominis*; per *Littleton Arg.* and *Danby concessit.* Br. *Idempt. Nom.* pl. 9. cites 10 E. 4. 12.

So in præcipe quod reddat. *Ibid.* pl. 8. cites 21 E. 4. 54

4. In debt, the defendant pleaded outlawry in the plaintiff by name of J. S. of S. gentleman, the plaintiff said that there is a J. S. of S. the elder, and J. S. of S. the younger in the same county, and the elder was outlawed, and he is the younger, and demanded judgment if he shall not be answered, and it was held no plea contrary to this matter of record, and he was put to his *identitate nominis*, because the plea was but dilatory, otherwise it should have been if he had pleaded it in bar; note the diversity. Br. *Idempt. Nom.* pl. 7. cites 21 E. 4. 15.

(C) Where Plaintiff may shew the Diversity of Names.

1. **W**HERE *exigent* issues against J. W. and another of the same name appears, the plaintiff may shew the diversity of names, and shall have an *exigent de novo*. Br. Idempt. Nom. pl. 4. cites 21 E. 3. 35.

(D) Proceedings and Pleadings.

1. **D**EBT against J. H. of C. and one came of the name, and prayed that the plaintiff count against him, and the attorney said that he who appeared was another of the same name, and was J. H. the elder, and he who was impleaded by this writ was J. H. the younger, and he who appeared said that he was the younger, to which the attorney said that he who was impleaded was J. H. of South C. and he who appeared was J. H. of North C. and because (South) was not in the writ therefore it was awarded that the plaintiff should take nothing by his writ. Br. Idempt. Nom. pl. 10. cites 39 E. 3. 5.

2. Debt by J. S. the defendant pleaded outlawry against him, judgment if he shall be answered; the plaintiff shall not say that he is another person of the same name, but shall be put to *identitate nominis*; but he may say that he who is outlawed is J. S. of S. as appears in the record, and the plaintiff is J. S. of D. and was there dwelling at the time of the suit taken, in which the outlawry is had, and not at S. at the time of the suit aforesaid, nor ever after; but he shall not say that there is no such vill as S. but is put to his writ of error. Br. Idempt. Nom. pl. 5. cites 21 H. 7. 13.

3. One by the name of J. S. of Dale was bound in a recognizance in C. B. and comes another by process bearing the same name, and says that he was resiant at Sale, and never at Dale absque hoc, that he was party to the recognizance; the court held clearly that he might choose to take his *traverse* absque hoc, that he was the same person that was bound, or absque hoc, that he was party, &c. Kelw. 89. pl. 10. H. 22. H. 7.

4. Memorandum, That the ancient precedents in H. 4. time are, that a man shall not have \**sci. fa.* on a writ of *identitate nominis*, but the opinion of all the justices at this day is, that he ought to have *sci. fa.* against the party, &c. Kelw. 89. pl. 11. H. 22 H. 7.

(A) Jew.

1. 51 H. 3. CALLED the statute of the pillory, directs, *stat. 6. §. 1.* among other things, that the jury therein mentioned shall inquire if any buy flesh of Jews and then sell it to Christians.

2. 9 E. 1. A Jew had his trial *per medietatem linguæ*, viz. Judæorum, and they were sworn on the five books of Moses held in their arms (braches) and by the name of the God of Israel who is merciful. D. 144. pl. 59. Marg. cites 9 E. 1.

3. 13 E. 1. *stat. 3. cap. 1.* called the statute of merchants is directed to extend to all except Jews.

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S. P. Co.  
Litt. 31. b.  
32. and  
says, the

4. A Jew born in England purchased land, and married a Jewess; he is converted to christianity, but she is not converted; she shall not have dower. Jenk. 3. Marg. cites it as in the time of E. 1. & Parliam. Roll. Rot. 1.

reason given in the record is this, quia vero contra justitiam est, quod ipsa dotem petat vel habeat de tenemento quod fuit viri sui ex quo in conversione sua noluit cum eo adherere & cum eo converti.

\* This statute is 11 E. 1. 1. but says nothing of Jews. But see sup. pl. 3.

5. Jews are excepted in the statute of \* *Acton Burnel*, from having any benefit; per Hutton J. Winch. 84.

2 Show.  
367. Arg.

6. The marrying a Jew, either by a christian man, or a christian woman was anciently reckoned felony, and the party offending to be burnt alive. 3 Inst. 89.—and cites Fleta, lib. 1. cap. 35. that such as contract with Jews or Jewesses in terra vivi confodiantur, &c. Ibid.

7. A plaintiff had leave given by the court to alter the visne from London to Middlesex, because all the sittings in London were on a Saturday, and his witness was a Jew and would not appear that day. 2 Mod. 271. Mich. 29 Car. 2. C. B. in case of Barker v. Warren.

8. A Jew brought an action and the defendant pleaded that the plaintiff is a Jew, and that all Jews are perpetual enemies regis & religionis, judgment si actio. But per Cur. a Jew may recover, as well as a villein and the plea is but in disability so long as the king shall prohibit them to trade, and judgment for the plaintiff. L. P. R. 4. cites Mich. 36 Car. 2. B. R.

9. A Jew was ordered to swear his answer upon the Pentateuch, and that the plaintiff's clerk should be present to see him sworn. Mich. 1684. Vern. R. 263. Anon.

10. The Jews are here by an implied licence, but on a proclamation of banishment it is like a determination of letters of safe conduct to an alien enemy, that was here by virtue of such letters before, &c. Arg. 2 Show. 371. in case of the East India Company v. Sands.



11. 1 *Ann. stat. 1. cap. 30.* If any Jewish parent, in order to the compelling his protestant child to change his religion, shall refuse to allow such child a fitting maintenance, suitable to the ability of such parent, and the age and education of such child; upon complaint, it shall be lawful for the Lord Chancellor to make such order for the maintenance of such protestant child, as he shall think fit.

12. A Jew's daughter turned protestant; the Jew died leaving several legacies in charities and his personal estate to his executor but nothing to his daughter; she petitioned the Lord C. Parker for a maintenance upon the statute of Q. Anne; it was objected that she was 45 years old, and so the care of her education over. 2dly, That she is married, and not now to be called a child, but to be provided for by her husband. 3dly, That the parent is dead, and so cannot be said to have refused, and therefore the power given by the act at an end. But Ld. C. Parker said, that he inclined strongly to think this case to be within the act for several reasons there mentioned by him, and that possibly the charities given by the will may be under some secret trust for the child if she should turn Jew, and therefore directed that the master inquire into it. Wms's Rep. 524. Hill. 1718. Vincent v. Farnandez.

13. 10 Geo. 1. c. 4. Whenever any Jew shall present himself to take the oath of abjuration, in pursuance of this act the words (upon the true faith of a Christian) shall be omitted out of the said oath, in administering it to such persons; and the taking the said oath by persons professing the Jewish religion, without the said word, in like manner as Jews are admitted to give evidence in courts of justice, shall be deemed a sufficient taking of the abjuration-oath.

# Imparlanee.

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(A) \* Imparlanee. And what shall be said to be such, and in what Cases, and at what Time it may be.

1. **T**HE defendant may imparl if the plaintiff amend his declaration; otherwise if he accepts of costs, for by such amendment it shall be accounted as a new declaration, but if the defendant accepts of costs for such amendment, it is intended that he is satisfied for what he is prejudiced by the amendment, and therefore it is reason he should plead to the declaration so amended and not imparl. 2 L. P. R. 34, 35. cites Mich. 22 Car. B. R.

imparlanee when he need not, this is not erroneous, or any ways prejudicial to the defendant. G. Hist. of C. B. 128.

\* Want of an imparlanee if prayed is error; secus if not prayed. Comb. 13. Hill. 1 & 2 Jac. 2. B. R. Cooke v. Williams. — But if the plaintiff gives the defendant an

2. If

2. If the plaintiff *declares*, but *proceeds no farther for 3 terms*, defendant may imparl. 2 L. P. R. 35. cites Hill. 23 Car.

3. If the *cause have proceeded to issue* and defendant amends his *plea*, he shall pay the plaintiff costs; but the court will not grant an imparlanee; per Roll. Ch. J. 1655. For *after issue joined, and warning given for a trial upon that issue*, it is too late to imparl. 2 L. P. R. 35.

4. The court would not grant the defendant an imparlanee, though he was *sued upon a bond of 28 years old*, and could not see the bond; but bid him pray oyer of it, and plead; for the antiquity of the bond is no cause of imparlanee. 2. L. P. R. 35, 36. Pasch. 1656. Johnson's case.

But in B. R. when the defendant comes in by *latitat*, he knows not till after his imparlanee, what the plaintiff declares

5. Where the plaintiff sues out a *special original*, the defendant shall not imparl, but must plead as soon as the rules are out; because, where the writ is *general*, the *cause of action appears in the declaration*, which the law allows the defendant convenient time to consider of, and advise upon; but when the defendant is taken upon a special *capias*, there the declaration is mentioned *in the writ* itself; and the defendant sees what the cause of action is, and may take a copy of it, and prepare his answer ready against the term by the times that the rules are out. 2 L. P. R. 36.

for; and as he had no sight of the bill before-hand, he had time allowed him to plead any plea in abatement, which is called special imparlanee. G. Hist. of C. 147.

• It is, when one is to answer to the ac-

6. \* Imparlanee is only to enable the party the better to inform himself of the cause or action, in order to his defence. 2 Show. 310. Trin. 35 Car. 2. B. R. Anon.  
tion of another, he desireth some time to advise what he shall answer; and it is nothing but a continuance of the cause, until another day, 2 L. P. R. 34. — G. Hist. of C B. 35. says, that this *libertas interloquendi* seems to arise from a notion of religion, mentioned in 5 St. Mat. 25. *Agree with thine adversary quickly whilst thou art in the way with him.*

7. A *second imparlanee* was moved for in a *quo warranto*, and said to have been granted, in the case of the CITY OF LONDON, but the court denied it; for Astry said, that by the course of the court, they were to have but the common imparlanee. And the court said, that being *ex gratia*, they may grant or deny it as they please. Comb. 12. Hill. 1 & 2 Jac. 2. Anon.

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8. One pleaded a foreign plea after imparlanee, which could not be; but it was objected, not to be after imparlanee, because there was no entry of *defendit vim & injuriam*; but per Cur. that is not necessary to an imparlanee. 12 Mod. 307. Mich. 11 W. 3. Lenox v. Boddington.

9. Imparlanees are allowed in *general actions of trespass*, but not in a *special clausum fregit*. 3 Salk. 186. Hill. 9 Will. 3. Ellis v. Thomas.

2 Show. 244. Arg. contra in case of

Turbet v. Daffignee.

10. No imparlanee is allowed in an *homine replegiando*, or in *assise*, unless upon good cause shewn. Because it is *festinum remedium*. 3 Salk. 186. Anon.

(B) Imparlanee.

(B) Imparlançe. The several Sorts, and how granted.

1. **A**FTER the declaration, and before the defendant can be compelled to plead, many times there is an imparlançe; which is a longer and further day given by the court, and usually till the first day of the next term upon a petition made by the tenant or defendant, whereby he craveth respite. And this seemeth to be \* *Special* or † *general*. Reg. Plac. 54, 55.

*ad jurisdictionem curie quam ad breve & narrationem.*) Reg. Plac. 55. ——— † *General*, is consequently, where that or the like clause is not contained. Reg. Plac. 55. ——— But is only by the words *petit licentiam interloquendi*. G. Hist. of C. B. 147. ——— Where the imparlançe is general, both parties ought always to attend the court, and are demandable at the pleasure of the court. It is otherwise where the imparlançe is to a certain day; for in this case, the parties are not demandable till the day. Jenk. 81. pl. 58. ——— G. Hist. of C. B. 147. divides imparlançe in the like manner into *general* and *special*; and afterwards in pag. 170. he likewise mentions a *general-special* imparlançe. See (C) pl. 12.

2. *Special* imparlançe should not be allowed without the \* *leave* of the court and consent of the parties. 12 Mod. 102. Mich. 8 W. 3. in case Duncomb v. Church.

court is to judge whether it be necessary to plead such a plea as requires longer time to consider of than ordinary; and should it be otherwise the defendant might, upon such pretences, delay the plaintiff without cause. L. P. R. 37. cites Hill. 21 Car. 1. B. R.

3. One came to the prothonotary for an imparlançe generally, and having got it entered thus, *salvis sibi omnibus exceptionibus & advantagiis tam ad jurisdictionem Cur. quam, &c.* and after would plead to the jurisdiction of the Court. And per Powell J. there are two sorts of imparlançes, the one *general*, after which one cannot plead in abatement at all; the other *special* with a *salvis sibi omnibus exceptionibus tam ad breve quam ad narr.* after which one may plead in abatement of the writ and count; and this sort of *special* imparlançe may be granted by the prothonotary. There is another sort of an imparlançe more *special* with a *salvis sibi omnibus exceptionibus & advantagiis quibuscunque*, which cannot be granted without leave of the court, and is discretionary; and after which, one may plead to the jurisdiction of the court. And *respond. ouster* was awarded, and it was ordered to be entered, for reason on the roll specially, that it was obtained without leave of court. 12 Mod. 529. Trin. 13 W. 3. Anon. in C. B.

(C) What may be pleaded after Imparlançe.

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1. **I**N writ brought against J. N. of F. in S. he shall not say after imparlançe, that he was of F. extra S. and not of F. in S. in proper person, nor by attorney; for it is contrary to the record. Br. Brief, pl. 415. cites 32 H. 6. 28, 29.

See Foreign Plea. (C.)

2. In dept against J. N. executor of such a one, and he imparles, he shall \* not say after, that he is administrator and not executor, to the writ,

Br. Estoppel, pl. 24. cites S. C.

—\* For it is only a plea in abatement and so not pleadable after general imparlarice, and therefore gave judgment for the plaintiff. 2 Lev. 190. Pasch 29 Car. 2 B. R. Granwell v. Sibley———And says, that the like judgment was at the same time between Howly v. Sibly.

Br. Estop-  
pel. pl. 24-  
cites S. C. 3. So in debt against J. N. son and heir of W. N. he shall not say after imparlarice that he is not heir. Br. *ibid*.

Br. Estop-  
pel. pl. 24-  
cites S. C. 4. And in præcipe brought by one as heir, the tenant after imparlarice shall not alledge bastardy to the writ; contrary in bar. Br. *ibid*.

Br. Vari-  
ance, pl. 97.  
cites S. C. 5. Debt upon obligation, the defendant imparled he shall not haveoyer of the obligation, nor condition at the next day, by reason of the imparlarice, wherefore the defendant by policy, alleged variance, scilicet, that the obligation was yeoman, and the writ maltman, and well; for the obligation remains always in court, and therefore he may plead variance after imparlarice, and in another term; contra of testament this shall be but once shewn, and by this means the plaintiff shewed the obligation again, and then the defendant saw it, and pleaded the condition performed, which cannot be without seeing it, and so policy to see it. Br. Oyer de Records, pl. 16. cites 38 H. 6. 2.

6. In replevin against A. B. and C. who imparled; and at the day A. and B. said, that there was no such C. in rerum natura, judgment of the writ; & non allocatur; for it is after imparlarice, contrary before imparlarice; quod nota. Br. Brief, pl. 464. cites 4 H. 7. 17.

7. In præcipe quod reddat, of the manor of D. in D. the tenant imparled; and after, at another day, came and pleaded, that no such vill as D. within the same county. And the opinion of the court was, that he shall have the plea; for it goes in bar, as here; contra, if he was named J. S. of D. and imparles, he shall not say to the writ after, that no such vill as D. &c. Br. Misnosmer, pl. 57. cites 13 H. 7. 17.

8. If a man be impleaded in debt upon an obligation, and the defendant imparles, and does not pray that the condition be entered of record, yet, in another term, or at another day, the defendant may plead this well; per all the justices; quod nota. Br. Barre, pl. 54. cites 21 H. 7. 30.

† In trespass, if the name of the plaintiff in the process is Watre, and in the count Watton, to which the defendant imparles, he shall not have any advantage of the variance after by reason of the imparlarice. Br. Variance, pl. 37. cites 38 E. 3. 1, 2.——Br. Continuance, pl. 19. cites S. C.——So, in debt by executor who shewed testament as he ought, the defendant made defence and imparled, he shall not say in another term that there is a variance, scilicet, that the plaintiff in the testament is named J. C. chaplain of the church of All Saints of C. and in the writ he is named J. C. chaplain only; for the plaintiff shall not

be compelled to show the testament, but once; so of deed of remainder in formedon; contrary of an obligation; for this shall remain always in court, and then it is apparent. Br. Variance, pl. 44. cites 19 H. 6. 7.——\* Orig. (tuum.)

After imparlarice by attorney, to the name of J. prior of St. Peter, he nor his master shall not say, after, that he is of St. Peter and Paul; for this does not stand with, &c. for all is parcel of his name; contra of Over D. and Netber D. for this is addition and no parcel of his name, and so attorney may plead that after which stands with, &c. but not that which is contrary. Br. Attorney, pl. 12. cites 35 H. 6. 5.——Br. Misnomer, pl. cites S. C.

10. That the demandant is an *alien*, may be pleaded in bar after imparlarice, as well as to the writ before imparlarice. Jenk. 130. pl. 64.

11. † Outlawry, excommunication, jointenancy, misnomer, or non-tenure cannot be pleaded after imparlarice, to the person or the writ. Jenk. 130. pl. 64. cites 13 H. 7. 18. † S. P. But after imparlarice, outlawry

may be pleaded in bar. Br. Brief, pl. 36. cites 35 H. 6. 36.——Br. Estoppel, pl. 24. cites S. C.——In debt upon an obligation, outlawry may be pleaded in the plaintiff in *personal action* after imparlarice because this goes in bar; for debt by obligation is forfeited to the king by outlawry in the † obligee, contrary of debt upon a contract or trespass; but outlawry in *disability of the person* ought to be pleaded before imparlarice. Br. Nonability, pl. 36. cites 16 E. 4. 4.——\* As in debt or goods carried away; for the debt and goods belong to the king, and not to the plaintiff who sues; it is otherwise in trespass of battery, and *clauso fratre*; for uncertain damages only are to be recovered, and perhaps they will not be recovered. Jenk. 130. pl. 64.——† Orig. (obligation).——After imparlarice, the defendant pleaded outlawry, in the plaintiff, and it was agreed by the whole court, to be no plea. 2 Roll. R. 59. Hill. 16 Jac. B. R. Baron v. Hayne.

12. A clerk of the hamper, who is making his account in the exchequer is sued there by A. a judge; the defendant imparles; this imparlarice shall deprive, in this suit, the clerk of the hamper of his privilege as an officer in the court of chancery; but if he had not imparled he should have had his privilege, because he was attending his account; for he ought to perfect his account. Jenk. 131. pl. 67. In debt the defendant imparled to another term, *salvis omnibus allegationibus & exceptionibus*

*tionibus omnimodis tam ad breve quam ad narrationem*, and at the day he cast superedeas of the chancery of the privilege; sed non allocatur, by reason of the imparlarice, which affirmed the jurisdiction of the court; quod nota by award. Br. Privilege, pl. 15. cites 22 H. 6. 7.——G. Hist. C. B. cites S. C. [but is misprinted, viz. 71 for 7.] but says, that the true reason of that resolution seems to be, that by this imparlarice he has confined himself to take advantage only of the defect [defect] in the writ and count; but had he obtained from the court a general-special imparlarice, viz. *salvis omnibus & omnimodis advantagiis & exceptionibus*, he might then have pleaded his privilege; for that is not to oust the court of their jurisdiction, but is a privilege which each court allows to the officers of the other to be sued in their own court only, and the modern authorities are express, that privilege may be pleaded after a general-special imparlarice. But this privilege is restrained to *suits in their own right*, and not as executors, &c. and where an officer of one court sues an officer of another court, the defendant shall not plead his privilege, G. Hist. of C. B. 170, 171. and as to the first of the two last points cites Hob. 177. GAGES'S CASE, and as to the last point, 2 Mod. 293. Hambleton v. Scroggs.——\* This last case is misprinted, 293. and should be 296. but not adjudged, and was Pasch. 30 Car. 2. C. B.—and the same point. 2 Lev. 129. Hill. 26 and 27 Car. 2. B. R. DEAKINS v. SCROOGS, sergeant at law, where the court held, that he, as sergeant at law, was suable in any court at Westminster.——So in case of an attorney of C. B. who was executor, and sued as such in B. R. 1 Salk. 2. pl. 4. Mich. 11 W. 3. Newton v. Rowland.——So where sued as administrator. 1 Salk. 7. Hill. 4 Annæ, B. R. Lawrence v. Martin.

13. In a suit against an executor, if he pleads that he had administered, and traverses the executorship, it is ill; being only in abatement, and not pleadable after a general imparlarice. 2. L. P. R. 35.

14. Debt on bond of 100 l. after imparlarice, the defendant pleaded to the jurisdiction, that none of the privy chamber ought to be sued in any other court, at the suit of any person, without special licence of the lord chamberlain of the household, and that he is one of the privy chamber. The plaintiff demurred, and a respondeas



ouster awarded; for such plea cannot be pleaded after imparlarice, and the plea itself is ill; and the court seemed to be offended with the said plea. Raym. 34 Mich. 13 Car. 2. B. R. Barrington v. Venables.

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\* D. 210.  
b. Marg. pl.  
27. contra.  
Because it  
goes to the  
writ and not  
to the bar,  
cites the  
case of

15. If a defendant pleads *to the jurisdiction* of the court, he must do it *instanter* on his appearance; for if he imparls, he *owns the jurisdiction* of the court by craving leave of the court for time to plead in; and the court *shall never be ousted* of its jurisdiction after *imparlarice* unless it be the plea of \* *ancient demesne*, which may be pleaded after imparlarice, because the lord might reverse his judgment by writ of disceit, and it goes in bar of the action itself, (viz.) in that court. G. Hist. C. B. 148.

Marshall v. Allen—and Clerk v. Hampton.—Cro. C. 9. Pasch. 1 Car. C B. Curia ad visare vult. Marshall's case.

Unless the  
writ abate  
after im-  
parlarice, as  
if a man be  
excommuni-  
cated after

16. If the defendant *in a plea of land* would have *oyer of the deed* he must demand it before imparlarice; for by imparling, he undertakes to defend the land mentioned in the plaintiff's count, and it would be absurd in him to defend what he does not know. G. Hist. C. B. 148.

the term in which imparlarice was allowed, such excommunication may be pleaded after imparlarice. G. Hist. C. B. 149.

<sup>1</sup> Sid. 29.  
<sup>2</sup>nd 2 Ro.  
Rep. 244.  
seem to be  
contrary,  
and that

17. All pleas in abatement, (unless to the jurisdiction and privilege) may be pleaded after special imparlarice; but privilege can be only pleaded after a general imparlarice; because it is neither an objection to the writ, bill, or count. G. Hist. C. B. 149.

privilege cannot be pleaded after imparlarice; it is not said in either of the cases, that it was a special or general imparlarice, and the latest resolution, (viz.) Hardress and Lutwiche are express in point, that it may be pleaded after a special imparlarice; for it does not oust them of their jurisdiction but is a privilege which each court allows the officers of another, to be sued in their own court. G. Hist. C. B. 149.—It has been held by some of the books, that this may \* *not* be pleaded after imparlarice; because by imparling he affirms the jurisdiction of the court, which by this plea he would oust. G. Hist. C. B. 169.—But in all these cases, († except 22 H. 6. 71.) it is not said, whether it was a special or general imparlarice; and after a general imparlarice, it is certain it cannot be pleaded; for the defendant then must plead in chief. G. Hist. C. B. 170.—

\* S P. But the practice has been only to make it a respondeas ouster; per Holt Ch. J. 12 Mod. 40. Anon.—A special imparlarice admits the jurisdiction of the court, though it has been otherwise used. Ibid. ‡ See pl. 12. in the notes.

18. In indebitatus assumpsit tender was pleaded after imparlarice, and held to be ill. Lutw. 238, 239. Morris v. Coles.

\* G. Hist.  
C. B. 148.

19. The question was, whether *tout temps prist* was a good plea after a general imparlarice? it was objected, that the defendant after imparlarice should not plead any thing contrary to the matter in the declaration, to which he imparled, as bastardy to an action brought by an heir, &c. But the court was of opinion, that the plea was not good; for *petit licentiam interloquendi* is no more in English than for the defendant to say, *I will take time and resolve what to do*, which is \* contrary to the being always ready. 2 Mod. 62. Mich. 27 Car. 2. C. B. Anon.

The re-  
porter says,  
tamen  
quare of

20. Sci. fa. tested 12 Feb. by an administrator against the defendant as tertenant, who imparled generally, and after demanded *oyer of the letters of administration*, which bore date 26 March follow-  
ing;



ing; the defendant *pleaded this in abatement*; the plaintiff demurred, because he cannot plead in abatement after a general impar lance. But per Cur. it appearing now upon the record, that the plaintiff brought his action before he had cause of action, they ought ex officio to abate the writ, and so they did; though he could not have sci. fa. tested after 12 Feb. till Easter Term in B. R. notwithstanding, in truth, it might be sued out, after the administration granted in the vacation, otherwise where the suit is by *original out of chancery*, where the court is always open. 2 Lev. 197. Trin 29 Car. 2. Harker v. Moreland.

this judgment. For it does not rightly appear upon the record, when the administration bore teste, it coming in after general impar lance.

Quære tamen, for the oyer may be after general impar lance. Ibid.

21. On a plea to the jurisdiction on *special privileges* it is usual to grant a special impar lance as in the common case of *conusance*, &c. for Oxford, &c. but they cannot imparl generally. Cumb. 68. Trin. 3 Jac. 2. B. R. Anon.

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After impar lance it is too late for the

chancellor of *Cambridge* to claim conusance. 10 Mod. 125. B. R. Cambridge University's case.

22. Whether *recusancy* may be pleaded in *disability* of the person of the plaintiff after an impar lance? see 8 Mod. 43. Pasch. 7 Geo. COLVIN v. FLETCHER debated. And afterwards this being a plea in abatement, judgment was given for the plaintiff nisi; and at the day it was urged to set aside the rule, that they were several precedents of such pleas in Rast. Ent. But per Cur. if they are, it must be of pleas pleaded after the last continuance; and afterwards the rule was made absolute. 8 Mod. 381. Pasch. 11 Geo. Colvin v. Fletcher.

## (D) To what Time Impar lance may be.

1. **W**HEN a declaration upon a cepi corpus is delivered against the defendant in *Hillary or Trinity Term*, wherein the writ is returnable, (if it be by bill) or within the next term following, the defendant may, by the rules of the court, imparl to the next term after the term wherein such declaration is delivered. 2 L. P. R. 36.

But if the declaration is delivered in *Michaelmas* term, before, *crastino animarum*,

and in *Easter* term before *menssem Paschæ*, the defendant must plead to try the cause if the plaintiff will; and when delivered after, must plead to enter. But if the defendant doth not appear, but the bail bond is sued, and afterwards in another term bail is put in to the original action, and a declaration is delivered forthwith upon that bail; there the plaintiff may give rules to plead presently; and if he do not plead before the rules are out, he may sign judgment; because the fault here lies only in the defendant, against whom the plaintiff could not declare, untill he had put in bail: and he shall never take advantage of his own laches. 2 L. P. R. 36.

2. Where the defendant's case requires a special plea, and the matter which is to be pleaded is difficult, the court will, upon a motion, grant the defendant longer time to put in his plea than otherwise by the rules of the court he ought to have. 2 L. P. R. 36. cites Hill. 21 Car. 1. B. R.

So where the plaintiff doth keep any deed or writing, or other thing, from

the defendant which doth belong unto him, and whereby he is to make his defence and is disabled by the retaining thereof to plead for his best advantage, the court will grant an impar lance, to the defendant untill

untill the plaintiff deliver it unto him, or bring it into court, and also a convenient time after untill he can draw up his plea; for the *law gives* every defendant convenient time to make his best defence; and in this case, if the plaintiff be delayed, it shall be adjudged his own fault. 2 L. P. R. 37. cites Hill 22 Car. 1. B. R.

3. Whether a person, bound by *recognisance to appear the first day of the term, on entering appearance after*, may imparl till the next term? 12 Mod. 562. the King v. Fitzgerald.

6 Mod. 243. S. C. and by Holt, heretofore imparlances have been from one return of Mich. term to another; but in the *plea fide now*, we have imparlances to a

4. A. bound by recognizance to appear and answer to an information, appeared and prayed an imparlarice; the attorney general said, an imparlarice is not to be denied, but asked how long he shall be allowed? and per Cur. an imparlarice is a *reasonable time to advise*, and there have been from one return day to another, but now they are always from one term to another in the crown office. But by Holt Ch. J. it seems reasonable that the defendant should have the same time on such appearance as if he had stood out and come in upon attachment or *capias*, viz. the same time that the length of the process would take up and no more; for when he had come in upon that he must plead *instante*. 1 Salk. 397. Mich. 3 Annæ, B. R. the Queen v. Rawlins.

day certain in the same term. — But though the court declared this very reasonable, yet no rule was made. *ibid*.

\* Heretofore when one came in upon a recognizance or *hab. corp.* they were put to plead *instante*; indeed in the BISHOP'S CASE by great advice they pleaded that they ought to have time to imparl, but ruled that they should plead *instante*; but that was thought hard and is now redressed. Arg. per. Northey attorney general. *ibid*.

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See Ley Gager (D)

(E) Done. *What may be done after Imparlarice.*

\* In Brook it is (defendant.)

1. **I**N *trespass*, the \* plaintiff counted and left a space for the place, and the defendant imparled, the plaintiff after this cannot amend his count, and therefore it was awarded that the plaintiff take nothing by his writ. Br. Count, pl. 12. cites 20 H. 6. 18.

2. In debt upon a single bill, the defendant after imparlarice pleaded payment of part after the last continuance, & *petit quod billa cassetur*, &c. the plaintiff denied the payment, and the defendant demurred; it was resolved by Roll. Ch. J. (only in court) that though it be pleaded after imparlarice and issue tendered upon it, yet it is not peremptory upon a demurrer; but that if after imparlarice, the defendant pleads a plea in abatement which is waved by the imparlarice, the plaintiff must not demur but move the court that he may be compelled to plead in chief; but if demurrer be joined upon it, it is not peremptory to the defendant though the demurrer be adjourned to another term; and a respondeas ouster was awarded. Allen. 65. Trin. 24 Car. B. R. Beaton v. Forrest.

## Implication.

### (A) Of Implications in general.

See Devise.  
See Estate.

1. **EVERY** act that does *enure* to another act by implication ought to be such as of *necessity* ought to enure to the other act, which cannot be taken to be otherwise. Arg. Bridg. 55. Trin. 12 Jac. Ibid. 82,  
83. S. P.  
Hill. 12.  
Jac. in case  
of Robin-  
son v.

Groves.—*But when* the act of the party may be without any such implication and *the matter* to be implied rests *indifferent*, then it is quite contrary. Bridg. 83. Ibid.

2. An implication can *not be intended by deed*, unless they are apt words, but otherwise in a will. Brownl. 153. Mich. 15 Jac. Nevil v. Nevil.

3. An implied *intent* must not, without clear expression, alter the equitable general law. Arg. Hill. 28 & 29 Car. 2. 1 Chan. Cases 297. in case of Ford Lord Grey v. Lady Grey and al.

4. An *estate by implication* was never thought of *in a deed, nor in a will* but in case of *necessity*. 4 Mod. 156. Mich. 4 W. & M. B. R. Davis v. Speed.

5. No implication shall be *allowed* against an express estate limited by *express words*. 1 Salk. 226. Hill. 5 W. & M. B. R. Goodright v. Cornish. S. P. 1  
Salk. 236.  
Hill. 2.  
Anne, in  
Canc. Popham v. Bamfield.

6. An *express estate for life* cannot be *enlarged* by implication, but by express words it may; per Wright K. and a Ch. J. and 1 J. Mich. 1703. 2 Vern. 449. Bamfield v. Popham.

7. It is a general rule that *where an estate is to be raised by implication it must be a necessary and inevitable implication*, and such as that the words can have no other construction whatsoever. Arg. Cases in Chan. in Lord Talbot's time, 9. Mich. 1733. in case of Lord Glenorchy v. Bosville. [ 342 ]

## Imprisonment.

Fol. 47.

### (A) What Act or Thing shall be an \* Imprisonment.

\* For actions of false imprisonment see Trespass. — He who restrains my band imprisons all

[ 1. ] *Every case where a man is arrested by force and against his will, be it in the high-street or elsewhere, though he be not imprisoned in a house, yet this is an imprisonment.* 22 Aff. 85. per Thorpe. ]

my body where he holds my feet in the stocks, or my head in the pillory without authority, so this is an imprisonment to all the body; per Catesby. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

Br. False  
Imprison-  
ment, pl.  
2. cites S. C.

[ 2. If a man carries away the wife of another man with the assent of the feme but without the assent of the baron, this is not an imprisonment, because it was with her will, 14 H. 6. 2, b. ]

(B) *What Persons may Imprison. [Persons not Officers.]*

Br. Faux  
Imprison-  
ment, pl.  
28. cites  
S. C.

[ 1. ] If the master imprisons a man justly in a house and locks the door, and delivers the key to the servant to keep, the servant may well justify it; otherwise if it be not a lawful imprisonment. 22 E. 4. 43. ]

\* This is in  
the smallest  
editions.  
† Orig. (un)

2. The baron brought action of false imprisonment for imprisoning his wife, the defendant said, that he declared [\* to the feme that her husband was taken and imprisoned] for † a Scot, and she looked wild and lunatick, whereupon the defendant to avoid mischief, took her, and put her into his house for an hour, which is the same imprisonment; but Fairfax held this no plea; for a jury cannot try his conceit or mind, but he ought to have surmised in fact, that she was wild, and that he supposed she would have killed herself, or do other mischief, as to burn an house; by which the defendant pleaded accordingly, and the other said, de son tort demesne absque tali causa, &c. Br. Faux Imprisonment, pl. 28. cites 22 E. 4. 45.

3. If a man sees two fighting, he may lawfully part them, and put one into his house till the fray be over. Ibid.

4. Contra, where he sees two quarrelling; for perhaps they will not fight. Ibid.

5. But where a man is mad, and another doubts that he will do mischief he may keep him as above. Ibid.

See Tres-  
pass (Q)

(C) *By whom the Imprisonment shall be said to be made.*

† Torci-  
ously. Br.  
Faux Im-  
prison-  
ment, pl.  
28. cites  
S. C.

[ 1. ] If the master imprisons a man † in a house and locks the door, and delivers the key to the servant and commands him to keep him safe, and he does accordingly; this is an imprisonment by the servant as well as by the master, he having notice that the man was \* in prison in the said house; but otherwise it would be as to the servant if he had not notice of it. 22 E. 4. 45. ]

\* [343]

2. A. was committed by a privy counsellor and afterwards removed by bab. corp. and committed by B. R. It shall now be said, that he is imprisoned by the commitment of B. R. and not of the privy counsellor; by the better opinion of the court. Goldf. 133. pl. 31. Hill. 43 Eliz. Arundel's case.

(D) Imprisonment.

(D) Imprisonment. Excused or *avoided* by it, *what* may be. See Dures, per tot.—  
Fines  
(W. 3)  
(W. 4)——  
Outlawry  
(A) pl. 2.  
—† Br.  
Saver de-  
fault. pl. 4.  
cites S. C.  
—Pl. 28.

1. **W**HERE a man is imprisoned at the time of \*outlawry, he shall avoid the outlawry, and hence it follows that † recovery by default at the time of the imprisonment is error, and a man shall avoid it by error. Br. Error, pl. 57. cites † 3 H. 6. 46.

cites 38 H. 6. 12.—S. P. Bulf. 170. Anon.—\* S. P. be the outlawry in debt, trespass or appeal of robbery, &c. Litt. S. 437. last part; but Coke says, that for matters of fact, as imprisonment, &c. it must be by writ of error, unless in case of felony, and then, in favorem vite, he may plead it; but such imprisonment must be by process of law *in invitum*, and not by consent or co-tin; for that is as his own act. Co. Litt. 259. b.—† Litt. S. 438.

2. If a man in prison be disseised, and the disseisor dies seised during the imprisonment, yet disseisee may enter notwithstanding such descent; because he could not make continual claim when he was in prison. Litt. S. 436. But if he be disseised when at large, and the descent is cast dur-

ing his imprisonment disseisee shall be bound. Co. Litt. 259. a.—Litt. S. 437. cites Pasch. 11 H. 7. But Coke says, that this is an addition, and the book mistaken, which is 9 H. 7. 24. b.—And the reason, that a man imprisoned shall not be bound in this and the like cases is, because \* by intendment of law he is kept without intelligence of things abroad; and also that he hath not liberty to go at large to make entry or claim, or seek counsel. And so note a *diversity* between a recluse who might have intelligence, and a man in prison. Co. Litt. 259. And among other books cites Fleta, lib. 6. cap. 52, 53. but it is misprinted for cap. 54.—\* Per Catlyn. Pl. C. 360. in case of Stowell v. Zouch.

So, if he had fallen into the hands of thieves who had bound, robbed and detained him, so that he could not come or send, this, if well proved, might save the fresh default after summons in a real action, Fleta 396. cap. 14. f. 6.—382. cap. 7. f. 9. S. P.

3. Imprisonment shall excuse appearance to make a continual claim, and shall avoid a descent if he is imprisoned at the time; per Williams J. Bulf. 170. Trin. 9 Jac. in an Anon. case.

## (E) Unlawful in respect of the Place where.

1. 31 Car. 2. cap. 2. enacts that no subject shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or to any place beyond the seas, within or without his majesty's dominions. And any one so imprisoned shall have an action of false imprisonment against the person by whom he shall be so committed, detained, imprisoned, sent prisoner, or transported; and against all persons that shall frame, contrive, write, seal, or countersign any warrant or writing for such commitment, detainer, imprisonment or transportation, or shall be advising, aiding or assisting in the same, the plaintiff shall recover treble costs besides damages; which damages shall not be less than 500 l. And the said offenders shall be disabled to bear any office of trust and incur a *præmunire*, and be incapable of a pardon.

Not to extend to persons contracted to be transported, nor to persons convicted of felony and praying transportation.

Provided

*Provided that persons having committed any offence in Scotland, Ireland, or the plantations, may be sent thither to receive their trials as heretofore.*

[ 344 ] (F) *What gives a Power to imprison. And by what Courts, &c. Imprisonment may be.*

See Judge  
(F) —  
Physicians.

\* There is  
no court  
which may  
fine but  
may im-  
prison also,  
besides a  
leet; per  
Coke Ch.  
J. which  
he there-  
fore says,  
is the phe-  
nix. Roll.  
Rep. 35.  
Trin. 12  
Jac. B. R.  
in S. C.  
by name of  
Bullen v.  
Godfrey. —  
‡ 8 Rep.

38. b. in Griesly's case. — S. P. 8 Rep. 120. a. in Dr. Bonham's case. — By the stat. W. 2. cap. 11. *Auditors* are impowered to commit the defendant to prison, which none but judges of record can do, and consequently they are thereby made judges of record. 10 Rep. 103. a. in a nota of the reporter, and cites 2 H. 6. 41. and 10 H. 6. 24. b. 25. a. accordingly. — S. P. 2 Inst. 380. cites 20 H. 6. 17, 18. — S. P. 12 Mod. 388, 389. by Holt Ch. J. in delivering the opinion of the court. Pasch. 12 W. 3. in case of Grenville v. College of Physicians. — But the auditors make a record when they commit the defendant to prison. And so a justice of peace upon view of force may commit, but he ought to make a record of it. 8 Rep. 120. ut sup. — ‡ It should be 73. (D) — ‖ 8 Rep. 60. q. in Beecher's case.

¶ Some have power to imprison by law, not by way of punishment, but by way of prevention; as a constable may commit one to prevent a fray, but if he does it maliciously, an action lies against him, because he does it not as judge; and there are other ministerial commitments, as by justices of peace, commissioners of bankrupts, &c. for which action may lie. 12 Mod. 388.

But in  
writ of er-  
ror in the  
house of  
lords, it  
was argued  
that though

2. The king constituted a governor and council of state of Barba-  
does. In action of false imprisonment brought against the governor  
for imprisoning the plaintiff by order of the council judgment was  
given for the plaintiff in B. R. Hill, 3 Jac. 2. 3. Mod. 159.  
Witham v. Dutton.

it did not appear that the king gave any authority to the governor and council to commit, yet  
it is incident to their authority, as being a council of state; the council here in England commit no  
otherwise; and where the commitment is not authorized by law, the king's patent gives no  
power for it; but the government must be very weak where the council of state cannot commit  
a delinquent, so as to be forth-coming to another court that cannot punish his delinquency; and  
therefore prayed that the judgment should be reversed, and the same was accordingly reversed.  
Parl. Cases 34. Dutton v. Witham, Howell & al.



## Improper Words.

See Condi-  
tion.—  
Grants.—  
Indictment  
(N.)

1. **T**HE law takes words of substance and *not usual* as equivalent to words of substance and usual. Arg. Pl. C. 140. b. in case of Browning v. Beston.—And when the *intent appears* it will carry unapt words from their proper and common signification to the intent. Ibid. 154. in case of Throgmorton v. Tracy. —Ibid. 170. b. in case of Hill v. Grange.

## (A) Inception.

[ 345 ]

1. **T**HE same person is *patron and incumbent*, and he *devises the next avoidance*, it was objected, that by his death the church is void, and then the presentation is a chose en action, and not grantable, and the devise takes not effect till after the death of devisor, and therefore void, but held a good devise, because it has inception in his life. Roll. R. 214. Trin. 13 Jac. B. R. in case of Harris v. Austen.—3 Bull. 42. S. P.

2. The *condition* of a lease was, that if he *alien* to any person *during his life*, the lessor might enter. Lessee *devises* it to B. this does not take effect in his life, but has inception in his life. Roll. R. 214. cites D. 45. b.—3 Bull. 43. S. C. cited.

3. *Lease to A. for life, remainder to the right heir of A.* this is a good remainder to vest upon the death of A. for the inception in his life. Roll. R. 215. cites 7 H. 4.

4. *Institution gives inception to a lay-fee*, so that if a caveat be entered after to prevent induction, a prohibition shall be granted. 2 Roll. 294. Prohibition (M) pl. 14.

S. C. cited  
Arg. Vent.  
309. in case  
of Robinson  
v. Woolley.

## Incidents.

### (A) Incidents to Grants and Exceptions.

See Grants  
(2)

[ 1. ] **I**F a man seised of land in fee, leases it for life, or years, (*excepting all timber trees*) and after the lessor has an intention to sell the trees excepted. The law gives to him and such as will *buy them power*, as incident to the exception, *to come upon the*

*the land* of the lessor to shew the trees, and the buyers to view them; for without this they cannot view them. Resolved 11 Rep. 52. Liford's case.]

S. P. by Twisden J. Sand. 323. in case of Pomfret v. Ricroft.

2. Licence *to lay pipes* of lead in another's land, to convey water to my cistern; I may enter and dig the ground to amend the said pipes, though it be not expressly granted; for it is incident to such grant. Br. Incidents, pl. 8. cites 9 E. 4. 35.

—Mo. 644. Guy v. Brown S. P. — Arg. God. 53. — per Haughton J. Godb. 359. cites 9 E. 4.

3. One *liberty* cannot be incident *to another liberty*. Br. Incidents, pl. 18. cites 12 H. 7. 16.

4. The law gives to every tenant for life, as incident to his estate without provision of the party, three kinds of *estovers*, viz. *houseboote*, which is two-fold, viz. for building and burning. *Ploughboote*, that is estover for ploughing; and *hay-boote* and that is estover for fencing and inclosing; and these must be *reasonable*, and lessee may take them upon the land demised without any assignment, *unless restrained by special covenant*. And the same of tenant for years. Co. Litt. 41. b.

[ 346 ]

5. If *licence* be given *to a duke to hunt* in a park; the law for conveniency gives such attendants as are requisite to the dignity of his estate. 9 Rep. 49. b. Trin. 8 Jac. in the Earl of Salop's case.

S. C. cited by Twisden J. who said, that the judgment in that case was upon this reason. Sid. 430. Mich. 12 Car. 2. B. R. in case of Pomfret v. Ricroft.

6. Licence *to erect a hay-stack*, gives licence *to inclose*. Admitted. Arg. 2 Roll. R. 152. Hill. 17 Jac. B. R. in case of Webb v. Paternoster.

7. At nisi prius coram Holt the question upon evidence was, whether every house in the market round, had so many feet of ground toward the market belonging to it. Per Holt Ch. J. If the *act for building* of London orders a man *to build* his house *contiguous to his neighbour's soil*, it, of necessary consequence, gives you *all easements* over your neighbour's soil, as lights, passage, &c. without which you cannot use your house; but thereby gives you no interest in the soil. And in this case, a house-keeper who pretended the like interest before his door, *though* he derived his title under another person, was denied to be a witness. 12 Mod. 372. Pasch. 12 W. 3. Farmers of Newgate Market v. Dean and Chapter of St Paul's.

8. If a man, either by grant or prescription, has a right to a *wreck* thrown on another's land, of necessary consequence he has a right to a *way* over the same land to take it; and the very possession of the wreck is in him before seizure. 6 Mod. 149. Pasch. 3 Annæ, B. R. Anon.

9, *Quando aliquis aliquid concedit, concedere videtur et id, sine quo res ipsa esse non potest*. See Maxims.

## (B) Incidents inseparable.

See Condi-  
tions. (A. 2)

[ 1. **T**ENANT in fee simple may give the charters to another, and so sever them from the land, and he may keep them from the heir. 10 H. 6. 20. b. ]

[ 2. If the king grants to another the office of the clerk of the county-court, or shire-clerk of the county of S. with all fees, &c. for life; this is void \* against the sheriff of S. when he is made sheriff; because the county court, and the entering of all proceedings in it are incident to the office of sheriff, and this is the court of the sheriff, though the suitors are judges; for great inconvenience would ensue if the office of the clerk of it may be granted to another. Because the sheriff is the immediate officer to the court, and ought to answer for the records of the court if they are imbezzled. And therefore a clerk cannot be made who shall have the entry and custody of the rolls of the court, and yet the sheriff shall answer for them, and therefore the office of clerk is inseparable from the sheriff. 4 Rep. 33. Mitton's case. ]

\*Fol. 75.

[ 3. The custody of the gaols of counties is inseparable from the sheriff, and therefore if the king grants the custody of such gaol to another, it is void: because the sheriff is the immediate officer of the king's courts, and shall answer for escapes, and shall be subject to amercements, if he has not the body in court upon process to him directed; and therefore it is reason, that he shall put in such keepers of gaols for whom he will answer: 4 Re. Mitton. 34. cites 39 & 40 Eliz. Mich. resolved per all the justices of England. ]

See Gaol.  
(B)

[ 4. A court baron is an incident to a manor, and cannot be severed from the manor by grant or surrender. Hobart's Reports 150. adjudged between Brown and Goldsmith. ]

Br. Inci-  
dents pl.  
34. cites 19  
H. 8. —

Br. Grant, pl. 91. cites 1 E. 4. 10. — Fin. Law. 5. b. S. P. — A. seised of a manor leased it to B. and after bargains and sells the manor \* to C. — B. covenants that the assignee of the reversion shall hold the courts, proviso that B. shall have the rents of the copyholders and freeholders. It was moved, that by this exception the court baron is not excepted nor severed from the manor, nor destroyed; for it is incident to the manor and this covenant between the lessee and C. amounts to a grant of the court to C. But it was holden by the court, that it was a void covenant; for though C. has authority to hold the courts, yet it must be in lessee's name. Le. 118, 119. Trin. 30 Eliz. B. R. Wheeler v. Twogood.

\*[347]

5. Fealty is an incident inseparable to the reversion. 11 Rep. 77. a. in Magdalen Coll. case cites 26 Ass. 66.

Br. Grants,  
pl. 74. and  
140. cites

S. C. — Br. Reservations, pl. 32. cites S. C. — Br. Tenure, pl. 28. cites S. C. — Br. Incidents pl. 10. and 33. cites S. C. — Ibid. pl. 37. cites Dr. and St. lib. 2. cap. 9. fol. 75. that if a man holds by fealty and rent, the lord may grant over the fealty reserving the rent; for it is *seigniorij in socage*, contra of *seigniorij reserved with the reversion upon a gift in tail*, there grant of the fealty is void; for it is incident to the reversion, and cannot be severed. Quod nota,

6. If tenant holds by homage, fealty, and rent, and another re- covers the rent against him by default, yet the homage and fealty remain to the lord, and he may distrain for the fealty. Br. Incidents, pl. 5. cites 44 E. 3. 19, 20.

But where  
the land is  
held by feal-  
ty and rent,  
and the rent  
is recovered

by default, the fealty is gone. And the reason seems to be, that in the one case the fealty is incident to the homage, which homage is not incident to the rent service, and in the other case the fealty

ty

ty is incident to the rent-service, and therefore by the recovery of the one the other is gone. Br. Incidents, pl. 5. cites 44 E. 3. 19, 20.——Of Incidents, there are two sorts, *separable* and *inseparable*, as rents incident to reversions, &c. which may be severed; inseparable, as fealty to a reversion or tenure; for as all lands or tenements in England are holden of some lord or other, and either mediately or immediately of the king; so to every tenure at the least fealty is an inseparable incident so long as the tenure remains; and all other services except fealty are severable. Co. Litt. 93. a. S. 131.——And upon a lease for life or years without reserving any rent fealty is due to the lessor. Litt. S. 132.——Because there is a tenure, and fealty is incident to all manner of tenures. Co. Litt. 93. a.——Except frank-almoigne. Co. Litt. 23. a.

Where the king was seized of the patronage of a priory and of a corody, 7. Where the king is founder of a house of religion, *corodie* is incident; contrary where a common person is founder; but yet the corody above may be released as was said in time of H. 4. For the release pleaded was not contradicted. Br. Incidents, pl. 21. cites 11 H. 4. 81. and Pasch. 8 H. 7. 2.

and after granted the patronage without mentioning the corody, yet the corody passed; and if the king had reserved it, the reservation had been void; and so it was awarded, and therefore seems incident. Br. Incidents, pl. 23. cites 26. Aff. 53.——Br. Patents, pl. 34. cites 3. C. per all the justices.

8. *Distress* is incident to rent, and cannot be released. Br. Incidents, pl. 20. cites 7 E. 4. 11.

Fealty is incident to homage, and homage is incident to escuage. Ibid. pl. 16. cites 8 H. 7. 54. per Vavisor.——Ibid. pl. 27. cites 21 E. 3. 52.

Ibid. pl. 34 cites 19 H. 8. S. P. and they cannot grant the one without the other.

11. *Foundership* is incident inseparable, so that if the founder of a college, &c. would grant his foundership to the king by deed inrolled, it is void; for it is inseparable to the blood. 11 Rep. 77. a. in MAGDALEN COLLEGE'S CASE, says that it was so held in time of H. 8.

S. P. 10 Rep. 38. b. 39. in Mary Portington's case.

12. Incidents to an estate tail are 1st. to be *dispunishable of waste*. 2dly. That the wife shall be endowed. 3dly. That the husband shall be tenant by the courtesy. 4thly. That tenant in tail may suffer a common recovery. And therefore if a man makes a gift in tail upon condition to restrain him of any of those incidents, the condition is repugnant and void in law. Co. Litt. 224. a.

[ 348 ] 13. If *estovers* are granted to be burnt in a certain house there he that has the house, by whatever title he has it, shall have the estovers; for the one is an inseparable incident to the other. Fin. Law. 5. a. Max. 15.

14. A man grants service of castle-guard, and retains the castle it is void. Fin. Law. 5. b.

15. *Justice seat* is incident inseparable to a forest. Palm. 93. Hill. 17 Jac. B. R. in Bridges's case.

## Incongruent:

### (A) *Incongruent. What Things shall be said such.*

1. **L** E E T cannot be belonging to a church, because it is incongruent; per Coke Ch. J. 2 Brownl. 200. in case of Rowles v. Mason.—cites 10 E. 3. 5.

2. *Tithes* cannot be appurtenant to a manor, because incongruent, and a spiritual thing shall not be pertinent to a temporal, and so e converso. 2 Brownl. 200. ut sup.

3. *Turbary* cannot be to land, but must be to a house. 2 Brownl. 200. ut sup.

4. *Tenant of a manor* in Edw. 2. Time prescribed to have free bull and bear, but held not good, because incongruent; otherwise in case of the lord of the manor. 2 Brownl. 200. ut sup.

5. Custom to present common in the leet is incongruent and so not good; for it is not proper to the court. 2 Brownl. 200. ut sup.

## Inconsistent.

### (A) *What shall be said to be so.*

1. **I** F a man be forester by patent, and after is made justice of the same forest, the first patent is void. Br. Office and Off. pl. 47. cites 29 H. 8. by several. Br. N. C. 29 H. 8. pl. 116.

2. So where a parson is made a bishop, the parsonage is void; for he cannot be ordinary of himself nor punish himself. Ibid. Br. N. C. 29 H. 8. pl. 116.

3. But a man may be steward of a forest by one patent, and justice of the same forest by another patent and both good; for both are judicial, and justices of the forest may make a steward of the forest. Ibid. Br. N. C. 29 H. 8. pl. 116.

4. Quære, if a man may be keeper of the forest and justice of the forest, it seems that he shall not; because the killing of the deer by the keeper, &c. is a forfeiture of his office; for it shall be adjudged by the justice of the forest, and he cannot judge himself. Ibid. Br. N. C. 29 H. 8. pl. 116.

5. A man cannot be a judge and a minister in one and the same court, as to be king's remembrancer, and also a baron in the court of Exchequer; per Popham Ch. J. Pasch. 35 Eliz. Poph. 28. cites Blake's case. One may be judge and officer in different respects, as in re-dis-

seise the sheriff is judge and officer. And also, where there are several judges, part of the judges as where there are a mayor and bailiffs, the bailiffs may be officers too by custom. Cro. C. 128. Mich. 4 Car. B. R. Crane v. Holland.

6. The

6. The *custody of a park and interest in the park* cannot stand together in one person, and he cannot be the queen's parker when by grant it is his own park. Arg. Godb. 418. Trin. 21 Jac. B. R. in case of Zouch v. Moore.

7. A man may be *judge and gaoler*. Admitted. Arg. Show. 162. cites Roll. 806. (B) pl. 1. Durme v. Patie.

8. *Two fees immediately expectant one on another* cannot subsist in the same person. 1 Salk. 338. Hill. 5 W. & M. Simmonds v. Cudmore.

## Incroachment.

### (A) Incroachment of Land.

1. **W**HERE *land* is incroached out of a *manor*, the incroachment does not make it to be no parcel of the manor, but in right it belongs to the manor, per Doderidge J. and Lee Ch. J. Godb. 411. Trin. 21 Jac. B. R. Sommer's case.

2. *Debt by lord of the leet against the heir* for an incroachment on the highway by the ancestor, continued by the heir, and for which the ancestor was indicted in the leet, and on which indictment an order was made to reform the incroachment by such a day, upon the pain of 40 s. and for not reforming thereof this action is brought for the 40 s. and declares as before, and held good without alleging *notice of the order*; for being within the jurisdiction of the leet he ought to take notice at his peril. See Conditions (B. d) pl. 6. Mich. 11 Car. B. R. between Lee and Boothby.

3. The court seemed to incline, that an action of *debt* will not lye by a lord of a manor against his copyhold tenant for a *tain assessed by the homage* for an incroachment on the wast. Carth. 183. Mich. 2 W. & M. B. R. Cudmore v. Honeywood.——He ought to take his remedy by way of action and not to have it presented as a nuisance. Arg. Ibid.

### (B) Incroachment of Rent or Services. What shall be said to be such, and in what Cases binding.

1. **I**ncroachment of *rent by the hands of a disseisor* shall not bind him that has right. 6 Rep. 58. Hill. 4 Jac. C. B. in Brediman's case.

2. Incroachment by the *donor on the donee*, or of the *lessor on the lessee*, shall not bind them in *avowry*, as it shall between *lord and tenant*; because when the donor or lessor, or their heir avows, he must shew the original reservation, by which will appear how much was reserved; but if lord and tenant be, and the tenant makes gift,  
in



in tail or leases for life, the remainder in fee, incroachment of the lord on donee or lessee shall bind them; for the lord need not shew the beginning of the seignior; per Coke. 10 Rep. 108. Mich. 10 Jac. in Lofield's case. — Cites 8 Rep. 65. a. Sir William Foster's case. — And 20 E. 3. Avowry, 131. 5 E. 4. a. F. N. B. 11.

## (C) Incroachment of Rent or Services. *Actions* [350] and *Pleadings*. See Avowry (A. 2)

1. *Mag. Chart. cap. 10.* **E**NACTS, that *no man shall be distreined to do more service for a knight's fee, nor for any freehold, than therefore is due.* But this statute extends not to the king, so that

if he incroaches more rent or services, the party shall have no remedy by this statute against the king, either by petition or otherwise, because the king is not named, and so shall not be restrained of this advantage of the incroachment which the common law suffered. Pl. C. 243. b. 244. per Weston J. Trin. 4 Eliz. in case of Wyllion v. Lord Berkley. — This statute extends to the right and not to the possession. 9 Rep. 33. b. in Bucknall's case.

2. If an incroachment be made upon a tenant in tail, or for life, or any other who cannot maintain a writ of *ne injuste vexes*, nor *contra formam collationis*, nor other remedy, he shall have an action on the statute of magna charta, cap. 10. For that statute intends to relieve those who had no remedy at the common law. 2 Inst. 21. Such shall not have a ne injuste vexes; for, inasmuch as the reservation is the title,

no incroachment shall hurt them, but they shall avoid it in avowry and the stat. Mag. Chart. cap. 10. extends not to the donee in tail, lessee for life, or grantee of a rent-charge, which appears by the words (*majus servitium*) which is intended between very lord and very tenant. 8 Rep. 65. a. a note of the reporter in Sir William Foster's case — If lord and tenant be, and the tenant makes a gift in tail, or lease for life, the remainder in fee, there the incroachment by the lord upon the donee or lessee shall bind them; for the lord need not shew the commencement of the seignior; but it shall not bind the issue in tail. 10 Rep. 108. a. in a note of the reporter in Lofield's case.

3. Assise of 10s. rent, the plaintiff ascertained the court that it was rent service, the defendant said that J. S. whose estate the plaintiff hath in the lordship, by the deed which he shewed, enfeoffed W. N. whose estate he hath in the tenancy, to hold by 6 d. for all services, judgment, if for more rent, the assise ought to be; and a good plea; and it is said elsewhere that incroachment may be avoided by deed, as here, or by coercion of distress. Br. Encroachment, pl. 4. cites 28 Aff. 33.

4. If a man holds by 2s. and the lord incroaches 6s. the tenant shall not avoid this without deed; quære if by \* coercion of distress; by which he said that he held the two houses by 6s. and the remnant by fealty, judgment of the avowry; and the other that he held of him as in the avowry, &c. Prist. &c. Br. Avowry, pl. 49. cites 5 H. 5. 4. \* If it be by coercion of distress (though such coercion be only to his goods) yet

he shall avoid such seisin in avowry. 4 Rep. 11. b. in Bevil's case.

5. In rescous if the lord incroaches 4d. of his tenant who holds of him by 2d. only, he shall not avoid this incroachment in avowry, whether he has thereof deed or not, but if he has deed, he shall have Br. Avowry, pl. 91. cites S. C. — Pl. C. 94. b. —

• This writ have \* *contra formam feoffamenti*, and if he has not deed, he shall lie on a *ne injuste vexes*, but he may aid it by *rescous* and plead *specialty* in writ of rescous, and he may do the like in *assise*; per Danby Ch. J. and Choke J. quod nota. But it seems to be reason upon a deed to avoid it by *plea in avowry*, to avoid circuitry of action. Br. Cont. Form. Feoff. pl. 1. cites 5 E. 4. 87.

homage, fealty and rent by deed, and afterwards feoffor distrains for suit or other services, in such case the *feoffee* or *his heir* shall have this writ, and it may be directed to the lord himself or his bailiffs and is a prohibition of itself. F. N. B. 162. (E) (F) 163. (A)——But if a *feoffment* be made *before time of memory*, one shall not have this writ, but a *ne injuste vexes*; for such a *feoffment* is not pleadable. Ibid. in the notes there (b) cites 12 H. 4. 24.——But *none but the feoffor or his heirs* who are *privies to the deed*, shall have this writ of *contra formam*, &c. but if the [first] *feoffee* makes a *feoffment* over to hold of the chief lord, &c. the [second] *feoffee* shall not have this writ because not party or privy to the deed, but he shall *rebutt* the lord by that deed to *claim other services than mentioned in the deed*. F. N. B. 163. (C) But the notes there (a) say that the contrary has been adjudged, viz. that where the *feoffee of the [first] feoffee* to whom the deed was made, brought the writ against the grantee of him who made the deed, he was adjudged to answer, and that Wilby said, it had been often so adjudged; cites 4 E. 3. 25. and see 4 H. 4. 5. per Thirn. a *feoffee*, &c. and see 10 E. 3. 25. accordingly by Tremail. Ibid.——Though F. N. B. ibid. (1) says, that this writ lies only against the feoffor and his heirs, and cites 10 E. 3. 25. and 7 E. 3. 8.——† A stranger may *rebutt* the feoffor, or his heirs by the deed of *feoffment*, notwithstanding the *seisin*. F. N. B. 163. (C) in the notes \* there (c) cites 5 E. 3. 19. 8 E. 3. 67. 4 E. 2. Avowry, 202. see contra 4 E. 2. Avowry, 401. Rebutter, 22 E. 3. 18. although the *feoffment* was made to a stranger to the tenancy, he shall not rebutt a stranger in the *seignior* after *seisin* by *deed of confirmation before time of memory*. 11 E. 3. Avowry 100. nor by deed of *feoffment*. 10 E. 3. 25. He shall not *forejudge the tenant*. 7 E. 3. 8. see contra per Kirt. The party rebuts the lord by *confirmation of his grantor*, to hold by less services, 28 E. 3. 92, 93. per Cur. See 10 Aff. 29. 28 Aff. 33. 12 R. 2. Avowry, 266. 43 E. 3. ibid. 258. 19 E. 3. ibid. 122. F. N. B. 163. (C) in the notes there (c) cites the above cases.——If the lord confirms the estate of the tenant to hold by lesser services, &c. the tenant shall have this writ if he be distrained for more services than there are specified in the deed of confirmation. F. N. B. 163. (G) cites Mich. 16 E. 3. Avowry 243. 30 E. 3. 13. per Seton, &c.

† Pl. C. 94. b.——*Ne injuste vexes* lies where the lord has of late time got *seisin* of more rent, by the tenant's paying it voluntarily without coercion of distress. And if the lord distrains the tenant for this surplussage, the tenant cannot avoid the lord in *avowry*, because of the *seisin* the lord had by his own agreement; but he may have this writ directed to the lord, which is in itself a prohibition not to distrain his tenant, to do other services than of right he ought; and it is in its nature a writ of right and shall be patent; and this clause, *et nisi feceris, vicecomes, &c.* shall be in the writ; and the process is prohibition, attachment and distress; and this writ is founded on statute of Magna Charta, cap. 10. F. N. B. 10. (C) (D) (E)——But 2 Inst. 21. cites several ancient books to shew, that this writ is not founded on the statute, but was the ancient law of England, and long before this statute.——If the lord recovers more on an action tried, the tenant shall not have this writ; per Knivet, quære, 39 E. 3. 18. and see accordingly 38 E. 3. F. Droit 32. and by ¶ Green the tenant shall have a *ne injuste vexes*, though the lord recovers the rent by *assise*, which he had released, but the deed thereof not produced in evidence; or where the *assise* was taken on the *seisin* and *disseisin*, F. N. B. 10. (C) in notis (a) cites 7 H. 5. 7.——[¶ This seems a mistake and that it should be (Hals,) and there is no such name as Green there in the year book.]

The *feoffee* shall not avoid *seisin* of rent had of his feoffor by *incroachment*, nor shall he have a writ of *ne injuste vexes*. F. N. B. 11. (C) cites Mich. 18 E. 2.——And the notes there (2) cites 33 E. 3. F. Avowry 255, or rather 225. accordant, and that therefore, on special matter shewn, he may traverse, that he takes by the *feoffment*, and the tenant, by whose hands the *seisin* was, shall not avoid this on the *avowry*, cites 18 E. 2. F. Avowry 217.——Nor shall a man have this writ against the grantee of the *seignior*. F. N. B. 11. (C) cites Pasch. 10 E. 3.

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4 Rep. 11.  
b. S. C.  
cited in Bevil's case.  
—2 Inst.  
21.—S. P.  
Br. Assise,  
pl. 148.  
cites 22 Aff.

6. In replevin it was held by all the justices, that if a man holds land of his lord by 2 s. per ann. and the lord gets 3 s. per ann. the *incroachment* or *seisin* of surplussage of the services shall not bind the tenant in \* *assise of rent*, nor in a writ of *rescous*, nor in *cessavit*; for in these actions the tenure shall be tried, and not the *seisin*, quod nota. And per Brian J. in replevin the *seisin* is traversable and not the tenure; for † *incroachment*, or surplus of services shall bind

bind in replevin, and there the seisin shall be answered, and not the tenure. Br. Encroachments, pl. 1. cites 12 E. 4. 7. 68. per Thorp, quod non negatur. — Br. Encroachment, pl. 2. S. P. cites 22 Aff. 68. — † This rule holds not in case of a *successor*, or of the *issue in tail*; for they shall avoid it in an avowry. 2 Inst. 21. — 4 Rep. 11. b. S. P. in Bevil's case.

7. And if the lord by distress makes the tenant pay more than is due, such seisin is by coercion. Br. Encroachments, pl. 1. cites 12 E. 4. 7. And in such case the tenant, upon the lord's distraining for the rent due, and the rent incroached, may tender what is due of right, and make rescue if the lord will not accept it and shall not be driven to a ne injuste vexes, or contra formam feoffamenti as his case lies; but it shall be avoided in action brought by the lord for the rescue, or in trespass brought by himself for the distress for the sum incroached, and not due of right. 4 Rep. 11. b. in Bevil's case.

8. Avowry, because A. held of him by fealty 12 d. rent and suit of court, the rent payable at 4 days in the year, and alleged seisin by the hands of the said A. que estate the plaintiff has, and for the rent of 4 days and fealty he avowed; the plaintiff said that he held of the avowant by fealty and 12 d. payable at one day, of which the defendant was seised, absque hoc that he held of him by the 12 d. payable at 4 days, and as to the fealty he tendered to him at such a place, and he refused; and it was agreed, per tot. Cur. that the obtaining of the rent at 4 days, which should be paid at one day only, was no incroachment; because they agree in the sum, whereof he has alleged seisin in the avowry. Br. Avowry, pl. 109. cites 21 E. 4. 84.

9. The lord incroacheth services of another nature and avows for it; the tenure shall be traversed and not the seisin; otherwise it is if he incroach more of the same nature; as where he holdeth by 12 d. to incroach 2 s. &c. there the seisin shall be traversed; for the quality of the tenure is traversable, and not the quantity; but to avoid the incroachment of the quantity, the tenant is put to a writ of customs and services, or contra formam feoffamenti; and this is an estoppel between true lord and tenant only in replevin; and the tenant may make rescous, if he distrains for this incroachment, and also this incroachment is intendable only between true lord and true tenant, and not donor and donee, lessor and lessee; for there they ought to avow upon the reservation, which the tenants may traverse notwithstanding the incroachment; per Plowden. Pl. C. 94. Woodland v. Mantle and Redsole.

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## Incumbrances.

### (A) What are Incumbrances.

1. GRANT by copy is an incumbrance. Savil. 75. 26 Eliz. Lovell v. Lutterell.

2. A term is devised to A. for life, in case she lives sole, and Mo. 249. after pl. 393.

Anon. S. C.  
—Goldsb.  
59 and 65.  
S. C.

after to B. The inheritance is in J. S. A purchases the inheritance of J. S. who covenants with A. to discharge the tenement of all former charges, and afterwards A. marries. Upon this B. enters. A. sues J. S. upon the covenant and adjudged that it lies; for that this possibility to have the residue of the term upon A.'s marriage, is a former charge; for the will was before the covenant, and the possibility shall awake and have relation before the marriage, Ow. 7. Trin. 28 Eliz. C. B. Haverington's case, als. Hamington v. Rider.

3. Tenant in tail of a rent purchases the land out of which the rent issues, and makes a feoffment, and covenants that the land at the time is discharged of all former charges; though this charge is not in esse but is in suspense, as it is said 3 H. 7. 12. yet if the tenant in tail die, his issue may distrein for this rent, and then is the covenant broke; for now it shall be accounted a former charge before the feoffment. Ow. 7. in the case of Haverington als. Hanington v. Rider.

4. Covenant that land shall be discharged of incumbrances does not extend to such things as are of common right; for they are by law exempted, as tenure; but 7 Eliz. it was adjudged, that if any claim common by prescription by eigne title and recovers, it is a breach of such covenant. Arg. 2 Roll. R. 287. Hill. 20 Jac. B. R. in case of Swinnerton v. Butlar.

5. A remitter is no incumbrance; for it is an ancient right. Arg. Godb. 317. Pasch. 21 Jac.

6. A proviso that lessee for years shall not charge or incumber the land restrains him not from making a lease of it, as was said by Holt. Skin. 150. Mich. 35 Car. 2. B. R. in the Exchequer.

### (B) Equity. Decreed to be discharged.

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1. WHERE there were articles, and in them a covenant to covenant in the conveyance, that the lands were free from incumbrances Ld Cowper said, this is not a covenant that the lands are free, but only that in the conveyance he would covenant so. But in case of such a covenant, if any incumbrance is discovered between the executing the articles, and sealing the conveyance, or deed of settlement, whereof the party had no notice, that incumbrance shall be discharged, even before the sealing the deed of settlement, both as the concealment is a fraud, and because it would be needless to enter into a covenant, which before entering into, is already known to be broke; but against all other incumbrances discovered afterwards there is the party's covenant only. G. Equ. R. 6. Trin. 7 Anne, Vane v. Ld Bernard.

(C) Bought

(C) *Bought in by subsequent Mortgagees or Incumbrancers.* How far protected.

1. **A.** *mortgaged* lands to B. The mortgage was *forfeited*; redemption was decreed, but the mortgagor, after the forfeiture and before the decree performed, had entered into several *bonds*, and a *statute*, which were brought in by B. *on which bonds and statute B. extended the land*; per Cur. the judgments recovered on the said bonds ought not to *attach* the said mortgaged premisses, they being *after the decree*, and decreed them and the extents thereon to be set aside. 1656. Ch. Rep. 171. Welden v. Ralison.

2. The plaintiff, for a valuable consideration, had a *security for 60 l. a year for lives*, and so was a *purchaser* for a valuable consideration, and the lands were afterwards mortgaged to the defendant, who being informed of the purchase, and that it was before him in time, he took assignments of three *recognizances* prior to the plaintiff's title, two of which were for money, and the other for counter security, upon which he extended all the lands charged. The plaintiff prays a discovery of the nature of these dormant incumbrances, and for what cause contracted, and what was actually received and paid upon them, or by perception of profits since the extent. The defendant pleaded his mortgage, and, subsequent to that, his purchase of the other incumbrances to corroborate his security, and that therefore he ought not to make any discovery. But the court conceived, the defendant ought to answer, because the plaintiff has a prior security, though both were purchasers. But Baron Turner said, that if the *prior incumbrance*, that was taken in, had been a *fee simple* upon a forfeited mortgage, then the second mortgagee or purchaser should not have a discovery; because then the whole estate was absolutely in the first, and consequently the second could have no interest in it. But here the first incumbrances were only charges upon the land, the cognizees having no interest in it. The defendant's counsel produced two orders of Chancery, whereby they alleged that that court had ruled it otherwise in the point in question. But the court ordered ut supra notwithstanding. Mich. 12 Car. 2. Hard. 173. Hacket and Bedell v. Wakefield.

3. S. seised in fee, *granted a rent charge to H.* and afterwards *mortgaged the premisses to C. who bought in a judgment precedent to the rent-charge*; there C. having no notice of the rent charge when he lent his money, H. could have no remedy in equity against the judgment, unless he would pay both the mortgage and judgment. Chan. Cases. 149. Mich. 21 Car. 2. Higgon v. Syddal, Calamy & al.

S. C. cited by the Master of the Rolls, who said that it is to be observed in that case, that the judgment creditor, who was the first incumbrancer, could

4. Third mortgagee, without notice at the time of his mortgage buys in the first incumbrance, viz. *a satisfied judgment*; he shall have the benefit of it. Mich. 1683. Vern. 187. † Edmonds v. Povey.

at law extend but a moiety and out of the remaining moiety S. might distrein for the whole rent; but



but that it seems, if the first incumbrance had been a *statute staple*, and the third mortgagee had brought it in, he should have had the whole land, until at law the conusor by *scire fac. ad computandum* had got the statute vacated, and that could only be on payment of the penalty. For equity would not in such case, give any assistance against a third mortgagee, without notice until \* he was paid both mortgage and statute, and so took a difference between a third mortgagee, buying in a statute, being the first incumbrance, and a statute creditor, &c. being a third incumbrancer buying in a first mortgage. 2 Wms's Rep. 493. Mich. 1728, in case of *Brace v. the Dutchess of Marlborough*.——Though the rule of equity has been so settled, it is not however, without great *appearance of hardship*; per the Master of the Rolls. Mich. 1728. and said that still it seems reasonable that each mortgagee should be paid according to his priority, and it is hard to leave a second mortgagee without remedy, who might know when he lent the money, that the land was of sufficient value to pay the first mortgage, and also his own, and that to be defeated of a just debt, by a matter *inter alios acta* is great severity being only a contrivance between the first mortgagee and the third; but that this had been settled upon solemn debate in the case of † *MARSH v. LEE*. 2 Vent. 337. but that there is no reason to carry it further. 2 Wms's Rep. 492. Mich. 1728. in case of *Brace v. the Dutchess of Marlborough*.——Pasch. 22 Car. 2. 1 Chan. Cases, 166. March & al. v. Lee. S. P.——3 Ch. Rep. 62. March v. Lee.——Trin. 1690. 2 Vern. 159.——† S. C. cited by the Master of the Rolls, Mich. 1728. 2 Wms's Rep. 494. in case of *Brace v. the Dutchess of Marlborough*.

It seems not. Vid. Ibid. 168. —\* 2 Vent. 337. S. C.——5. Whether a *statute bought in by a mortgagee* ought to be used as to lands not in his mortgage? Pasch. 22 Car. 2. 1 Chan. Cases 166. \* March v. Lee. Pasch. 1671. 3 Ch. Rep. 67. per Ld. Keeper Bridgman. Two justices against two, that it shall.

Hill. 27, 28. Car. 2. 2 Chan. Cases 212. Windham and Atkins v. Richardson and Bailey & al. seems to be S. C.——6. A mortgagee buying in a prior security of the *lands in his mortgage and other lands* shall not hold all against a middle mortgagee of all those lands till all due to him on both securities be satisfied; per Wild and Twisden. But it was resolved and ruled otherwise. Quære tamen. Pasch. 23 Car. 2. 1 Chan. Cases 202. Bovey v. Skipwith. —Per Hale Ch. B 2 Vent. 339 in case of *Marsh v. Lee*.

Though bought in \* *pendente lite*. Trin. 1687. 2 Vern. 29. Hawkins v. Taylor and Leigh.——7. A *third mortgagee buying in a first incumbrance*, shall hold against the second mortgagee till both are satisfied. Pasch. 23 Car. 2. 1 Chan. Cases 201. Bovey v. Skipwith. —So as to a judgment creditor. Vern. 81. 2. Trin. 1688. Turner v. Richmond.

8. *Mortgagee subsequent to a jointure* got an assignment of a *satisfied statute precedent* to the jointure, and extended it on the lands mortgaged. On a bill by the jointress, to set aside the extent, the statute being satisfied, the Master of the Rolls decreed, that upon the plaintiff's paying the mortgage money with interest, the defendants should assign all their securities to her; but would not set aside the extent without payment thereof. 2 Vern. 30. Mich. 1687. Stanton v. Sadler and Bush.

Pasch. 27 Car. 2. Fin. R. 207. Degelder v. Depester and Monday.——9. Where a *prior incumbrancer* buys in a subsequent incumbrance with *notice of an intervening security*, he shall not be allowed the same; and cited the case of *Borough and Francis*. Trin. 1687. Vern. 464. Long v. Clopton. Trin. 31 Car. 2. Fin. R. 406. Shermer v. Robbins, Cox & al.——In all such cases it must be intended that the puisne mortgagee, when he lent the money, had *no notice* of the second mortgage statute or judgment. For that is the *sole equity*. And therefore where a creditor by recognizance who bought in a first mortgage did *not deny notice in his answer*, though such notice was *not charged in the bill*, (which was brought by some mesne incumbrancers for a sale, and upon bill and answer there was first a decree to state the several incumbrances, and then a report, and upon that a further



farther decree for the master to state the value of the land mortgaged to each of the mortgagees) yet after all these proceedings for a puisne judgment, &c. creditor to insist upon his having had no notice, and offering to be examined upon interrogatories is not sufficient; but this denying of notice ought to appear on the pleadings, whereupon the parties might go to issue, and have an opportunity of proving notice; per the Master of the Rolls, Mich. 1728. 2 Wms's Rep. 495. *Brace v. the Dutcheis of Marlborough*.

10. A. having mortgaged lands to B. became a bankrupt, and after a commission taken out, and an assignment made by the commissioners, he made a second mortgage to C. who knew nothing of the bankruptcy, and took an assignment of the prior mortgage to trustees. Ld. Rawlinson held, that C. might protect himself, by his having taken in the prior mortgage, and cited many cases of innocent purchasers having been allowed to defend themselves in equity in the like manner. But Ld. Trevor and Hutchins contra; and held that he was not in the case of an innocent purchaser, and that when the commission was sued out he was bound to take notice. And Ld. Hutchins said, that the case turned upon this, that A. the bankrupt, at the time of C.'s mortgage had no estate or interest in him, either in law or equity; all was divested and gone by the act of parliament, to which all persons are presumed to be parties, and are bound by it; and the act gives the commissioners power to perform conditions; and in this case the mortgage was not forfeited, but if it had, the commissioners should have had the equity of redemption; and took a difference between a man's divesting himself by his own act of his estate, and where it was taken out of him by act of parliament, which concludes every body. 2 Vern. 156 to 161. Trin. 1690. *Hitchcock v. Sedgwick*.

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11. A mortgagor for further consideration releases the equity of redemption to the mortgagee, and after mortgages to a third person. Such second mortgagee may protect himself by an old statute; cited Trin. 1690. per Ld. Rawlinson. 2 Vern. 160.

12. A third mortgagee bought in an old satisfied incumbrance, and brought his bill to compel the defendant, the second mortgagee, to redeem or foreclose. He need not prove payment of the consideration money, but the producing the deed and acquittance is sufficient. Mich. 1692. 2 Vern. 279. Ld. Ch. J. Holt v. Mill & al.

13. Where a third mortgagee without notice buys in a first in another's name, he may make use of his trustees names at law, either to defend or recover, and may have an action at law against them to assign. Pasch. 1701. Ch. Prec. 159. in case of *Blake v. Sir Edward Hungerford*.

14. If a third mortgagee takes only an agreement of first mortgagee to convey to him, the second mortgagee cannot afterwards compel the first to assign to him. Because such agreement was no more than what they might have done without any agreement. Pasch. 1701. Ch. Prec. 160. in case of *Blake v. Hungerford*.

15. A puisne incumbrancer, after the bill brought, and after the first decree made, and in truth after the report, gets assignment of an old judgment or mortgage, but was denied any advantage by it; for he must come in according to the time of his own incumbrance.

A third mortgagee bought in the first mortgage,

*pending a bill by the second mortgagee to redeem the first* 2 Vern. 525. Mich. 1705. E. Bristol & al. creditors of Sir Wm. Basset v. Hungerford & al.

and the Master of the Rolls held, that the third mortgagee, having thus got the law of his side, and equal equity, shall thereby squeeze out the second mortgage, and that *Ld. J. Hale* called this a plank or tabula in naufragio gained by the third mortgagee. 2 Wms's Rep. 491. Mich. 1728. Brace v. Dutchess of Marlborough.

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16. *A. mortgaged to B. and then assigned the equity of redemption to C. afterwards D. obtained a judgment against A. and B. The mortgagee assigns to D. his mortgage, and then C. tenders the money due on the first mortgage to D. who had notice of the assignment of the equity of redemption upon his purchasing in his first mortgage; and it was objected, that D. having the legal estate in him by the assignment of the forfeited mortgage, and C. having only an equitable interest, not supported by the legal estate, if C. would have equity, he ought to do equity, by paying off both monies to D. But it was answered and resolved by the court, that C. should redeem, paying only the money due on the mortgage, and not what was due on the judgment; because the equity of redemption was never bound by the judgment; for the judgment was not confessed, so as to become a real lien upon the estate, at the time when this equity was assigned; and therefore the judgment could never charge or affect it, and consequently C. purchased an estate not bound by the judgment, and by consequence the judgment creditor, by purchasing in the prior mortgagor, could never defeat the interest of C. Trin. 1708. Abr. Equ. Cases, 326. Brereton v. Jones.*

18. Where a puisne incumbrancer buys in a prior mortgage, in order to unite the same, and there was a mortgage prior to that which was bought in, so as he has not got the legal estate, there he can make no advantage of his mortgage; per the Master of the Rolls. Mich. 1728. 2 Wms's Rep. 495. Brace v. the Dutchess of Marlborough.

19. So where the legal estate vested in the trustee. Ibid. 496.

20. In all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time; qui prior est in tempore potior est in jure. Ibid. 496.

21. *A. copyholder in fee mortgaged to B. who is admitted by J. S. steward of the manor. Then A. makes a second mortgage to C. who is admitted by J. S. and afterwards A. mortgaged to J. S. the steward, who buys in A. But per King C. decreed that J. S. should not postpone C. because of the notice he must necessarily have of the mesne mortgage to C. by his being steward of the manor, when C. was admitted. Hill. 3 Geo. 2. Gibb. 118. Brothers v. Bence.*

### (D) Bought in by Creditors. How far protected.

1. *CONUSEE* of a statute shall be relieved in some cases against a purchaser by taking in prior incumbrances, and in some not, and the difference will depend upon the circumstances. Lev. 198. Mich. 18 Car. 2. B. R. Middleton v. Shelly.

2. A.

2. A. mortgaged lands to B. for 60 l. and was also indebted to C. on bond 60 l. B. assigned to C. per Cur. inasmuch as the estate so vested in C. is a *chattle lease*, and so liable to debts, and C. having an assignment of the mortgage, and his debt on bond being a just debt, A. ought not to be let into the *redemption*, but on payment of the principal, and interest money due on the said bond, as well as the mortgage money; and so decreed. 1 Jac. 2. 2 Ch. Rep. 360. Hallily v. Kirtland.

N. Ch. R. 183. cites BURGH v. FRANCIS, where a bond creditor had the like advantage, on assignment of a mort-

gage *in fee*; and it being by feoffment to the first mortgagee, but no livery and seisin, that was supplied, the bond creditor having first got judgment at law and then brought his bill.

3. A first mortgage was paid off, but no reconveyance, then there was a judgment creditor, and afterwards was a second mortgagee; the second mortgagee brought a bill against the first mortgagee, the mortgagor and judgment creditor to have a reconveyance from the first mortgagee, he being satisfied, which he owned by answer, and afterwards *pendente lite* assigned the mortgage to the judgment creditor; per Jefferies Ch. it is justifiable, unless the plaintiff will redeem and pay off the debt by judgment, and therefore dismissed the bill. Trin. 1688. 2 Vern. 81. Turner v. Richmond.

4. A difference has always been taken between a general incumbrancer by *statute or judgment*, and one that comes in by *purchase or mortgage*. The first is *no lien on any particular part* of the estate, but affects it only at large, but in the last it is a contract for that particular part. That if a man had confessed 20 judgments or statutes, the last cannot, by buying in the first, hold out all the intervening ones; because when the debt on the first judgment was paid, that security determined and expired of itself. Arg. and agreed to by the court. Ch. Prec. 495. But Ld. Cooper, and several at the bar, thought a judgment creditor may secure himself by taking in a prior mortgage, as well as a third mortgagee; because his judgment is a *lien* on the land. Tr. 1718. Ibid. S. C. 496. Wright v. Pilling.

A creditor by judgment, statute, or recognizance shall not by buying in a mortgage tack it to his judgment, &c. and thereby gain a preference to an after mortgagee; for such is no purchase.

for, nor has any right to the land, neither in re nor ad rem; nor does he lend his money upon the immediate view or contemplation of the cognisor's real estate; per the Master of the Rolls. Mich. 1728. 2 Wms's Rep. 491. Brace v. the Dutcheffs of Marlborough.

## (E) Bought in by Purchasers or Strangers. How [ 357 ] far protected.

1. NOTICE to purchaser of a second mortgage before assignment of the first mortgage to him, but after the purchase money paid is too late, and second mortgagee's bill dismissed. 14 Car. 2. N. Ch. R. 64. Meynell v. Garroway.

2. If a purchaser of land incumbered with two statutes, purchaseth in a precedent statute, having no notice of the second statute before he was dipt in the purchase; he shall defend himself by the first statute (whether the same were paid off or no) if he can at law do it, equity shall not hurt him; per Ld. Keeper. Mich. 27 Car. 2. 2 Chan. Cases 208. Anon.

1 Chan. Cases 267. seems to be S. C. but misprinted, and named as the case of Jefferson.

v. Dawson.—Ld. Rawlinson. 2 Vern. 159 cites 21 Car. 2. HIGDEN v. CALAMY, S. P. and May 1674. WYMONSELL v. HAWLAND. S. P. and said there were many cases of that kind.

3. A.

Quere this case, it being seemingly very obscurely reported.

3. A. devised lands to trustees to pay debts and legacies out of the rents and profits. By this they may sell the land itself.—J. S. purchased (of the heir as it seems) and had notice of the will. B. son of A. *devised land to be sold for payment of debts*, the whole estate being incumbered; the trustees sold certain part of the lands for 6000 l. and the *trustees assigned to him several of the incumbrances bought off with his own money*, and allowed good, though the estate was not wholly freed thereby. Mich. 26 Car. 2. 2 Chan. Cases 205. *Lingon v. Foley.*

\* Quere if it should not be (though had be taken a lease first, &c.)

4. A. seised of lands in fee confessed a judgment, and afterwards made a *jointure on his wife*. Then B. *bought in the judgment, and purchased a lease of A.* A. died. Decreed that B. shall not hold over by the lease, since the profits taken after the extent were enough to satisfy the judgment according to the true value, nor shall hold over by the extent after the extended value to protect his lease, though in truth, he did purchase the lease for a valuable consideration, though \* also he had taken a lease first, and for a valuable consideration, and without notice of the jointure, and then had bought in and extended the judgment, he might protect his lease thereof. But A. and B. when the extent is laid on, and in a way of satisfaction by the true value, shall not turn the debt on the jointress. The extent it seems was returned and filed; but B. entered not but by a lease subsequent. Chan. Cases, 247. Hill. 26 & 27 Car. 2. *Jacob v. Thatcher.*

5. A. purchases land charged with a judgment, of which he had notice; afterwards A. bought in several mortgages for years, and some of them subsequent to the plaintiff's judgment to protect his purchase. Decreed that the plaintiff paying off those mortgages that were *precedent* to his judgment should redeem, and the mortgage be assigned to him to satisfy his debt and charges; especially since the purchaser, in this case, had sufficient in his hands to satisfy the same. Trin. 30 Car. 2. Fin. R. 366. *Bacon v. Ashby, Castle & al.*

So that if such purchasers or mortgagees come in without no-

6. Chancery never *protects* purchasers of prior incumbrances, but *only where* they have been concerned with the land before for a valuable consideration, and came *innocently* into the purchase. Hill. 31 Car. 2. Fin. R. 409. *Shermor v. Robins, Cox & al.*

notice, if after they purchase in a precedent incumbrance, it shall protect his estate against any *mesne* incumbrance, though such purchasing in was *after notice of the second mortgage*. Trin. 22 Car. 2. 2 Vent. 339. Sir H. Finch cited the case of *PRIMATE v. JACKSON*, and other cases so resolved in Canc.

S. C. cited per Ld. Rawlinson. Trin. 1690. 2 Vern.

159.—Hill. 27 & 28 Car. 2.

2 Chan. Cases 212. *Windham v. Ld. Richardson & al. S. P.*—2 Vent. 339. *Marth v. Lee.*

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7. No purchaser shall be further or longer *protected* by an incumbrance bought in, than *till such time* only as he has received so much of the profits as would satisfy that security, and then the same shall be avoided by a \**sci. fa. ad comp.* or by an account to be taken in this court. Pasch. 1682. Vern. 52. *Earl of Huntingdon v. Greenville.*

8. A statute bought in *before a purchase* is as good as if bought in after to protect a purchase; and such a purchaser shall *account only*

only according to the extended value, and not according to the real value of the estate. Pasch. 1682. Vern. 52. Earl of Huntingdon v. Greenville.

9. A purchaser came into a man's study, and there *laid hands on a statute that would have fallen on his purchase*, and put it into his pocket; in that case he having thereby obtained an advantage in law, though so unfairly, and by so ill a practice, the court would not take that advantage from him. Cited per Ld. Chancellor. Pasch. 1682. Vern. 52. as Sir Jo. Fagg's case.

S. C. cited per Ld. Rawlinson. Trin. 1690. 2 Vern. 159.

10. Purchaser of lands *in the rebellion* under the parliament's title gets in an old statute; *after the restoration* equity would not relieve against him; per Ld. Rawlinson. 2 Vern. 160. Tr. 1690. cites it as the case of Taylor v. Tabor.

Chan. Cases 274. Hill. 27 & 28 Car. 2. S. C. by the name of

Taylor v. Debarr.

11. A man *articles to sell to J. S. and afterwards articles to sell to J. D.* who actually pays the money, and has a conveyance. J. S. afterwards assigns the benefit of his articles to W. R. who gets in an *old statute*, he was permitted to defend himself by it; per Ld. Rawlinson. 2 Vern. 161. Tr. 1690. in case of Hitchcock v. Sedgwick.

12. A purchaser shall not protect himself by taking a *conveyance from a trustee* after he had *notice of the trust*; for so he becomes a trustee himself, and must not, to get a plank to save himself, be guilty of a breach of trust. Tr. 1692. 2 Vern. 271. Sanders v. Dehew.

13. Though *tenant for life* of land *subject to a mortgage* is intitled to *redeem on payment of a third part*, and though if he *confesses a statute*, such statute is a charge on that equity, yet this may be defeated by a subsequent incumbrance without notice; but then such purchaser *must not be a purchaser of a bare equity only*, for then the first will prevail, but if he purchases in such equity (to redeem on payment of a third part) and the legal estate together (as by paying off the mortgage), and taking an *assignment*, he will have the protection of the legal estate. Pasch. 1701. Chan. Prec. 160. Blake v. Hungerford.

## (F) Bought in. Redeemable by Purchasers or Creditors on what Terms.

1. **W**HERE there were *some special circumstances* in the case, an *heir* was allowed the whole money due on the incumbrance he bought in though he paid less for it. Pasch. 1682. Vern. 49. Darcy v. Hall.

And though an heir or a trustee buys in an incumbrance he shall be

allowed no more than what he really pays for it, unless he bought it in to *protect an incumbrance to which himself is intitled*. Ibid.

2. If the *heir* buys in an incumbrance *on an estate charged with portions*, he shall be allowed no more than what he really paid.  
And

And the whole estate shall be liable to satisfy this incumbrance first. Per Jefferies C. Mich. 1685. Vern. 334. Brathwait v. Brathwait.

2 Vent. 353.

Anon. S. P.

—But

where such buyer in is

a stranger,

he shall be allowed all. Mich. 6 Annæ, 1 Salk. 155. per Cowper Chanc. — But if a man had purchased without notice, perhaps he had equity to redeem for what was really paid. Per Jefferies C. Mich. 1685. Vern. 336. Philips v. Vaughan.

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19 Car. 2.

N. Ch. R.

117. Baker v. Hallet S. P.

3. If an heir or any other buys in an incumbrance, he shall not be allowed as against a purchaser any more than he really paid for such an incumbrance. Trin. 1687. Vern. 464. Long v. Clifton.

4. Mortgages assigns for less than is really due to him; the mortgagor shall not redeem without paying the whole money due on the mortgage. Mich. 1687. Vern. 476. Williams v. Bringfield.

\* Tr. 1688.

2 Vern. 66.

Afcough v.

Johnson.—

1 Salk. 155.

S. P.

5. Where there are subsequent incumbrances or creditors, in this case allowance shall be only of what was really paid. \* But mortgagor or his heir must pay all that is due. per Cur. Mich. 1687. Vern. 476. Williams v. Springfield.

## In Custodia.

### (A) In Custodia Legis.

So though they are replevied.

Went. Off.

Executors, 151.

1. **GOODS** *distreined* or impounded are in custodia legis, and so cannot be attached at common law. Cro. E. 691. Trin.

41 Eliz. C. B. Humphrey v. Barns.

2. *Cattle impounded* are in custodia legis, and the party that distreined them damage feasant has not any interest in them, nor authority to deliver them. Cro. E. 813. Pasch. 43 Eliz. B. R. Pilkington v. Hastings and Meacocks.

3. After judgment executed, the goods, &c. are in custodia legis, and not liable to exchequer process or commission of bankruptcy. Comb. 123. Trin. 1 W. & M. B. R. Lechmere v. Thoroughgood.

### (B) In Custodia Marescalli, &c. who, what and how.

1. **B.** C. has action against one who was outlawed, and went and came by mainprize, and prayed that he answer to it instantly, for that he is in ward here; per Cur. he is not in ward of the



*the court because he appears by mainprize, and not in ward, by which it is at his election if he will answer or not, and e contra, if he had been in ward, he shall answer or shall be condemned, by which he was not compelled to answer, but was put to his election. Br. Responder, pl. 30. cites 39 H. 6. 27.*

2. *Error is not well assigned, that there was no bail filed, unless added that the defendant was not in custodia. Vent. 233. Hill. 24 & 25 Car. 2. B. R. Anon.*

A man is not in custodia mareschalli

till bail filed. 6 Mod. 33. Mich. 2 Annæ, B. R. Wyat v. Ayland.

3. A person is not in custody of the sheriffs of *London*, till he is brought into the counter, and before he be in the custody of the sergeants. Per Holt. A man is not regularly in custody at the suit of another, till a writ is delivered to the sheriff, and arrested. 11 Mod. 69. Hill. 4 Annæ, B. R. Jackson v. Humphrys.

4. If the sheriff of *Northumberland* has a man in custody in N. and the sheriff is himself here in town, and a writ is delivered to him here in town against that person, he is in his custody immediately upon the writ; otherwise, if the man was out of the county at the delivery of the writ, as in case the sheriff was bringing him to Westminster on a habeas corpus. 1 Salk. 274. Trin. 5 Annæ, B. R. Jackson v. Humphries.

5. Persons were indicted of murder, but before their discharge, the sheriff produced a writ of appeal, which was delivered to him, and the court held, that the prisoners were in custody by delivering of the writ to the sheriff. 11 Mod. 252. Mich. 8 Annæ, B. R. the Queen v. Tooty, Arch and Lawson.

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### (C) Of delivering Declarations to Persons In Custodia.

1. **D**ECLARATIONS on the bye against one in custodia, ought to be delivered in term time; per Roll Ch. J. Sti. 321. Hill. 1651. B. R. Anon.

2. When a man is in custodia mareschalli, any man may declare against him in a personal action; and if he be bailed out, he is still in custodia to this purpose, viz. as to declarations brought in against him that term; for the bail are as it were delegated by the court to have him in prison. Vent. 233. Hill. 24 and 25 Car. 2. Anon. cites Hob. 264.

3. Defendant committed by the court for a contempt cannot be charged with an action without leave of the court; but on motion, they generally give leave as they did in this case. 2 Show. 88. Hill. 31 & 32 Car. 2. B. R. the King v. Dean & al.

He cannot declare against one as in custodia, that is committed

for a misdemeanor. Sti. 356. Mich. 1652. Maurice's case. — If a person be in execution for a fine, it is a contempt for any to charge him with a civil action without leave of the court, but the court will hardly discharge the action, though they will punish the contempt. Per Cur. 6 Mod. 88. Mich. 2 Annæ, B. R. Anon.

4. Though

But the not delivering a declaration within three terms to one in custody, or entering judgment, is irrecoverable in B. R. but otherwise in C. B. if defendant continues still in custody & per Eyre Ch. J. 1726.

4. Though by the course of the court, if the *defendant lie in prison two whole terms and no declaration* is put in, he may get a rule to be discharged, yet if the declaration be *delivered afterwards* and judgment thereupon, it is a good judgment, and the bail will be liable in such case. 2 Vent. 143. Hill. 1 & 2 W. & M. C. B. Dod v. Dawson.

But if privilege had been waived as to the first action it would have been waived as to the second also.

5. Where a person is here in *actual custody*, he is liable to all actions; but if he be here *only upon bail*, he may *plead his privilege*; for the sheriff cannot take notice of his privilege so that he must give bail. 1 Salk. 1. per Holt Ch. J. Mich. 8 W. 3. B. R. Duncomb v. Church.

1 Salk. 2. Hill. 8 W. 3. B. R. Jones v. Bodiner.

But if he be in execution you shall not charge him till acknowledged; per Cur. 12 Mod. 73. Anon.

6. If a man be in custody of the marshall on a *reddidit se*, you may *charge him* on the reddidit se in execution with the marshall, without making the *marshall acknowledge him* in court to be in his custody; per Cur. 12 Mod. 73. Trin. 7 W. & M. Anon.

7. Declaration delivered against one in custody, he shall have the whole term to *plead in abatement*. 2 Salk. 515. Mich. 8 W. 3. B. R. Anon.

8. 8 & 9 W. 3. 26. For the more easy and quick obtaining judgment against a prisoner in the Fleet, it shall be lawful for any person, having cause of action against such prisoner, after filing or entering a declaration with proper officer, to deliver a copy thereof to such defendant in any personal action, or to the turnkey or porter of the said Fleet prison, and after a rule given to plead, to be out in 8 days at most after delivery of such copy, and affidavit made thereof before one of the judges of the Common Pleas or Exchequer, to sign judgment against such defendant as if he had actually been charged at the bar of the Common Pleas or Exchequer with such action.

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8 Mod. 227.  
Hill. 10  
Geo. Anon.  
S. P.

9. If after judgment a prisoner is not charged in execution within two terms he shall have a *superfedeas* as well since the 4 & 5 W. & M. 21. as before, Carth. 469. Mich. 10 W. 3. B. R. Holland v. Serjeant.

10. A. is in execution at the suit of B. and charged with action at suit of C. who obtains judgment; he ought to charge him in execution by *committitur*, and not by *ca. sa.* but he may have *fi. fa.* But quære, if after he has charged him by *committitur*, he may have *fi. fa.* he continuing so in execution. By the statute, if one in execution by *ca. sa.* escape, the plaintiff may sue *fi. fa.* 12 Mod. 313. Mich. 11 W. 3. Anon.

11. One arrested by process of this court, for want of bail goes to custody of marshall, and after by *hab. corp.* gets himself turned over to the Fleet; sure the plaintiff shall not thereby lose the benefit of declaring against him in custody of marshall; but if he removes himself in that case out of custody of sheriff into the Fleet, so that he never was in custody of marshall quære if there may be a difference.

ence, though even there it will be dangerous to suffer such removal to the prejudice of the first plaintiff's action; per Holt Ch. J. 12 Mod. 560. Mich. 13 W. 3. Anon.

12. Note, before the late act of parliament, one *in prison of the Fleet* could not be declared against without *bringing him by hab. corpus into court*; but the course here was to *leave declaration with the turnkey*. 12 Mod. 561.

13. If one is in custodia mareschalli, to charge him with action or execution you must (if *in term time*) file a bill against him and deliver a declaration to the turnkey; upon this he shall lie two terms before he shall be discharged, even on common bail; but if it be *in vacation*, the plaintiff must go to the marshal's book in the office, and make an entry, quod remaneat in custod. ad sect. J. S. but then he must be in actual custody, and not at liberty, because then he may be arrested; per Cur. 1 Salk. 213. Mich. 3 Annæ, B. R. Tilsden v. Palfriman. 345. S. C. and P.

6 Mod. 254. S. C. — A declaration was filed in the office against one in custody of the marshal and a copy left with the clerk of the prison, against him

*but the prisoner had no notice*; on shewing thereof and affidavit a judgment by nil dicit was discharged, and plaintiff ordered to accept a plea. Sti. 386. Trin. 1653. B. R.

14. If marshal *owns one to be in his custody who is not*, that shall conclude himself but no body else, and shall subject him to an escape. 6 Mod. 254. Mich. 3 Annæ, B. R. Tilsden v. Palfryman.

15. If marshal *suffer one to be in and out at times*, and during such time he is charged by a *remanet*, &c. though he were actually out of prison at that time, yet if he returned in again, that will be quasi a continuance of the first imprisonment. 6 Mod. 254. Tilsden v. Palfryman.

16. You cannot declare against a man in custodia any where *but in B. R.* but a process must go to the officer to bring him to the bar. 11 Mod. 69. Hill. 4 Annæ, B. R. Jackson v. Humphrys.

17. It was held by the court that it was not sufficient to deliver a *copy of a declaration to the turnkey* or gaoler where the defendant is in custody, unless the declaration is first *filed in the office*, and a judgment for that reason was set aside. Hill. 10 Geo. 1. 8 Mod. 226. Anon.

### (D) *In whose Custody the Prisoner shall be said to be.*

1. **H**E who comes to London by writ of corpus cum causa brought by officer of London, is prisoner to the officer who brought him, till he be thereof dismissed, and not prisoner to the bank; so that if another action should be against him in banco, he shall not be compelled to answer to it. Br. Imprisonment, pl. 99. cites 9 H. 6. 54.

2. If a man be *imprisoned in Newgate* in London for surety of the peace by precept of Middlesex, he shall not be stayed by any plaint taken against him in London; for though Newgate be in London, yet it is the prison as well for the county of Middlesex as for the city of London,

Br. Plaint, pl. 24. cites 16 E. 4. 5. — Br. Privilege, pl. 44 cites S. C.

London, and in this case he is prisoner there for Middlesex, and not for the city of London, and therefore *shall not answer to the plaint in London.* Br. Imprisonment, pl. 104. cites 16 E. 4. 6.

Br. Corone,  
pl. 128.  
cites S. C.

3. A prisoner who comes from the tower of London to B. R. to answer for treason, shall be in custodia mareschalli, sedente curia, and not in custody of the lieutenant of the tower of London, and when he departs he shall be sent again to the lieutenant of the tower. Br. Imprisonment, pl. 96. cites 1 H. 7. 23.

## Indictment.

\* An indictment is an accusation

(A) \* Indictment, Extortion, [and Misdemeanours.]

Extortion  
& pl. 5 to  
11.

[ 1. M. 14. E. 3. B. R. Rot. 38. Richardus Bernard clericus Thome de Bolton militis taxatoris & collectoris 15. fecit finem per 50 marcas pro eo quod *recepit denarios per pondus magnum, per quod lucravit in qualibet libra 20s. 6d. & ultra, & pro extortionibus.* ]

at the suit

of the King, by the oaths of 12 men of the same county, wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true; but when such accusation is found by a grand-jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a presentment; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an inquisition. 2 Hawk. PL C. 209. cap. 25. s. 1.

[ 2. Tr. 36. E. 3. B. R. Rot, 27. Presentatur quod Phill. Otere capellanus, collegit ad pontem vocatum Feribrig 20l. quas expendit circa dictum pontem; sed barras ad dictum pontem confixit & conclusit quod nullus transire potuit sine fine sibi faciendo, &c. defendens fatetur, & is fined. ]

Misdemeanours, and pl. 12. to 14.

[ 3. If the apprentice of J. S. gets a woman with child, and thereupon secretly departs, and after J. S. procures some justices of peace to make a warrant to the constable to take him, and to bring him before them or others to answer this offence, and after a stranger, well knowing of this warrant, harbours, and comforts the apprentice in locis ignotis, by which the constable cannot take him, yet this is not any offence punishable by the common law, in as much as the warrant was not to apprehend him for felony or treason, and therefore the harbouring and comforting not punishable. Hil. 16 Ja. B. R. Vaughan's case in writ of error per totam curiam. ]

[ 4. But in this case if the stranger, knowing of the warrant, advises and incites the apprentice to absent himself so that the constable shall not take him, and he harbours and comforts him to this purpose, this is an offence punishable by the common law by fine and imprisonment; because he persuades him to avoid and to hinder the

course

course of justice, though the warrant was not for felony or treason, Hil. 15 Ja. B. R. Vaughan's case per Curiam, præter Doderidge (but quere well of it.) ]

5. The mayor of L. was indicted for extortion, for that he had received 24s. of one A. for giving of judgment in an action of debt. 1 Le. 295. Hill. 27 Eliz. B. R. the Mayor of Lynn's case.

6. A commissary of the archbishop of Canterbury, B. register, and C. apparitor, were indicted of extortion, that they *colore officiorum suorum* had *malitiose* accepted and received 11 s. 6 d. for absolution of one D. who was excommunicated, where they ought to have received but 2 s. 6 d. And exception was taken to this indictment, because that all their offences are put together, viz. *colore officiorum suorum*, whereas the particular offence of every offender ought to be specially set down, but here they are confounded; which see by the statute of 25 Ed. 3. 9. that ordinaries shall not be impeached by such general indictments, unless they say, and put in certain, in what things, and of what, and in what manner the said ordinaries have committed extortion; but that exception was not allowed; because of that the party grieved cannot have notice; for they took in gross, and afterwards parted it betwixt them; another exception was, because it is not shewed what is their due fee, and that was conceived to be a good cause of exception; and if no fee be due, the same ought to appear in the indictment. And afterwards the opinion of the court was, that they should be discharged. 3 Le. 268. Mich. 33 Eliz. B. R. Lake's case.

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7. A. was indicted, quod existens servus sive deputatus of the chancellor of the bishop of H. he took 10 s. for writing letters of administration contra formam statuti, &c. Palm. 318. Mich. 20 Jac. B. R. Smith's case.

8. A. a sheriff's bailiff was indicted for extortion by two several indictments; in the one, that he had received 20 s. from one extorsive *colore officii sui*; and in the other, that he extorsive took 6 s. 8 d. Cro. Car. 438. Hill. 11 Car. B. R. Brunsten's case.

Jo. 379. S. C. by name of the King v. Lamferne.—So bailiff of

the hundred of S. was indicted for extortion, viz. that *colore officii* he had taken 50 s. and was found guilty; and after the indictment was removed hither and exceptions taken to it; because the cause for which he took the 50 s. is not expressed in the indictment; for it is issuable; but the court held the indictment good; for it is *colore officii*, and perhaps he went to one of the hundred, and said that he ought to have so much as bailiff, &c. the which matter could not have been otherwise expressed. But if it had been upon demurrer, perhaps it should be otherwise. Sid. 91. Mich. 14 Car. 2. B. R. the King v. Cover.

9. A miller was indicted for taking too great toll. 5 Mod. 13. Mich. 6 W. & M. the King v. Wadsworth.

10. Indictment was for extortion against an officer for taking money for not carrying his prisoner to a spunging-house. 12 Mod. 255. Mich. 10 W. 3. the King v. Beechcroft.

11. Indictment against several for intending to defraud A. of his money by threatening to send him to Newgate by colour of a warrant, and to indict him of perjury, unless he would give them money and a note, which he did through their threats; and though exception was taken, because it was neither averred, that there was no warrant, nor that he was not guilty of perjury, nor that any money was ac-

tually paid; yet the court held, that it was offence indictable, and over-ruled the exceptions; and by Holt Ch. J. every extortion is an actual trespass, and an action of trespass will lie against a man for frightening another out of his money. If a man will *make use of a process of law to terrify another out of his money*, it is such a trespass for which an indictment will lie; and judgment for the Queen. Mich. 1707. B. R. 11 Mod. 137. the Queen v. Woodward & al.

[ 364 ] 12. A. was indicted at the common law for several misdemeanors against the peace of the king, and which were to the great scandal of christianity, viz. because he *shewed his naked body in a balcony in Covent Garden to a great multitude of people*, and there did such things, and spoke such words, &c. (shewing some particulars of his misbehaviour,) and this indictment was openly read to him in court; and after he had been continued by recognizance from Trin. term to the end of Mich. term, the court demanded him to have his trial for it at the bar; but he, having advised, submitted himself to the court, and confessed the indictment, wherefore the court considered what judgment to give, and *because he was a gentleman of a very ancient family and his estate incumbered* (not intending his ruin, but to reform him,) they *fined him only 2000 marks*, and that he should be *imprisoned for a week without bail, and be of the good behaviour for 3 years*. Sid. 168. Mich. 15 Car. 2. B. R. the King v. Sir Charles Sidley.

13. If what was a *misdemeanor at common law* be made felony by statute, as for buying stolen goods knowing them to be stolen before the acts making it felony; yet after the acts which make it felony, it is not punishable as a misdemeanor, and must therefore now be indicted for felony. 12 Mod. 634. Hill. 13 W. 3. the King v. Crosse.

14. A. settled an account with B. by which he was indebted to B. in such a sum; A. *signed the account and afterwards got it into his hands and tore it*, and was indicted for it. 6 Mod. 179. Pasch. 3 Annæ, B. R. the Queen v. Crisp.

### (B) Contempts to Courts.

[ 1. ] If a man comes before the justices itinerant, and there the bishop of London says, that he is excommunicated, and so publicly denounced him, upon which A. before the justices *literam sigillo officii curiæ Cantuariensis signatam in plena curia regis ibidem porrexit capitali clerico justiciariorum prædictorum legendam, ad famam & statum suum clarificandum*; the which letter the bishop statim de manu prædicti capitalis clerici cepit & asportavit against the will of the said clerk, though the clerk several times requested him to deliver it to him again. The bishop may be indicted for this contempt to the court. Liber Parliamentorum. 21 E. 1. 44. b. between Penkison and the Bishop of London; this offence was punished in parliament. ]

### (C) Concerning



(C) Concerning [Things *done, or spoke in Court to*] Judges. What shall be said an Offence punishable. See (T) pl. 3.

[ 1. **H.** 13. E. 3. B. R. Rot. 116. A man was committed in parliament, and fined for *saying to a justice of oyer, &c. that he lied, and laying violent hands upon him.* ]

2. *A. came to the court of C. B. (justice Hutton and justice Crawley then being there, giving rules and orders) and said, I accuse Mr. Justice Hutton of high treason;* for which he was committed to the custody of the warden of the Fleet by justice Crawley; and after by the direction of the king, he was indicted in B. R. and convicted and fined 5,000 *l.* to the King. And justice Hutton preferred his bill against him there, and recovered 10,000 *l.* damages. Hutt. 130. Mich. 14. Car. Hanson's case.

3. *A. said to the justices in their quarter sessions, if I cannot have justice here, I will have justice elsewhere;* for which contempt the justices of the said sessions indicted him, fined him 5 *l.* and committed him to prison for default of payment; all which matter was returned upon habeas corpus, and the return being filed, it was prayed that he should be discharged; but several of the justices were of opinion, that it was a contempt, for which upon indictment, he may be fined, as here he is, for which fine he is now in execution, and therefore shall not be discharged nor bailed. But Twisden J. doubted, if the words before were a contempt; for though it is a contempt to accuse them of injustice, yet it is not to appeal, and these words are spoke by way of appeal, which is lawful for every subject to do; *ideo quære.* 1 Sid. 144. Pasch. 15 Car. 2. B. R. the King v. Mayo.

4. *A. being brought by warrant before the justices of peace at their sessions said, this is no justice of peace's business; you shall not try this matter; have a care what you do; I have blood in me, if I had you in another place.* The court inclined, that the words are not indictable as laid in this indictment; because they did not carry any necessary intendment of a challenge or intent to break the peace, especially when it appears in this very indictment that the defendant was a wheelwright, and so not likely to challenge or be challenged. 10 Mod. 186. Mich. 12 Annæ, B. R. the Queen v. Nun.

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(D) [By going *Armed.*] Touching Contempts to Courts [by *Threatning, or \* Striking* there.] See (B) (I) pl. 4.—  
\* See Striking.

[ 1. **P.** 18 E. 3. B. R. Rot. 18. Willielmus Jordan inventus fuit *vagrans armatus de platis*, in contemptum domini regis & attachiatur, qui dicit quod *minatus fuit per homines ignotos de vita sua, & sic in salvationem vitæ suæ apposuit super corpus suum quoddam*

Going armed.

One came

into the  
palace arm-  
ed, and  
being

quoddam par de platis & non in contemptum curiæ. Et hoc per juratum compertum est, ideo quietus, ita tamen quod *inveniat securitatem de bono gestu suo*. Et invenit manucaptos. ]

brought to the bar in his compleat armour, the cause was demanded, and he said that it was in his defence, being in fear of a great man then in court, and he was committed to prison by the court during the king's pleasure, and his lands forfeited during his life. Poph. 207. Trin. 2 Car. B. R. per Doderidge J. cites 24 E. 3. 33. Fitzh. Forfeiture, 22.—But in Fitzh. pl. 22. is no mention of forfeiture of lands.—And 3 Inst. 162. cites S. C. but mentions only forfeiture of arms and imprisonment during the king's pleasure, and after says that it appears by this case that the offender was to be punished according to the act of 2 E. 3. 3. by forfeiture of the armour and imprisonment only, but that the statute 20 R. 2. adds fine and imprisonment 2 E. 3. 3. enacts that *none shall come with force and arms before the king's justices, or other his ministers, nor go or ride armed in affray of peace, in pain to forfeit their armour, and to suffer imprisonment at the king's pleasure*.

Threat-  
ning.

One was  
indicted  
and ar-  
raigned  
for striking  
one in *West-*  
*minster-hall*,  
with his  
right hand  
sitting all the  
courts and  
threatning to  
hang him if  
he gave evi-  
dence against  
a felon then  
to be ar-  
raigned; he

[ 2. Tr. 1 H. 5. B. R. Rot. 16. A man is fined 100 l. for speaking threatening words to the marshall of B. R. in *Westminster-hall*, for keeping of a prisoner committed to him by the court of B. R. Tr. 19 E. 3. B. R. Rot. 21. Presentatum fuit per juratum quod cum jurata capta fuit coram domino rege apud *Westmonasterium* die Lunæ, &c. inter Aliciam de Legh querentem & Willielmum Waghvain defendentem de placito transgressionis quidam Richardus de Carlil & alii tempore quo juratores inquisitionis fuerunt ad barram coram justiciariis ad veredictum suum dicendum dictis juratoribus minas fecerunt & ipsos persecuti sunt ad portam palatii domini regis *Westmonasterii* & ibidem insultum fecerunt & ipsos vulneraverunt & male tractaverunt, &c. Et dictus Richardus in curiam ductus dicit quod non est culpabilis & statim fatetur præmissa & submittit gratiæ curiæ. Judicium redditur quod *manum suam dextram amittat & amputetur & committitur turri London ibidem moraturus dum vixerit*. Sed executio pro amputatione manus respectuatur quousque, &c. simile judicium. P. 24 E. 3. B. R. Rot. 56. ]

confessed the indictment, and his judgment was imprisonment for life; \* forfeiture of all his lands, goods, and chattels, and amputation of his right hand, at the standard in Cheape; and execution was done accordingly. D. 188. b. pl. 10. reports that this appears of record in B. R. Trin. 1 E. 4. Rot. 3. Davis's case.—\* Finch. 75. b.—Dal. 23. pl. 6. 3 & 4 P. & M. cites 4 E. 3. Corone, 6. S. P. [but it seems to be misprinted, it being neither at the same title and plea in Fitzh. or in Brooke.] But Dalison makes a quære, what law there is for the forfeiture of his lands, but there is, that the forfeiture of his lands may be for his life.—Jenk. 43. pl. 81. cites S. C. in D. 188. b. and says, the forfeiture is of the inheritance of the lands, and that the offender must be indicted and convicted before this punishment can be inflicted; and that it is the same of striking before the king's justices of assise or gaol delivery.—He who makes an affray in the presence of the justices, and they who rescue him with drawn weapons, shall be disinherited and imprisoned for ever, and their hands cut off. Br. Pain, pl. 16. cites 22 E. 3. 13. and Fitzh. Forfeiture, 21.

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Striking.

Br. Char-  
ters de par-  
don, pl. 70.

\* Fol. 77.

cites S. C.  
—Trespas  
of assault  
and battery

[ 3. 41 Ass. 25. A man struck a juror at *Westminster* who passed against him and was indicted and arraigned at the suit of the king and attainted, and the judgment was that he should go to the tower of London and there remain in prison all his life, and that his right hand shall be cut off, and his land, &c. should be seized into the hands of the king, and the king answered of the issues; and after the king gave the lands to another, supposing that they were forfeited; and after the king \* by his charter pardoned him who struck the juror by such words (reciting how he was convicted, and also all the judgment as above) *pardonavimus predictæ personæ predictam amputationem & quicquid ad nos pertinet in hac parte*; and upon this the heir of him sued a scire facias out of the charter against him, to whom

whom the land was given, why he should not be restored to the land, and the defendant pleaded that this writ does not lye upon a charter, not being warranted of record; and because the defendant would not say any other thing, execution was awarded by judgment.]

in Westminster hall and wounding and mauling; the defendant

dant pleaded not guilty, and Knivet justice command'd the marshal to make panel of the people who have stalls of merchandize in the same hall, and swore him to return persons not suspicious nor procured of the one part nor of the other. Br. Trespass, pl. 258. cites 42 Aff. 18.

4. Indictment for *drawing a sword* in Aula Westm. sedentibus Curiis, and had judgment of *perpetual imprisonment and 100 l. fine*; note on the evidence it appeared to be on the stairs ascending the court of wards, and so *out of the view of the courts*; but per Popham, if the indictment had been (as it ought to have been and as we have precedents in 1 E. 4.) viz coram domina regina; the judgment should have been *amputation of his right hand, forfeiture of all his lands and chattels, and perpetual imprisonment*. Cro. E. 405. Trin. 37 Eliz. B. R. Peter Carey's case.

Ow. 120. S. C.—Fin. Law, 8vo. 205. cites 41 E. 3. Corone, 280. 19 E. 3. Judgment, 174.—One did nothing more than

draw his sword to strike a justice assigned sitting in judgment, &c. and upon being found guilty had judgment to forfeit his lands and chattels and his right hand to be cut off. Staunf. Pl. C. 38. a.

5. One was indicted of assault and battery in the palace of Westminster near the hall there, all the courts judicially sitting, &c. in contempt of the king and disturbance of the laws to be ministered to the people, &c. he was found guilty; but because the indictment was *not* that he did it in the presence of the justices or of the king, all the judges agreed that judgment should not be of the cutting off his hand; but being done in the palace near the hall door, he was awarded to be imprisoned during the king's pleasure, to pay 1,000 l. fine, and to be bound with sureties for his good behaviour; and Jones and Barkley J. were for adjudging him to make his submission in the three courts, but Richardson Ch. J. and Crook J. were against it, and Crooke conceived 500 l. to be fine sufficient. Cro C. 373. Trin. 10 Car. B. R. Sir William Waller's case.

Jo. 343. S. C.—S. C. cited D. 188. b. Marg. pl. 10.—Jenk. 43. pl. 81. cites S. C.

6. B. was indicted for *striking one H. in Westminster hall near the side bar of C. B. sitting the courts*, and in a former term it was moved that he should be bailed; and it was said per Cur. that inasmuch as the judgment is so great, that his hand shall be cut off, &c. those who are bail for him shall be body for body, and not in any sum certain, and so it was done; and this term he was tried at the bar here by a jury of Middlesex, and witnesses who gave evidence for B. were admitted to be sworn as well as H. and others who gave evidence for the king, and though B. offered evidence that H. had offered to compound with him, and to take so much money, yet the court would not allow it as matter to invalidate the testimony of H. because they said it should be intended that this was a composition for the battery, and not for this prosecution, which was not in his power to compound; and after the jury found B. guilty, upon which he was committed till he had judgment, but B. obtained the pardon of the king. Sid. 211. Trin. 16 Car. 2. B. R. the King v. Bockman.

See Conspi-  
racy.

## (E) Conspirators.

[ 1. **SEE** 33 E. 1. *statute of conspirators, who shall be adjudged conspirators.* ]

Indictment  
for con-  
spiracy  
lies before  
acquittal;  
but case

[ 2. If two confederate together each of them to maintain the other, whether their matter be true or false, though they do not put any thing in ure, yet they may be indicted of it; for this confederation is prohibited by the law. 27. Ass. fol. 139. b. adjudged. ]

not till after, 6 Mod. 137. 186.——To charge one falsely, with *fornication* is a conspiracy; and a confederacy falsely to charge with a thing that is a crime by any law is indictable. 1 Salk. 174. Queen v. Best.

[ 3. So if men confederate by oath in such manner as before, they may (a fortiori) be indicted of it. 27 Ass. fol. 139. b. 34. though nothing be put in ure. ]

[ 4. If a man makes a false affidavit against another in B. R. Chancery, B. &c. though no action lies against him upon this statute, yet he may be indicted for it at the common law. Mich. 11 Ja. B. R. per Coke: for such false affidavits procure damage and vexation to the party divers ways. ]

[ 5. If a man swears, or procures another to swear, before a master in chancery, to have the good behaviour of J. S. certain articles to be true of his own knowledge, where he does not know it to be true, though it be true for the matter; yet this is a false oath punishable at the common law, though it be not within the statute. Mich. 20 Ja. B. R. adjudged per Curiam, Whittlesey v. Oakley. ]

From this  
definition  
it seems  
clearly that  
not only those  
who actually  
cause an in-  
nocent man to  
be indicted,  
and also to

6. Stat. 33 E. 1. *Conspirators are such as bind themselves by oath, or other alliance falsely and maliciously to inflict, and falsely, to move and maintain pleas, and such as cause children within age to appeal men of felony, and retain men to maintain their malicious enterprizes; and this extendeth as well to the takers as givers, and also stewards and bailiffs, who by their power maintain debates that concern not their lords or themselves, but other parties.*

be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators but those also who barely conspire to indict a man falsely and maliciously whether they do any act in prosecution of such conspiracy or not. Hawk. Pl. C. 189. cap. 72. f. 2.

S. P. Lev.  
62. Pasc.  
14 Car. 2.  
B. R. the  
King. v.  
Kimberly  
and May-  
north.

7. Several were indicted for conspiring to charge a man to be the father of a bastard child; the whole court thought that bare agreeing together to charge a man with a crime falsely is indictable. Indeed if the truth had been, that there was a woman with child, and the parish likely to become chargeable, and the defendants, being parish officers had met to inquire and find out the father to save the parish harmless, and should upon such an occasion upon their information charge such person to be the father, and the indictment had been for that, they must be acquitted; judgment for the Queen. 6 Mod. 185. 187. Trin. 3 Annæ, B. R. the Queen v. Best & al.

(F) What

(F) *What shall be said an Offence punishable by the Common Law.*

[ 1. ] F a man impanelled and sworn upon the grand inquest discovers to strangers the evidence given to him and the residue of the jurors for the king, this is an offence punishable by fine and imprisonment upon an indictment. Mich. 15 Ja. B. R. in Smith and Hill's case admitted. And the clerks of the crown-office said that it is usual. \* 27 Aff. 63. arraigned as of felony. ]

\* Br. Corone, pl. 113. cites S. C. per Shard; some justices hold this to be treason; quære.

[ 2. Inter placita coronæ coram justiciariis itinerantibus 30 E. 1. within the hundred of Pidreshire in Cornwall, the sheriff of Cornwall, scilicet, Innepenn is presented for counselling a prisoner to stand mute, &c. ]

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3. Keeping a gaming-house is an offence indictable at common law, as a nuisance; per Cur. 10 Mod. 336. the King v. Dixon and Ux.

(G) *What shall be said an Offence punishable.*

[ 1. ] F a commission be granted to two and one executes it alone without the other and puts people to fine; yet it is not any cause of an indictment, because it was error of judgment. 27 Aff. 23. adjudged. ]

[ 2. A man cannot be indicted because by his conspiracy all the land of J. S. was extended upon an elegit under the name of a moiety, supposing him to have other land, and also because it was extended very low; for the extent was by the oath of the 12. 27 Aff. 23. adjudged. But quære. ]

3. A person was indicted for opening a letter sent by the post; but quashed for a fault in the caption. 12 Mod. 514. the King v. Ruffel.

4. For being a common scold, and judgment that she should be ducked. 6 Mod. 178. Trin. 3 Annæ, the Queen v. Foxby.

5. One is indictable for setting up a leet. 1st. Because it is an usurpation upon the queen, for which she may bring a quo warranto, where there may be two judgments, the one for seizure of the franchise into her hands, and the other for a fine for the usurpation. 2dly, To keep a leet to summon the subjects to make presentments, and to amerce is a grievance to the people besides. 6 Mod. 183, 184. Trin. 7 Annæ, per Cur. Anon.

So for setting up a fair or market if they take toll of the people. Ibid. 183, 184.

(G. 2) *What Persons in General are indictable.*

See Murder.

1. F an infant, of so tender age that the justices think he cannot conceive malice, be indicted and found guilty of felony, the

the justices may dismiss him; per Moile and Billinger, quod nemo negavit. Br. Corone, pl. 6. cites 35 H. 6. 12.

2. He that owes no allegiance is not indictable; as an *alien enemy*; per S. Eyre J. 12 Mod. 51. cites 7 Rep. 6. b.

3. A *corporation* is not indictable, but the particular members of it are; per Holt Ch. J. 12 Mod. 559. Mich. 13 W. 3.

Fol. 78.

(H) For what Offence [a Man] may be indicted.

† S. P. or for any other way of cheating at play or otherwise; for cheating is a high crime against the common wealth, as

[ 1. ] If two men are common hazardors, and use with † false dice to deceive the king's subjects, and they join together, and with false dice deceive J. S. of his money at play with him; they may be indicted for it; for it is an offence, and if they are found guilty, they may be adjudged to stand in the pillory. Trin. 2 H. 4. Robert Beckingham and Martin Leson Vantonye were indicted for such offence, and the said Martin adjudged to stand in the pillory in the Strand, by three days, and after in Southwark by three other days. ]

well as against the party cheated. 2 L. P. R. 44. cites Hill. 22 Car. B. R.

A. was indicted, for that he, falso and per conspirationem to cheat B. of his money, prevailed on him to lay a wager upon a foot-race, and afterwards got the party to run booty; this being a cheat, the court would not quash it upon motion. 6 Mod. 42. Mich. 2 Annæ, B. R. the Queen v. Orbell.

All cheats and abuses of tradesmen are matters indictable; per Ch. J. and not denied. Comb. 16. Pasch 2 Jac. 2. B. R. Anon.

\*[369]

[ 2. See Mirror of Justices, fol. 18. One of the articles inquirable in a leet is of the makers and haunters of false dice. ]

[ 3. Mirror of Justices, 17. b. cap. i. f. 17. of bounds removed to common nuisance, (this is there put for one of the articles inquirable in a leet.) ]

[ 4. 17 E. 1. Rot. Clausarum, M. 4. dorso. Quod vicecomes certificet regi de nominibus & cognominibus incedentium in regno cum equis & armis & congregationes & conventicula clam vel palam, &c. ]

5. If a collector of any thing pro bono publico does not employ it accordingly, he may be indicted; Roll R. 2. per Coke Ch. J. cites 27 Ass. which was of monies collected to furnish archers, and the collector indicted for converting it to his own use.

6. For an unlawful assembly, and entry into another's close. 2 Lc. 184. Mich. 32 Eliz. Ashpernon's case.

7. An indictment lies against one for assaulting and stopping of another in his passing in the highway. Hill. 22 Car. B. R. for it is a breach of the publick peace. 2 L. P. R. 44.

8. Every indictment ought to be preferred against the party for some offence committed by him, either against the common law, or against some statute; Trin. 23 Car. B. R. and not for every slight misdemeanor. 2 L. P. R. 44.

But then it must be an indictment

9. An indictment lies against one that makes a false oath in an answer to a bill in chancery, or in an affidavit made in a cause depending



pending there, or in any other court of record. Trin. 23 Car. at common law; for being main-  
B. R. 2 L. P. R. 44.  
tainable at common law in these cases, it will not lie on the statute. Roll R. 79. per Coke Ch. J. Mich. 12 Jac. B. R. Anon.—& 5 Mod. 348. Trin. 9 W. 3. The King v. Greep.

10. One for *counterfeiting a protection in the name of a privy counsellor*, (though only a commoner, and not a parliament man) and selling it for 6 l. was indicted and found guilty of counterfeiting and extortion, and fined 50 l. and imprisonment 'till paid. Sid. 142. Pasch. 15 Car. 2. The King v. Deakins.

11. One was indicted for *kidnapping*, and convicted and fined. Comb. 10. Hill. 1 & 2 Jac. 2. The King v. Baily.

12. It lies for *bringing back a poor person after an order to settle him elsewhere*. Comb. 205. Pasch. 5 W. & M. The King v. Wiggot and Petty.

13. One was indicted for *erecting a mountebank's stage* in Moorfields; and Holt Ch. J. said, the grand jury should present those that have *licences* as well as those that have not. Comb. 304. Mich. 6 W. & M. The King, &c. v. Bradford.

14. One was indicted for *lying with another man's wife*. Comb. 337. Trin. 8 W. 3. The King v. Johnson.

15. Indictment for a cheat done to J. S. by *imposing upon him a quantity of beer mixed with vinegar and grounds of coffee for port wine*; one of the defendants pretended to be a broker, and the other a Portuguese merchant, for the better carrying on the cheat; and per Holt Ch. J. J. S. was allowed to be a witness, to prove the fact upon the trial, for in such private transactions, no body else can be a witness of the circumstances of the fact, but he that suffers. 1 Salk. 286. Mich. 2 Annæ, B. R. The Queen v. Mackartney & al.

S. C. and the cheat was in exchanging this pretended wine for hats of 118 l. value. But the indictment was quashed for

its being called vinum prætextum. 6 Mod. 301, 302. Mich. 3 Annæ.

16. J. S. was indicted for that *he came to A. pretending B. sent him to receive 20 l. and A. received it accordingly, whereas B. did not send him*. And per Cur. it is not indictable, unless the defendant came with false tokens; and said, that we are not to indict one man for making a fool of another. 1 Salk. 379. Trin. 2 Annæ, B. R. the Queen v. Jones.

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17. A. was indicted for that B. *borrowed 5 l. of him, and pawned gold rings to secure the payment*, and that at the day A. tendered the money, but the defendant refused to deliver up the rings; and it was quashed; cited 1 Salk. 379. in the case above, as Bainham's case.

In such a case he may be indicted for refusing to deliver them; per

Holt Ch. J. 2 Salk. 522. Pasch. 5 W. & M. B. R. Anon.

18. Whatever is a *breach of the peace* is indictable; as sending a challenge; agreed per Cur. 6 Mod. 125. Hill. 2 Annæ, B. R. in case of the Queen v. Langley.

19. For *fishing in one's pond*, and taking and carrying away so many carps de bonis & catallis of the prosecutor. 6 Mod. 183. Trin. 3 Annæ, the Queen v. Steer.

20. An

20. An indictment was, *for entering into a wood, and cutting down 20 ashes and 30 oaks.* Holt's Rep. 353. Trin. 6 Annæ, the Queen v. Harris.

21. A crime that shakes religion, as *profaneness on the stage, &c.* is indictable; but *writing an obscene book*, (as that intitled, The Fifteen Plagues of a Maidenhead) is not indictable, but punishable only in the spiritual court. 11 Mod. 142. Mich. 6 Annæ, the Queen v. Rudd.

22. For *keeping a gaming-house*; notwithstanding the stat. 33 H. 8. cap. 9. s. 12. chalks out a particular method of proceeding for recovery of 40 s. a day. 10 Mod. 336. Trin. 2 Geo. 2. King v. Dixon.

23. Several were indicted for a conspiracy, in giving a man money to marry a poor helpless woman, who was an inhabitant in the parish of B. and incapable of marriage, on purpose to gain a settlement for her in the parish of A. where the man was settled. But upon a motion to quash the indictment, judgment was given for the defendant, because it was *not averred, that she was last legally settled in B.* but only, that she was an inhabitant there. 8 Mod. 320, 321. Mich. 11 Geo. 1725, the King v. Edwards & al.

24. There can be no doubt, but that *all capital crimes whatsoever*; and also *all kinds of inferior crimes of a publick nature*, as *misprisions*, and all other *contempts*, all *disturbances of the peace*, all *oppressions*, and all other *misdemeanors whatsoever*, of a *publickly evil example against the common law*, may be indicted; but *no injuries of a private nature*, unless they some way concern the king. 2 Hawk. Pl. C. 210. cap. 25. s. 4.

## (H. 2) For Non-feasance. In what Cases.

1. **H**E that has a port is bound to repair it, otherwise he may be indicted; per Powel J. 2 Lutw. 1523, in case of Wilks v. Kirby.

Ibid. 325.  
Pasch. 7 W.  
3. seems to  
be S. C.  
Anon.

2. Overseer of the poor was indicted for not obeying an order of sessions concerning the settlement of a poor man. Comb. 213. Trin. 5 W. & M. the King v. Pope.

3. An indictment was against a woman, for that she being duly required to watch and ward, she did not watch and ward; but quashed, because it did not say, nor procured one to watch for her, which she might have done. Comb. 243. Hill. 5 W. & M. Anon.

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4. It lies not for not assisting a constable (upon request) to execute a warrant for searching for nets, &c. to take conies, &c. For the constable has no power to require whom he will to attend him on such occasions. Comb. 309. Mich. 6 W. & M. the King v. Wildboare.

5. Indictment lies not against a justice of peace for not binding over rioters charged upon oath; and the indictment was quashed. Comb. 317. Hill. 6 W. 3. Aston's case.

6. If a master turns away an apprentice, which he is bound to keep, and thereby the apprentice is likely to become chargeable to the parish; if the master upon complaint of the church-wardens, refuses to take him again, by order of the justices, (and which order Holt Ch. J. said it seemed reasonable, that they may make) he thought the remedy must be by way of indictment. Comb. 405. Hill. 9 W. 3. Anon.

(H. 3) What Offences are Indictable by Statute. See Judge (F.)

1. **A** *Fact made felony by statute* is not indictable as a misdemeanor. 12 Mod. 634. Hill. 13 W. 3. the King v. Croffe.

2. It seems to be a good general ground, that wherever a statute prohibits a matter of a publick grievance to the liberties and security of the subject, or commands a matter of a publick convenience, as the repairing of a common street of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment, for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet if the party offending have been fined to the king in the action brought by the party, as it is said, that he may in every action for doing a thing prohibited by statute, it seems questionable whether he may afterwards be indicted; because that would make him liable to a second fine for the same offence. 2 Hawk. Pl. C. 210. cap. 25. f. 4.

3. Also, if a statute extend only to private persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to distresses made by lords on their tenants, it is said, that offences against such statute will hardly bear an indictment. 2 Hawk. Pl. C. 211. cap. 25. f. 4.

4. Also, where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, &c. without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment. Yet it hath been adjudged, that if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorises a proceeding by way of indictment. 2 Hawk. Pl. C. 211. cap. 25. f. 4.

Cro. J. 644.  
Mich. 20  
Jac. B. R.  
in Castle's  
case.—  
\* S. P. 12  
Mod. 104.  
The King  
v. Gluff.

5. Also, where a statute adds a farther penalty to an offence prohibited by the common law, there can be no doubt, but that the offender may still be indicted if the prosecutor think fit, at the common law. 2 Hawk. Pl. C. 211. cap. 25. f. 4.

(H. 4) Taken in what County. Where the Offence [ 372 ]  
was done in several Counties.

1. **A** Man was indicted in B. R. in Middlesex, inasmuch as he at B. in the county of Middlesex procured J. S. to kill T. B. by which he killed him at S. in the county of Berks, and it was not excepted

excepted to whether it was a good indictment or not. Br. Indictment, pl. 52. cites 9 E. 4. 48.

Br. Indictment, pl. 26. cites S. C.—

\* S. P. for it is felony in each of the counties; for felony shall not alter the property. Br. Corone, pl. 270. cites 34 H. 8.

2. A man was arraigned upon indictment of *stealing goods in the county of S. who said, that he was indicted of taking the same goods in the county of M. at the same time, and of this was acquitted*, which was the same felony, and demanded judgment if of this, &c. Per Frowike, this is a good plea; for if goods are stolen in one county, and carried into another county, he *may be indicted in every county*, and shall have judgment accordingly; and by the same reason, if he be acquitted in one county, it shall serve in another county. But Husley and Fairfax contra. But Brook says, the law is with Frowike. And after Mordant pleaded the plea supra, and prayed allowance, and to the felony not guilty; and a good plea, per all the justices, though the one *matter be matter in law, and the other matter in fact*, & adjournatur. Br. Corone, pl. 139. cites 4 H. 7. 5.

Contra of two counties which may join, there they shall join. *Quare*, because but upon a nota. Ibid.

3. Indictment that a man *struck another in the county of Middlesex, by which he died in London*, is not good; for London cannot join with any. Br. Indictments, pl. 45. cites 6 H. 7. 10.

Br. Corone, pl. 145. cites S. C. but not adjudged, but Brook says, it seems to him that the indictment is not good of an act in a foreign county.—\* The trial in such case was by both counties; but it was said, that the indictment shall be taken in the one county only. Br. Corone, pl. 140. cites 4 H. 7. 18.

4. Indictment of \* *striking a man in the county of Middlesex, by which he died in the county of Essex*. And per Tremaille and Husley J. it is a good indictment; for the striking is the principal, and *those who may take notice of the principal, may take notice of the accessory*, which is the death, though it be in another county; but per Fairfax J. contra that they cannot take notice of an act done in foreign county. And Brook says, the law seems to be with Fairfax. Br. Indictment, pl. 31. cites 7 H. 7. 8.

(H. 5) In what Cases. Where the Thing, in which the *Offence* consists, is only prepared or inchoate, or intended, but *not executed*.

1. **NOTE** per Shard, he who is *taken deprædando vel burgulando* shall be hanged, though he puts nothing in ure. Br. Corone, pl. 106. cites 27 Ass. 28.

2. And said, that a *thief, who assaults a man to have robbed him*, shall be hanged, by advice of all the counsel except Stouf. Quod quære; for at this day a man shall not be hanged without an act done in case of felony; contra of treason. Ibid.

3. A man was *indicted in B. R. for giving of liveries, and for wearing of liveries*; but *nothing of the wearing of liveries is mentioned in the indictment*; per Keble, therefore the indictment is not good: and per Wood, the giving of liveries is an offence without the wearing. Br. Indictment, pl. 30. cites 6 H. 7. 12.

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4. If a man *makes money and does not utter it*, it is not punishable; which was denied by all the justices except two. Ibid.

5. It

5. It was touched that the *statute for laying scrolls at the door of a man*, is not felony, by making of the bills without laying of them. Ibid.

6. Indictment against two for conspiring to indict J. S. for begetting a bastard on M. one of the defendants, to the intent to extort money from him. After verdict, and motion in arrest of judgment it was resolved that the indictment lies *for the mere conspiracy*, without indictment or other act done. 1 Lev. 62. Pasch. 14 Car. 2. B. R. the King v. Kimberty and North.—Cites 9 Rep. 56. b. the Poulter's case.

7. A. and B. were indicted for a misdemeanor, which was, that *A. had challenged J. S. by way of duelling and sent it by B. to J. S. B. knowing the matter*; A. and B. were found guilty by verdict, and brought here to receive their judgment; and the court, after advisement, gave judgment that they should be *fined 100 l. each*, and that they should be committed for a month without bail, and within that time to *make such publick recantation* of the said action, as the court should direct, and to be of the *good behaviour for seven years*; and at another day, they made such publick recantation, &c. Sid. 186. Pasch. 16 Car. 2. B. R. the King v. Darcy and Collins.

*An intention to fight a duel is a misdemeanor, and punishable by fine and imprisonment; and therefore, if a challenge be sent to another, though the parties never fight, yet both he who sent and he who carried the challenge are punishable, according to the rule which is mentioned by my lord Coke, quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* 5 Mod. 207. S. C. cited Pasch. 8 W. 3. in case of the King v. Cowper.

8. B. was indicted, for that he, *intending to kill Sir H. G. Master of the Rolls, offered 100 l. to one C. to do it*; whereupon he was found guilty. And it was moved in arrest of judgment, that this is a matter not indictable, being only matter of *intention*, and that our law does not punish the intent; but the court said, that though voluntas reputabatur pro facto, so as to punish it as felony, yet this cannot be punished as a misdemeanor; wherefore judgment was given, that he should be fined a thousand marks, imprisoned for 3 months without bail, and be of the good behaviour during his life, and should acknowledge his offence at the chancery bar. Sid. 230, 231. Mich. 16 Car. 2. the King v. Bacon.

9. Indictment against the defendant setting forth, that there was a war with Lewis the French king; that during the continuance of that war, the defendant did *hire a boat for 20 guineas, falso malitiose & proditorie, to assist the king's enemies*; that the boat so hired was brought to the shore, in order to embark him and others, where he was taken. This matter was all found by verdict. It was moved in arrest of judgment, that this was not an offence at common law; for then any act, which shews an intention to do an unlawful thing, will be a fault. But per Cur. the very *intention to commit treason* is regarded in law; and any preparation to assist the king's enemies is a prejudice to the publick, and therefore an offence at common law. Our actions are governed by intentions, as qualified by them; so that in diverse cases, the intention makes the act more or less criminal; whereupon the judgment was affirmed, and the defendant fined 100 marks, and committed till paid. 5 Mod. 206, 207, 208. Pasch. 8 W. 3. the King v. Cowper.

(H. 6) Amounts

(H. 6) Amounts to. *What amounts to, or will serve for an Indictment.*

[ 374 ] 1. **N**OTE, upon indictment of felony for stealing of the goods of A. feloniously taken; defendant pleaded not guilty, and the jury found, that N. took the goods from the said A. feloniously, out of whose possession the now defendant took the goods, but not feloniously; and it was agreed, that this verdict shall not serve for indictment against N. for the jury is not compelled to find who did the felony, as the jury before the coroner upon view of the body; for there, if they find the defendant not guilty, they enquire who killed the man, and if they say that W. did it, this shall serve for indictment against him; quod nota, by the justices, as Littleton said. Br. Indictment, pl. 35. cites 13 E. 4. 3.

2. Note, per Montague, in conspiracy, that if felony be presented in a leet, and the steward of the leet presents it to the justices at the next sessions by indenture, it shall serve for indictment; and e contra, if he shews the roll only, and does not certify it by indenture, quod nemo dedixit. Br. Indictment, pl. 1. cites 27 H. 8. 2.

3. The caption of an indictment was *præsentat. existit, quod separalia indictamenta huic schedulæ annexa sunt billæ veræ*. It was objected, that they are not indictments till found; for till then they are only bills, and for this cause they were quashed. 1 Salk. 376. Trin. 12 W. 3. B. R. the King v. Brown.

(H. 7) Good or not. In Respect of the Indictors not being *Probi & Legales*.

\* Lord Coke says, Note the said act saith, that they were outlawed before themselves, so as the court may take notice thereof of themselves, or of any other as *amicus curiæ*, but the safest way is for the inditee, upon his arraign-

1. 11 H. 4. 9. recites, that of late, inquests had been taken of persons named to the justices, without due return of the sheriff, of which persons some had been outlawed \* before the said justices of record, &c. and that many persons had been thereupon indicted by conspiracy, &c. and thereupon it is enacted, that the same indictments so made, with all the dependance thereof be revoked, annulled, void, and holden for none, for ever: and that no indictment be made by any such persons, but by inquests of the king's lawful liege people, returned by the sheriffs or bailiffs of franchises, without any denomination to such sheriffs or bailiffs of franchises before made by any person, of the names which by him should be impannelled, except it be by the officers of the said sheriffs or bailiffs of franchises sworn and known to make the same, and other officers to whom it pertaineth to make the same, according to the law of England; and that † if any indictment be made to the contrary, the same be also void and revoked, and holden for none.

ment to plead the special matter given him by this act to overthrow the indictment, with such averments as by law are required, agreeable to Lord Brooke's opinion, [See pl. 2.] and to plead over to the felony, and to require counsel learned for pleading thereof, which ought to be granted; and



and also to require a copy of so much of the indictment, as shall be necessary for framing his plea, which ought also to be granted. 3 Inst. 34.

† In this matter this act of 11 H. 4. hath made a new law, viz. That any indictment found against the act shall be void; which branch does not make void any indictment or presentment, that, in the nature of an indictment, found any point † contrary to the said act, is made void by the said act, so that this may draw in question all the indictments found at the same sessions. 12 Rep. 97, 98. Scarlet's case.

3 Inst. 33. cites S. C. and that all the indictments found by W. R. and the rest (though all the rest were duly returned) were void by this statute.

† This seems to be clearer express by serjeant Hawkins. 2 Hawk. 218. cap. 25. s. 25. That a person arraigned upon an indictment taken contrary to the purview of this statute, may plead such matter in avoidance of the indictment, and also plead over to the felony.—See Sir William Withipole's case.

The sheriff being about to return a grand inquest at the sessions of peace for the county of S. one W. R. was very importunate with the sheriff to get himself returned; but the sheriff knowing the malice of the man, refused to do it. Whereupon he applied to, and prevailed upon the sheriff's clerk to read him as one of the panel, (though not returned therein) which he did, and W. R. was sworn accordingly. By means of which, and the testimony of this W. R. to the others of the grand-jury, many honest men were indicted upon penal statutes, all which appeared upon examination. He was afterwards indicted upon this statute; and it was resolved, 1st. That the justices of assize have power to punish this offence by virtue of their commission of oyer and terminer. 2dly. That this case was within the statute, which is partly affirmative of the common law, and partly a new law. 3dly. That the statute of 3 H. 8. 12. hath not altered this act of 11 H. 4. 9. as to the offence of W. R. And judgment was given that he should be fined and imprisoned. 12 Rep. 97, 98. Trin. 10 Jac. Scarlet's case.—2 Hawk. Pl. C. 218. cap. 25. s. 23. cites S. C. and says, that the statute does not expressly provide, that any such person shall be any ways punished, but only that the indictment shall be void, &c.

\* This act extends not only to indictments of treason and felony, but of all other offences and defaults whatsoever, according to the generality of the words. 3 Inst. 33. says it was so resolved.

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2. Note, that where a man is indicted of felony by persons, some of whom are indicted or outlawed of felony, and others acquitted by pardon; so that they are not *probi & legales homines*, there it was awarded, that the indictments by them presented should be void, and the parties who were indicted should not be arraigned upon it; and note that this matter ought to be pleaded by him who is arraigned upon this indictment, before he pleads to the felony. Br. Indictment, pl. 2. cites 11 H. 4. 41.

3 Inst. 34. cites S. C. Br. Corone, pl. 188. cites S. C. for the indictors ought to be *probi et legales homines*. —

S. C. cited 2 Hawk. Pl. C. 216. cap. 25. s. 17. And the serjeant says, it seems to be the general opinion, that this resolution is rather grounded on the stat. of 11 H. 4. 9. which was made the same term, in which this resolution was given, than on the common law; because it appears by the very same year-book, that when this plea was first proposed, it was disallowed, from whence the serjeant says, he supposes, it is collected, that the subsequent resolution was founded on the authority of the said statute, which may be intended to have been made after the plea was disallowed, and before the subsequent resolution, by which it was adjudged good. Yet considering, that the said resolution was given in Hillary term, and that the parliament which made the said statute was not holden before the beginning of the same term, and therefore it is not likely that the said statute was so soon made, and also, considering that the said resolution was given by advice of all the judges, who seem to have been consulted about the validity of the plea above-mentioned at the common law, and takes no manner of notice of any statute, but only of the law in general, it may deserve a question, whether such plea be not good at the common law?

3. A. was indicted before the coroner of S. of murder, and it was removed into B. R. where he prayed counsel, who took several exceptions upon this statute to the indictment, and put them in by way of plea. 1st. That the jury was returned by one who was neither bailiff of a liberty, nor sheriff. 2dly. That B. one of the jury nominated himself to be returned, and divers others of the jury were of his denomination. 3dly. That two of the jurors were outlawed in personal actions, and thereupon prayed that the indictment be quashed, and pleaded over to the felony. It was held by three justices,

Ley. 81. S. C. Mich. 4 Car. B. R. upon the taking these exceptions the first time, the defendant, without answering to the ex-

ceptions, was ordered to be brought to the bar again the next day; and then, upon opening again as before, he had time given him for a week to plead at his peril, and that in the mean time, he should have notes of the names of the jurors,

and of the day of the murder, and of his abettors and their additions, and also of the names of the coroners; and so departed again without pleading to the indictment. — Cro. C. 134. 147. Hill. 4 Car. S. P.

Serjeant Hawkins says, it seems somewhat questionable, whether outlawry in a personal action be within the purview of the statute. 2 Hawk. Pl. C. 219. cap. 25. §. 30.

If a person tried upon such indictment takes no such exception before trial, it may be doubtful whether he may do it afterwards; unless it can be verified by the records of the same court, as by an outlawry of one of the indictors in such court. 2 Hawk. Pl. C. 219. cap. 25. §. 26.

justices, contra Jones, that the statute 11 H. 4. did not extend to inquisitions taken before the coroner, but upon praying the advice of all the other justices and barons, they all thought that the statute did extend to inquisitions taken before the coroner; but as to the outlawry in personal actions they doubted; and being afterwards indicted by commission of oyer and terminer, and arraigned, he said that he ought not to be arraigned, because he had pleaded to the first inquisition; but Curia e contra; but to make the matter clear they gave rule that the first inquisition be quashed, and then he pleaded ore tenus, that one of the jury was outlawed, but this was not admitted per Curiam. For supposing the plea good, (which was not granted) yet he ought to have the record of the outlawry under seal, upon his plea pleaded, and therefore he pleaded over to the felony, not guilty. Jo. 198. Sir William Withipole's case. — 2 Hawk. Pl. C. 218. S. 24. says, it has been questioned, whether a coroner's inquest be within the purview of this act.

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4. 3 H. 8. cap. 12. recites, that there had been many great oppressions by indictments wrongfully found by persons returned by sheriffs to serve a turn, and many great felonies had been concealed, and not presented; and thereupon, it is enacted, that justices of gaol delivery, and justices of peace may, in their discretion, reform any pannel returned before them, to inquire for the king, &c. by putting to and taking out of the pannel what names they please; and if any sheriff, &c. shall not return the pannel so reformed, he shall forfeit for each offence 20l.

(H. 8) Good or not in Respect of the Place where, or before whom taken, or where the fact is alleged to be done.

S. P. Br. Indictment, pl. 27. cites 6 H. 7. 2. And it was greatly argued, whether the indictment

be void or not.—By indictment taken at the great court of J. B. with a leet held such a day, &c. it was presented, &c. it is not good; for it does not appear at which court he was presented; and if it was at the court, and not at the leet, it is not good, and the same law if it be at the county of Middlesex with the sheriffs' tourn. Br. Indictment, pl. 34. cites 10 E. 4. and 49 H. 6. 15. — S. P. Jenk. 124. pl. 51. — So such presentment at the county court with the sheriffs' tourn is also void for the same reason. By the judges in the Exchequer Chamber. Jenk. 124. pl. 51.

2. Indictment,

2. Indictment, taken such a day, and year at C. before J. S. Steward, &c. and did not express to whom he is steward nor in what court it was taken; therefore not good. Br. Indictment, pl. 46. cites 22 E. 4. 19.

So of indictment, taken before a coroner, &c. and it is not expressed of what county, &c. quod non contra dicitur. ibid.

pressed of what county, &c. quod non contra dicitur. ibid.

3. Indictment ought to express in what county. Br. Indictment, pl. 43, cites 5 H. 7. 3.

For it shall be intended the best

consequence of the fact shall be had there. 2 L. P. R. 48.——So the parish in which the fact was done, for which the party is indicted, and the place of the defendant's abode, ought to be named in the indictment; that the party indicted may be the plainer described, and outlawed if he does not appear. 2 L. P. R. 48.

4. An indictment for a conspiracy by several journeymen taylor's of or in the town of Cambridge, to raise their wages. The fact was laid to be done in the town of Cambridge, and it did not appear in the record in what county Cambridge was. It was insisted, that this was a fatal error in the record, and not to be helped by naming the county in the certiorari to remove this indictment, because that writ is only an order of this court; and that this being a criminal case, it shall not be intended that Cambridge is in the county of Cambridge. But it was answered, that the fact being laid in the town of Cambridge, it shall be intended that the town is within the county of Cambridge. Besides the justices of peace having jurisdiction within the town of Cambridge, it need not be alledged in what county that town lies; because, in order to support all inferior jurisdictions, we will intend their proceedings to be regular and good, if the contrary does not appear. And the indictment was confirmed by the whole court. 8 Mod. 10. Mich. 7 Geo. the King v. Journeymen Taylors of Cambridge.

5. Every indictment at common law must expressly shew some place wherein the offence was committed, which must appear to have been within the jurisdiction of the court in which the indictment was taken, and must be alledged without any repugnancy; for if one and the same offence be alledged at two different places, or at B. aforesaid, where B. was not before\* mentioned; or if the stroke be alledged at A. and the death at B. and the indictment conclude that the defendant sic felonice murdravit the deceased at A. the indictment is void; so is it also if it lay not both a place of the stroke and death; or if any place so alledged be not such from whence a visne may come; as to which it has been adjudged, that if a fact be alledged in a parish of London, with some other addition, which sufficiently ascertains it, as in the parish of St. Laurence Jewry, it needs not shew the ward. 2 Hawk. Pl. C. cap. 25. s. 85.

Every caption must also shew where the indictment was found, that it may appear to have been at a place within the jurisdiction of the court; and therefore it is set forth that the indictment was taken

at a sessions of the peace holden for such a county at B. without shewing in what county B. lies; otherwise than by putting the county into the margin, it is insufficient: but if an inquest of death be set forth as taken at B. before the coroner of the liberty of B. it need not express that B. is within the liberty of B. for it cannot but be intended. 2 Hawk. Pl. C. Abr. 236. s. 80.

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## (H. 9) Caption. Good or not, in Respect of the Manner of taking, and Authority of the Takers.

1. **I** F commission issues contrary to law, all indictments taken by virtue thereof are void, as commission to take J. S. and to seize his goods; where J. S. is not indicted nor other process made. Br. Indictments, pl. 38. cites 42 Aff. 5.

• S. P. Br. Indictment, pl. 22. cites S. C.

— So writ issued to the escheator of C.

2. Writ of the chancery issued to B. C. to enquire of all champerties, conspiracies, confederacies, ambodexters, &c. by which one was indicted of diverse of them; and because this authority ought to be by commission, and not by writ, therefore by all the justices, all such indictments were void. Br. Indictment, pl. 38. (bis) cites 42 Aff. 12.

to inquire what larceny J. S. had done to W. N. who found that he had stole 20 gallons of wine price 13 s. 4 d. and that N. was accessory; and held void, because it was not by commission, quod nota. Br. Indictment, pl. 39. cites 42 Aff. 13.

3. The caption of an indictment *ad magnam curiam cum leta tent.* is insufficient; but if it be *ad magnam curiam & ad letam* or *ad vis. franci pleg. cum cur. baron' tent.* perhaps it is sufficient; for since the court baron has no jurisdiction over criminal matters, and the caption, in these last cases, is not express that the indictment was taken at it, as it is in the first case, the court will intend that it was taken at the leet which alone had power to take it. 2 Hawk. Pl. C. Abr. 234. f. 76.

4. The *not shewing* in the caption of an indictment at a *leet*, whether the court were holden by charter or prescription, is helped by the multitude of precedents. 2 Hawk. Pl. C. Abr. 235. f. 77.

5. Every caption of an indictment ought to *shew* that the *indictors* were of the *precinct*, for which the court was holden, and that they were 12 in number, and that they found the indictment on their oaths. Also indictments have been quashed for an omission of the names of the jurors; and others, for the want of the words *proborum & legalium hominum*, and others, for want of words, *jurat. & onerat.* and others, for want of the words *ad tunc ibidem* before *jurat. & onerat.* and others for want of the words *ad inquirend' pro domino rege & pro corpore comitatus*; yet of late years exceptions of this kind have not been much favoured, especially if the indictment were in a *superiour* court, and that which is omitted be in common understanding implied in what is expressed. 2 Hawk. Pl. C. Abr. 235. f. 78.

6. Every caption must *shew* a certain day and year when the indictment was found, and must record it in the present tense; but if it describe the court as holden *die Martis & die Mercurii*, or on such a day, in such a year of the king, without *shewing* what king; or if it shews the day or year in figures, which are not Roman, it is insufficient; yet it need not add the year of the Lord; and the multitude of precedents have made good the use of *extitit presentat.* instead of *existit*, &c. 2 Hawk Pl. C. Abr. 235. f. 79.

(H. 10) Good or not. In respect of the *Time when* taken, and setting forth the *Time of the Fact*.

1. A man was indicted of trespass, by the name of *J. N. of D. &c.* of trespass done *die Jovis proximo post diem Pentecostes*, and it was assigned for error, that the *day is not certain for all the week is Pentecost*; sed non allocatur, for the day of Pentecost is the Lord's day only. Br. Error, pl. 69. cites 7 H. 6. 39.

2. Three were indicted in the tourn of the sheriff in the county of D. of felony, that they three at two vills, at two several days, such a year, on *J. C. made an assault, & vi & armis him beat, and a certain gown to the value, &c. then and there found, feloniously took, &c.* and because it is uncertain, scilicet, two days and two places, where one and the same felony cannot be at two places, therefore it was adjudged void. Br. Indictment, pl. 24. cites 2 H. 7. 7.

3. Indictment, &c. in the feast of St. Thomas, it ought to express what St. Thomas according to the kalendar. Br. Indictment, pl. 47. cites 3 H. 7. 5.

4. Error because the party alleged the felony to be done 24 Aug. anno 3 R. 3. where the king (H. 7.) had wrote himself king two days before it, and had scire facias, &c. therefore it seems to be error. Br. Error, pl. 102. cites 21 H. 7. 34.

5. Indictment in the time of one king shall serve in the time of another king, quod nota, and the offender shall be arraigned upon it. Br. Indictment, pl. 44. cites H. 1 E. 6.

Br. N. C.  
1 E. 6.—  
S. P. Br.  
Corone, pl.  
220. cites 1 E. 3. 3.

6. If an act be made felony by statute as hunting, &c. and after a man offends in it, and then the act is repealed by statute, there the hunting is dispunishable; for the law by which it should be punished is repealed. But where trespass is done upon termor, and after the term expires, the trespass is punishable; for there the interest expires; but not the law. And so see a diversity where the interest expires, and the law remains, and where the law is repealed, and does not remain. Br. Corone, pl. 202. cites 2 M. 1.

7. If an action upon the case be brought against one for calling another thief, and the defendant doth justify the words, and upon the trial it be found for the defendant, an indictment may be forthwith framed against the plaintiff, to try him for the felony; so it was done in Mich. 21 Car. in the case of one PERRY, who was after executed at Tyburn; Mich. 22 Car. B. R. for the felony appears to the court by the verdict found for the defendant. 2 L. P. R. 44.

8. It seems agreed, that no indictment can be good, without precisely, shewing the year and day of all the material facts alleged in it; as if an indictment of death, laying the assault at a certain time, &c. do not repeat it in the clause of the stroke; or if it do not set forth the time of the death, as well as of the stroke; or if any indictment

\* S. P. For it ought to be certain in time as well as in other matters. 2 L.



P. R. 42.  
cites Hill.  
1649. 30  
January  
B. R.

ment lay the offence on an impossible day, or on a day, that makes the indictment repugnant to itself; or if it lay one and the same offence at different days. 2 Hawk. Pl. C. Abr. 215. f. 49.

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(I) For what *Words* it lies.

[ 1. **A** man may be indicted by the common law for saying to another, *your religion is a new religion, and preaching is but prattling, and prayer once a day is more edifying*; for the words are seditious words against the state of our church, and against the peace of the realm, and though they are spiritual words, yet they draw a temporal consequence, scilicet the disturbance of the peace. Mich. 15 Jac. B. R. adjudged. Adwood's case. ]

[ 2. If a man says, *that the laws of the queen were not God's laws*, yet no indictment lies for those words; for it is true that they are not the laws of God. 41 Eliz. B. R. adjudged. But otherwise it had been, if he had said, *that the laws of the queen are not agreeable to the laws of God.* ]

[ 3. If a man says, *that a sentence of divorce which was given by the high-commissioned court was against the law and the consciences of the commissioners*, this is an offence punishable at the common law by indictment, for a slander of the justice of the realm. Clubford Hale's case adjudged, cited per Coke. Mich. 13 Jac. B. R. ]

[ 4. If a man says to a steward of a court, in time of the court, *you are forsworn*; though it be a contempt to the court, for which he may be fined, yet he cannot be indicted for it. Mich. 10 Car. such indictment quashed, per Curiam. Lucas being steward at the Devises in the county of Wilts. ]

[ 5. Trin. 5 H. 5. B. R. Rot. 18. William Morton indicted for saying, *that he could make a certain powder, called Elix. which powder would make gold and silver*, being put upon other metal. Pardonatur. ]

[ 6. If a man says to a justice of peace, in execution of his office of justice, being in his house, but not sitting on the bench, certain scandalous words, touching his office of justice of peace, yet he may not be indicted for it. Trin. 11 Car. B. R. This was Master Hide's case, who was so scandalized, and the indictment quashed accordingly, and then said that it was Sir Sackfield's case accordingly. ]

Vid. Good  
Behaviour  
(B. 2.)—  
See more  
matter  
concerning  
justices of  
peace, pl.  
9 to 15.—  
The de-

endant was indicted for saying of Sir Rowland Winn, who was justice of peace, these words, (Sir Rowland Winn is a fool, an ass and a coxcomb, for making such a warrant, and unders. ands no more how to make a warrant than a stick-head) and the defendant, being found guilty on the trial, moved in arrest of judgment. Holt Ch. J. said, he knew no case like this, but the QUEEN v. DABBY. Indeed words spoken in disparagement of a justice's parts is a breach of good behaviour, but not indictable; besides the indictment does not set forth, that this was a legal warrant; it ought to appear to the court, what sort of a warrant it was; for if it was a foolish warrant or of a matter whereof he had no cognizance, it was lawful to say so. The words perhaps may be true, and justices of peace are not beyond censure; Powell agreed, and said, if the words were not indictable, they were much less actionable; and Powis and Gould agreed. 11 Mod. 166, 167. The Queen v. Wrightson. — cites 3 Keb. 492. — 2 Roll. Abr. 78. — 4 Inst. 181. — And the case of \* Soley for abusing the mayor of Salisbury. — So saying of a justice of peace, that he would judge in any cause against the



him according to his affection, was held not indictable. Arg. 10 Mod. 187. cites Mich. 4 Annæ. The Queen v. Soley.—So that he deserved to be hanged for making such a rum skull order, was held not indictable. 10 Mod. 187. Arg. cites Hill. 1712. The Queen v. Lycasset.—\* It seems this should be (Langley.)

[ 7. If a man says to one who is not an officer of justice, thou art a pelter, thou art a liar, and hast told my lord lies, and I will make thee \* a poor man, and thou art a drunken knave; he cannot be indicted for those words because though the said words are motives and provocations for the breach of the peace, yet they do not tend immediately to the breach of the peace. Co. 4 Institutes 181. ]

\* Fol. 79.

[ 8. An information upon the statute of liveries generally, without putting in certain any statute, is sufficient, though they are divers statutes of \* liveries; for the best shall be taken for the king. 5 H. 7. 17. b. adjudged. ]

[This does not belong to this subdivision.]

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9. Indictment for saying, that none of the justices of the peace did understand the statutes of excise, except J. S. and truly he neither did well understand them, nor most of the parliament men who made them. But the indictment was quashed. Arg. 5 Mod. 204. cites 21 Car. 2. the King v. Burford.

But if a man saith, the king hath appointed an ignorant man to be a justice

of peace, it is a matter indictable; per Holt. Arg. Comb. 66. in case of the King v. Danby.—As to words being a disparagement upon the government, a diversity was taken between *eleven* officers, and such as are nominated by the crown; for the corruption of the first cannot reflect upon the government. Arg. 6 Mod. 124. in case of the Queen v. Langley.

10. One was indicted, for saying of a justice of peace that *he is a buffle-headed fellow*. Exception was taken, that the words were not indictable. But per Cur. because it appears that they were spoken of him in the execution of his office, the indictment is good. And per the Ch. J. all actions for slandering a justice in his office may be turned into indictments. Comb. 46. Pasch. 3 Jac. 2 Anon. *But not done justice to my client, &c.* Exception was taken, that the words are not indictable. But adjudged for the king. Comb. 66. Mich. 3 Jac. 2. B. R. The King v. Derby.—But here it is said to be on an information.

The words were further, viz. he understands not law, and is not fit to discourse it with me, and

11. One was indicted for saying, *the mayor and aldermen of H. are a pack of as great villains as any who rob upon the highway, and we will take away their charter*. One exception was taken (among others), that these words are not indictable, being only words of heat, for which the defendant ought to be bound to his good behaviour, but not indicted. 5 Mod. 203. Pasch. 8 W. 3. The King v. Cranfield.—[No reply appears to have been made or judgment given.]

Per Cur. we are not satisfied, the words are such, as they may be indicted for; for what is it to the govern-

ment, that the mayor, &c. are a pack of rogues, and the defendant moving to submit to a small fine, they fined him 6 d. 12 Mod. 98. Trin. 8 W. 3. S. C. by name of the King. v. Granfield.

12. One was indicted for saying of one Martin a justice of peace, *I do not care a farthing if all the Martins had been hanged seven years ago; and for the justice, he is now turned out of commission*. But the indictment was quashed. Comb. 414. Hill. 9 W. 3. The King v. Penny.

13. Indictment, for that the defendant being before a justice of peace for a matter, as it did appear, conusable by him, he contemptuously, &c. spoke these words, *your worship speaks to me here but you dare*

*dare not do so in another place*; and it was quashed on motion. 12 Mod. 414. The King v. Walden.

14. One said to the mayor of Salisbury, you Mr. Mayor *I do not care a fart for you*. You Mr. Mayor, *are a rogue and a rascal*; after great deliberation, the court adjudged the words not indictable; for it is not so much as said, that he was in execution of his office, or a justice of peace; but indeed had they been in writing, they had been punishable either by action or indictment. 6 Mod. 124, 125. Hill. 2 Annæ, B. R. The Queen v. Langley.

15. Indictment for saying, *you are an informing rogue, an informing rascal and an informing villain*, (knowing him to be a justice of peace.) It was moved to quash this indictment; and per Cur. it was quashed nisi, &c. the end of the term; for words said of a justice of peace are not indictable, according to the late resolutions between QUEEN AND WRIGHTSON, Pasch. 7 Annæ Reg. [ante in pl. 6;] sed Quære. For this point is very unsettled, it depending much on what is called *discretio curiæ*. 11 Mod. 195. Mich. 7. Annæ, B. R. the Queen v. Shaftow.

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But where an indictment was for calling a man thief. Ex-

ception was taken, that the words are actionable, and the indictment was quashed. Comb. 13. Hill. 1 and 2 Jac. 2. The King v. Freak—[And therefore it seems *are not indictable*.] — Words which directly tend to the breach of the peace, may be indictable; but otherwise, to encourage indictments for words, would make them as uncertain as actions for words, are; per Holt Ch. J. 6 Mod. 125. in case of the Queen v. Langley.

17. Indictment was for words spoke to the prejudice of a market and hindering the town of toll, viz. *I have got a judgment against the town (of Barnstaple) that we shall not pay for standing, and they are fools that pay*; but the court quashed it, and said, that the recorder of the town ought to be fined for it. 1 Salk. 370. Trin. 5 W. & M. B. R. the King, &c. v. Harwood.

### (K) Incertainty in the Offence too general.

[ 1. ] If a man be indicted, because he is *defamator bonorum nominis & famæ*, it is not good, without shewing some particular matter. Mich. 14 Jac. Br. Jones's case adjudged, and the indictment quashed. ]

Communis oppressor vicinorum suorum, not good without

[ 2. So if one be indicted, that he is *defamator vexator, & oppressor multorum hominum, &c.* it is good, without shewing any particular matter. Mich. 14 Jac. B. R. Jones indicted and the indictment quashed for this cause aforesaid. ]

barretor. Sid. 282. the King v. Hardwick.—Raym. 193. the King v. Leffingham.—Not good because too general. Lev. 299. Mich 22 Car. 2. B. R. S. C.

[ 3. But if a man be indicted because he is *common barretor, against the form of the statute*, it is good, as was held per Houghton

ton in the said case, and so is the common experience. Mich. 15 Jac. B. R. Bowser's case adjudged; for the statute has made it an offence known. ]

[ 4. An indictment of a man, that he is *a common foreſtaller*, without alledging any thing in certain is not good; because it is too general. 20 Aff. 45. adjudged. See 3 E. 2. Action upon the statute, 26. ] Br. Indictment, pl. 19 cites S. C.

[ 5. So an indictment, that he is *a common thief*, without more, is not good. 29 Aff. 45. 22 Aff. 73. 3 E. 2. Action upon the statute, 26. ] And he shall not be put to answer; but

in this case they ought to send for the indictors, and make them to shew it more certainly. Br. Indictment, pl. 12. cites 22 Aff. 73.—pl. 19. cites 29 Aff. 45.—Sid. 282.

[ 6. So indictment of *champerty*, is not good without more. 29 Aff. 45. ] Br. Indictment, pl. 19. cites S. C.

[ 7. So indictment of *conspiracy* is not good without more. 29 Aff. 45. ] Br. Indictment, pl. 19. cites S. C.

[ 8. So indictment of *confederacy* is not good without more. Contra 29 Aff. 45. But quere. ] Br. Indictment, pl. 19. cites

S. C. that an indictment of confederacy is good without more. But he says it seems that the one and the other, (viz. common foreſtaller, thief, champerty, conspiracy and confederacy) ought to comprehend certainty.

[ 9. An indictment of a man, that he is *a common misdoer*, is not good, because it is too general. 22 Aff. 73. ] [ 382 ]

Br. Indictment, pl. 12. cites S. C.

[ 10. So an indictment that he is *a common disturber of the king's peace, ac diversus lites & discordias tam inter vicinos suos, quam inter diversos ligeos & subditos domini regis apud W. in comitatu prædicto injuste excitavit movit & procuravit in magnum dispendium & perturbationem vicinorum suorum prædictorum & aliorum subditorum domini regis in comitatu prædicto*, it is not good, because too general. M. 6 Car. B. R. per Curiam; indictment quashed in Periam's case. ]

[ 11. If a man be indicted for speaking *diverse false and scandalous words of J. S. mayor of D.* it is not good, because it is not alleged, what were the words, by which it may appear to the court, whether he may be indicted for them. M. 12 Jac. B. R. adjudged Bagg's case. ]

[ 12. If indictment be, that *J. S was, and yet is, of ill behaviour*, it is not good, because it is too general without any particular. Mich. 8 Car. B. R. Cary's case adjudged, and the indictment quashed. ]

13. Indictment shall not be *taken by intendment*. Cro. E. 606. Child's case. S. P. and they must be precise

and certain in every point. Cro. J. 19, 20. in Sir William Fitzwilliams's case.

14. Exception was taken to an indictment of murder, because it was, that *G. and two others did make an assault on the body of the deceased*,

deceased, and that *quidam Johannes* in nubibus did wound him with a gun, so that it is uncertain who did shoot, and what gun was discharged, which ought to be certainly laid in the indictment. And the indictment was quashed. 3 Mod. 201, 202. Pasch. 4 Jac. 2. B. R. the King v. Griffith.

15. *Getting money from the wife, on pretence of having sold a ship to her husband, is a thing of a private nature.* So that indicting such person as *communis deceptor* is too general, without adding particular instances. But if he had made use of *false tokens*, it would be otherwise. 6 Mod. 311. Mich. 3 Annæ, B. R. the Queen v. Hannon.

(L) Incertainty in the Person, that commits the Offence, too general.

[ 1. ] If a presentment be, *that the king's highway in such a place is decayed, in default of the inhabitants of such a vill*, it is good without naming any person in certainty. P. 8 Jac. B. between Walker and Measure. ]

Note, that none is bound to answer in appeal of felony, where the

plaintiff does not shew the name of the deceased; but to indictment of death *ignoti*, a man ought to answer. Br. Corone, pl. 91. cites 27 Ass. 55.

[ 383 ] (M) Incertainty in the [Persons or] Thing in which, or to which, [or whom] the Offence is committed.

Fol. 80.

Br. Indictment, pl. 21. cites S. C. and that Caund. held it ill; but Ingl.

contra. and therefore Caund. dared not demur; but Brook says that it seems to be ill. — 2 Hawk. Pl. C. 231. f. 73.

2 Hawk. Pl. C. 231. cap. 25. f. 73.

[ 1. ] If an indictment be of *a steward of a leet, for permitting divers brewers and bakers to brew and sell contrary to the assise pro redemptione inde capienda*, it is not good; because it is not supposed what people he has suffered, nor of whom he hath taken redemption, and so not certain. Contra 38 Ass. 11. ]

[ 2. So if it be presented, that *a steward has distrained diverse people without cause by colour of his office*, it is not good; for the uncertainty of the persons by name whom he has distrained. Contra 38 Ass. 12. ]

Forcible entry.

Saying that the party

was seised or possessed is uncertain, and indictment quashed. Vent. 108. Hill. 22 & 23 Car. 2. Annæ.

[ 3. An indictment upon 8 H. 6. for forcible entry, that *A. was seised in fee, quousque B. entered, and expelled C. farmer of the aforesaid A. and disseised A.* it is good without shewing what estate the termor had; for it is sufficient to shew that he had the possession. H. 41 Eliz. B. R. Chesterman's case adjudged. ]

[ 4. If a man be indicted upon 8 H. 6. for forcible entry *in unum cotagium, sive tenementum*, it is not good for the uncertainty. M. 40 & 41 Eliz. B. R. Ward and Harrison's case adjudged. ]

In an indictment or information, the

fact is never laid in the disjunctive; and therefore an indictment on this statute, for a forcible entry into two closes of meadow or pasture, was held void for the uncertainty; so *murdravit, vel murdrari causavit* is not good; so of *verberavit vel verberari causavit*; for the causing him to be beaten will not make the defendant guilty of the battery, it being only a trespass. 5 Mod. 137, 138. Per Cur. Mich. 7 W. 3. in case of the King v. Stocker. — All criminal charges ought to be certain, so as the defendant may make certain answers to it; and where an indictment was on the statute of 5 Eliz. for *exercising artem sive misterium*, and was held good, there the art was not the cause of the indictment, but the exercising it; and therefore if it had been \* *for exercising the art, or causing it to be exercised*, the indictment would be ill; for causing a thing to be done may be by several means. 8 Mod. 330. Mich. 11 Geo. in case of the King v. Brereton. — \* The Orig. is (to exercise).

[ 5. If a man be indicted for forcible entry *in mesuagium sive tenementum*, it is not good for the uncertainty of the thing. My Reports, 13 Ja. adjudged. \* Gill's case M. 4 Ja. B. R. Sir Tho. Winston's case adjudged. ]

\* Roll. R. 334. S. C. But entry in unum mesuagium is well e-

nough; for a messuage and a house are both the same. 2 L. P. R. 46.

[ 6. If a man be indicted for forcible entry into a tenement, it is not good. Tr. 16 Ja. B. R. an indictment quashed for it. ]

[ 7. So indictment for entry into a tenement cum pertinentiis, called Turnpenny in D. is not good. M. 10 Car. B. R. Cottington's case. Per Curiam the indictment quashed. ]

[ 8. An indictment upon 8 H. 6. for forcible entry into the close of J. S. is good enough; for the word close includes sufficient certainty. P. 38 Eliz. B. R. adjudged. Ditton's case. ]

[ 9. If a man be indicted for entry with force into a messuage in D. and ousting of J. S. the farmer of the land for years, and disseising J. D. it is not good, without alledging the franktenement to be in J. D. for it ought to be expressly alledged in him. M. 11 Ja. B. R. adjudged. Lucas's case. ]

[ 10. If a man be indicted, because he *custodiavit land with force*; it is not good, without alledging an entry by him. M. 11 Ja. B. R. adjudged. Ashton's case. ] [ 384 ]

[ 11. If a man be indicted, because he *entered into land, and vi & armis ejected a copyholder, and detained it vi & armis*, it is not good; because he doth not allege that he entered vi & armis, or entered peaceably, and detained with force, according to the words of the statute of 8 H. 6. For the statute of 21 Ja. does not alter the form of the indictment before used, but only gives restitution in other cases than before. Mich. 21 Car. such indictment quashed. ]

[ 12. If a man be indicted for erecting of a messuage for habitation, without laying 4 acres of land to it, this is good; though it doth not say that he inhabits it, in as much as it is contra formam statuti. Mich. 8 Car. B. R. adjudged. Sessleon's case. ]

Erecting cottages.

[ 13. If four are indicted for erecting several cottages contra formam statuti, it is not good without shewing how many cottages they erected. Mich. 11 Car. B. R. Such indictment against Butler and others quashed. ]

[ 14. If an indictment be, that where there was quædam pars aquæ running from such a place to such a place, the defendant had stopped it, it

Other matters.

Cro. J. 324. it is not good ; because *quædam pars aquæ* is utterly uncertain. Trin. S. C. ——— 11 Ja. B. R. adjudged. Sorrel's case. ]

4 Rep. 88. b. S. C. cited in Luttrell's case. ——— 2 Bull. 119. S. C. It ought to have been *quædam pars terræ aqua cooperta*, per Croke J. But per Dodderidge J. if the same had been shewn to be a water-course, and that this had been turned, then to have said, *magnam partem aquæ* had been good, according to Luttrell's case. 4 Rep. 88. b. ——— 2 Hawk. Pl. C. 233. cap. 25. s. 75.

[ 15. If an indictment be for *keeping diversa tormenta Anglice gunns, carentia longitudine secundum formam statuti*, it is not good ; because he says, *diversa tormenta*, and does not shew *what* they are.

The defend- M. 11 Ja. B. R. adjudged. Ashton's case. ]  
dant was

convicted upon the 5 Ann. 14. for that he *unlawfully had and kept in his custody a gun*, contrary to the form of the statute, *being an engine for killing of game* ; but the conviction being removed by certiorari, the court, after argument, were of opinion for the defendant ; for that as guns are not particularly mentioned in the act, the only words that can reach this case, are *(other engines for the killing of game.)* Now these words must mean *such engines, the having of which necessarily implies the using, or intending to use them to kill game ; or which are in their own nature peculiar to that purpose*, and no other ; but a gun is not properly such an engine, being an useful instrument, necessary for the defence of one's house, and for husbandmen in their business ; and it is not sufficient that it may possibly be used to a bad purpose ; therefore the bare *having* a gun in one's custody cannot be criminal, unless in the conviction there be laid either *an actual use or an intention to use*. And the conviction was quashed. Trin. 11 & 12 Geo. 2. B. R. the King v. Gardiner.

Stopping  
highways. [ 16. If a man be indicted for *stopping quandam partem of the king's highway at Kensington*, it is not good without alleging *what part* he has stopped ; as to say, *so many feet in length, and so many in breadth*. P. 9 Car. B. R. adjudged. Halsey's case. ]

Lat. 183. S.

C. There said to be quashed, for that the stopping was alleged to be at Kensington, but the highway to be from London to Kensington ; and so Kensington is excluded. In the same case, in another indictment, the stopping was alleged to be in *alta via regia* in K. but did not say, leading from such a town to such a town, nor any boundaries, and adjudged that it *need not*, where the stopping is alleged to be in a highway ; but it *must* where it is in another common way.

[ 17. So if an indictment be for *stopping quandam partem of the king's highway, containing by estimation so many feet in length and so many in breadth*, it is not good for the uncertainty, in as much as it is said *(by estimation)* P. 9 Car. B. R. adjudged. Halsey's case. ]

[ 18. If a man be indicted for *putting a lay-stall near the highway in S.* it is not good, without shewing *from what place to what place* the common way leads. P. 15 Car. B. R. Hukley's case. The indictment quashed, and said to be a common exception, and diverse indictments quashed for this cause. ]

[ 385 ] [ 19. If A. be indicted for *stopping a way at D. leading from D. to S.* it is not good ; because he does not *allege the way to be in D. but from D.* which excludes the vill. M. 21 Car. Such indictment quashed. ]

See pl. 16.

S. P. in the  
notes there.

20. A. was indicted for feloniously stealing of a piece of linen cloth from J. S. exception was taken to the indictment, because it was *quod felonice furatus fuit quandam peciam panni linei cujusdam J. S. præd. draper ad valentiam, &c.* and doth not say, *de bonis & cattallis cujusdam J. S.* as the common form of the precedents are, and therefore ill ; for an indictment ought to be certain to every intent without any intendment to the contrary ; and here it may be that this piece of linen was not the goods and chattles of J. S. at the time of the taking, but by him let out, or delivered or pledged to another.



*another.* And the court held this to be a material exception, and therefore discharged the indictment, and restored the party to his goods seized for that cause. Cro. E. 489, 490. Mich. 38 & 39 Eliz. B. R. Long's case.

21. Indictment for *taking carps out of his pond*; exception was taken, because it is *not said what number* he took, which is ill in indictments as well as in actions; and indictments ought to be more certain than actions, or at least as certain, that the defendant may know to what he is to answer. But Keeling and Windham over-ruled the exception; in actions damages are to be recovered, not in indictments; but the party is to be fined at the discretion of the court, be it one fish or more; but Twifden contra, indictments ought to be as certain as actions; Morton *silente*; and the other two ruled the party to plead to the indictment. 1 Lev. 203. Hill, 18 & 19 Car. 2. B. R. the King v. Wetwang.

22. Not only the defendant, but regularly *all other persons* also mentioned in an indictment, must be described with convenient certainty; and therefore it seems to be generally agreed at this day, that an indictment for *taking diverse sums of money of diverse persons for such a toll, &c.* without naming any in particular, is insufficient; yet in *special cases*, for the necessity of the thing, an indictment may be good without describing in certain the persons mentioned in it; as where one is indicted for having *knowingly received* and harboured divers *thieves to the jurors unknown*, (and yet in such case he cannot be punished as an accessory, without a greater certainty) or where a *murder or robbery is committed on a person unknown*, in which case the offender may be indicted for having killed or robbed *quendam ignotum, &c.* or where an *abbey is robbed during a vacancy*, in which case, to prevent a failure of justice, the law will feign a property, and allow an indictment for stealing *bona ecclesiæ*; but if there be no such special reason, the party killed must be set forth in an indictment of murder; and the person to whom the property belonged, in an indictment of larceny. 2 Hawk. Pl. C. 231. cap. 25. f. 73.

2 Hawk.  
Pl. C. 233.  
cap. 25. f.  
76.

23. An indictment which doth not with sufficient certainty set forth the thing wherein the offence was committed, is insufficient; as where one is indicted for having *forged a lease* of certain lands, *without naming some one certain parcel*; or for having *stolen bona & catalla J. S. without shewing any in particular*; or for having trespassed on two closes of meadow or pasture; or for having *ingrossed magnam quantitatem straminis & feni*, or *diversos cumulos tritici*, *without shewing how much* of each; or for having *carried away duas centenas casei*, without adding *libras or uncias, &c.* 2 Hawk. Pl. C. Abr. 213. f. 47.

2 Hawk.  
Pl. C. 233.  
cap. 25. f.  
76.—See  
Forestaller  
(E).

24. It is said to be most proper in indictments of larceny and trespass on a living thing, to shew *to whom the property* of it belonged by calling it the ox, or horse, &c. of J. S. without using the words *bona & catalla*; yet there are many precedents in books of good authority, wherein this nicety is not observed: If the thing be moveable, it is said to be most proper to shew its worth by the word.

2 Hawk.  
Pl. C. 234.  
cap. 25. f.  
77.

word *pretium*, and if it be immoveable by the word *valentia*; yet this nicety seems not necessary; neither is it clear, that the worth of the thing stolen is required to be *set forth* in an indictment of larceny for any other purpose, than to *shew that the crime amounts to grand larceny*, and the better to ascertain the crime, in order for a *restitution*, or in an indictment of trespass for any other purpose, than to *aggravate the crime*. 2 Hawk. Pl. C. Abr. 213: f. 48.

25. One was indicted for *selling beer without paying the duty*, but did not *shew to whom, or at what time it was to be paid, nor what quantity he sold*, and this was moved in arrest of judgment; and said, that a conviction upon such uncertain indictment, cannot be pleaded to any other for the same offence, neither any tolerable defence be made to such an uncertain charge; besides, in criminal cases the utmost certainty is required, and therefore the offence should have been *set forth* in this indictment so as a conviction thereon might have been a bar to all other actions and prosecutions for the same offence; and for this reason the judgment was arrested. 8 Mod. 58. Mich. 8 Geo. the King v. Gibbs.

26. In an indictment for *defrauding the prosecutor of a promissory note for 500 l.* one count set forth, that defendant did, *by false tokens*, get into his possession a promissory note, &c. and the defendant was found guilty; but after argument, and time taken to consider, the court held the indictment ill: that such a general charge of defrauding by false tokens, *without specifying the particular false tokens*, is not sufficient; for all indictments ought to be precise in charging the offence according to Cro. J. 20. And a general charge is never allowed but in the single instance of barrety. Hill. 13 Geo. 2. B. R. the King v. Munoes.

### (N) Uncertainty.

As to the thing by improper words.

[ 1. ] If a man be indicted for entry into certain lands, and *mowing an acre of hay*, it is good, though it is not proper, because it is not hay but *grass* before mowing. Mich. 14 Ja. B. R. per Curiam. ]

[ 2. So if the indictment be for entry, and mowing of *an acre of corn*, it is good; though it had been more proper to say, for mowing of *an acre sown with corn*. Mich. 14 Ja. B. R. per Curiam. ]

[ 3. So it is if the indictment be for entry and *cutting so many loads of wood*, though it be not proper; for *arbor dum crescit*, &c. Mich. 14 Ja. B. R. per Dodderidge. ]

As to the thing.

[ 4. If A. be indicted upon 8 H. 6. for entry into *two closes of meadow, or pasture*, it is not good for the uncertainty. M. 8 Car. B. R. resolved, and the indictment quashed. Speart's case. ]

In an indictment or information, the fact is never laid in the disjunctive. 5 Mod. 238. Mich. 7. W. 3.

[ 5. If an ironmonger be indicted for *selling iron by false weights and measures*, this is repugnant to sell iron by measure, which cannot be, and also to sell the same thing by weight, M. 8 Car. B. R.

Woodward's

Woodward's case resolved per Curiam in arrest of judgment, upon an indictment, intratur, Trin. 8. Car. ]

[ 6. If four persons are indicted for using the trade of a plumber, against the statute of 5 Eliz. and the indictment is, that they four & eorum uterque used the trade, this is not good, because the using of one cannot be the using of the other, and therefore not good. Pasch. 16 Car. B. R. Brooke's case among others adjudged, and such indictment quashed. ]

As to the persons; jointly against several.

S. C. cited

\* 5 Mod. 180.——Vent. 302.——10 Mod. 336.——Two were jointly indicted for blasphemous words severally spoken by them; it was objected, that the indictment was not good, because it was joint. But Roll. Ch. J. said, that the indictment was good enough though it be joint, as it is in the case of several perjuries, and several batteries, where a joint indictment doth lie, although it does not for several felonies; and here the indictment is upon one and the same statute, and for one and the same offence, and therefore the judgment given upon it is also good, and it shall be taken reddendo singula singulis, viz. the words to each of them as they spoke them. Sti. 312. Hill. 1651. B. R. Custodes v. Tawney and Norwood.

Two may be jointly indicted for extortion; otherwise for exercising a trade, not having served an apprenticeship. 1 Salk. 382. Pasch. 5 Annæ, B. R. the Queen v. Atkinson.——11 Mod. 79. S. C.

Two may be indicted for a cheat, and for several other offences. 5 Mod. 181. Arg. Hill. 7 W. 3.

Indictment lies against husband and wife for keeping a gaming-house; and the setting forth, that they & uterque eorum kept, &c. is well; for it is such an offence as may be committed by both jointly. And the addition of (uterque eorum) is but a further specifying and corroborating the former charge; for whoever says that both of them did keep, &c. does in truth and consequence say, that each of them did so; per Cur. 11 Mod. 336. Trin. 2 Geo. The King v. Dixon & Ux.

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[ 7. So it has been oftentimes resolved, that an indictment against several, that they & uterque eorum did not repair the streets before their houses, is not good. ]

8. Indictment of the death of a man unknown is good, and the name of baptism was not shewn; per Cur. the inquest shall mention his name; but then it seems that the indictment was taken before the coroner; contra upon other indictments taken before the justices of peace, oyer and terminer, &c. Br. Indictment, pl. 10. cites 1 Aff. 7.

In general.

9. Indictment that J. N. feloniously stole 2 sheep cujusdam personæ of the price, &c. and a good indictment, and the defendant arraigned upon it; quod nota. Br. Indictment, pl. 11. cites 18 Aff. 15.

10. A. B. and C. D. were presented for distraining certain persons without cause by colour of their office, &c. to the damage, &c. per Caund. this is uncertainty; for he does not declare what persons, nor what vill, so no visne can be known; per Ingl. we intend persons of the vill of the franchise. Br. Indictment, pl. 21. cites 38. Aff. 11.

11. A man was indicted, setting forth, that bona prædicti W. S. felonice cepit, &c. where no W. S. was mentioned before, and because every indictment ought to be certain, it was held that the indictment is not good. Br. Indictment, pl. 6. cites 9 E. 4. 1.

12. But indictment, that bona cujusdam ignoti, is good, quod nota. Ibid.

S. P. For the goods may be

stole in one county and carried into another, and so the right owner not known. D. 99. pl. 61. Pasch. 1 Mar. Anon.——A man was indicted quare vi & armis goods of the chappel of D. in custodia bujusmodi prepositorum invent. &c. he took and carried away; where a chappel cannot have a property. Per Lakin in time of vacation of an abbot, the indictment shall be goods of the house and church, &c. Br. Indictment, pl. 33. cites 7 E. 4. 14, 15.——And if it was of a parish, it shall be goods of the parsonage, &c. in custody of the wardens, &c. Ibid. And where it is of a fraternity, it shall be goods of the brothers and sisters, &c. quære. Ibid.——A person was taken at Southampton, having a silver tankard,

tankard, value 10l. and giving no satisfactory account how he came by it, was committed, and being brought by habeas corpus to Newgate, he was indicted, and the indictment was of the goods of a person unknown. At the trial, the prosecutor offered in evidence, that the defendant was a loose and disorderly person. Baron Gilbert said, that though an indictment might be good for stealing the goods *cujusdam ignoti*, yet a *property must be proved in somebody at the trial*, otherwise it shall be presumed that the property was in the prisoner, by his pleading not guilty to the indictment. For a man shall not be found guilty of felony, and hanged upon presumption, 8 Mod. 248. Pasch. 10 Geo. Anon.

13. *Conditional indictment* is not good. Yelv. 15. Mich. 44 & 45 Eliz. B. R. Ld. Cromwell's case.

14. Two were indicted, *eo quod felonice duas centenas casei cepit, & asportaverunt*, [exception was taken] because *centenas* is uncertain, what weight, viz. pounds or ounces, &c. as also because it was *cepit* in the singular number; and it was ruled, that the indictment was ill for both causes. Cro. E. 754. Pasch. 42 Eliz. C. B. Lane's case.

And in case of felony, it being 15. An indictment is the king's count, and ought to be *certain for the year, day, place and fact*. Jenk. 124. pl. 51.

against the † life of a subject, it ought to be certain as to the fact, which shall not be supplied either by argument or any intendment whatsoever. Arg. 3 Mod. 202. in case of the King v. Griffith.—† S. P. Jenk. 196. \* In indictments and appeals, *proditorie* for treason, *burglary* for house-breaking, *rape* for rape, *felony* for felony, *murder* for murder; these and no other words will serve,

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16. An indictment ought to be *more certain than common pleadings* in law need to be: Hill. 23 Car. B. R. because they are more penal, and ought to be more precisely answered unto. 2 L. P. R. 42.

17. An indictment must be certain, *that the party indicted may know how to plead to it or traverse*, or else it is not good, but may be quashed; Hill. 21 Car. B. R. because there can be no trial upon it, by reason of it's uncertainty. 2 L. P. R. 43.

18. Error of a judgment in an indictment was, that the defendant *scienter received and harboured divers thieves to the jury not known, who had stolen divers goods, and committed divers burglaries*; exception was taken, 1st, That it was too general, and amounted only to *communis receptor felonum*. 2dly, That it ought to be, that he knowing them to be thieves, received them; for he may know the persons and not know them to be thieves. 3dly, That it ought to be *felonice receptit*; because receiving and harbouring felons, knowing them to be felons is felony. But *non allocatur*; for per Curiam, perhaps the felons cannot be particularly known, any more than the felonies and burglaries: and an house which harbours felons is a common nuisance. And to the second, Jones said that *scienter* had been ruled good in one SALLIE'S CASE lately; and to the third the king may if he please take no notice of the felony, and make the indictment in trespass. And thereupon the judgment was affirmed. 2 Lev. 208. Mich. 29 Car. 2. B. R. The King v. Thompson.

19. An indictment filed Pasch. 10 W. 3. Rot. 42. was, that A. *using the trade of buying and selling cattle apud B. in com. M. did buy and expose to sale bad cattle, &c.* and it was quashed for uncertainty; for if it be understood that the using of buying and selling was at B. in com. M. there is *no venue where the exposing to sale* was;

was; and if (B. in com. M.) be applied to the place of sale, there is no place laid where the using the trade was; so quacunqve via, it will be impossible to make it good; per Cur. 12 Mod. 435. Mich. 12 W. 3. The King v. Purley.

20. An indictment against two *for scolding*. It was objected, that it could not be good jointly, because the scolding of the one cannot be the scolding of the other; but by Holt Ch. J. they may scold jointly, and therefore it is well; but it ought to be a common scold (which is a nuisance) that must be indicted, and not for once or twice only. Powell J. said, the indictment *may be taken as a several indictment*. However Holt said, they would not quash it, but let them demur to it. Holt's Rep. 352. Trin. 6 Annæ. The Queen v. Hoskins & al.

21. Indictment was, *for that M. being with child de illegitimo factu begotten by him, he (the defendant) secreted her, so as she could not be found to give evidence to the parish against him*. The defendant demurred, because there cannot be an illegitimus foetus; and for that reason the defendant had judgment; for every foetus is legitimate till born; for the parents may marry before the child is born; and if so, then the child is legitimate. 8 Mod. 336. Mich. 11 Geo. The King v. Chandler.

(O) Things of Form.

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Fol. 82.

[ 1. ] If men are indicted *for a riot, and the conclusion of the indictment is contra pacem & contra \*formam diversorum statutorum, but it is not contra † coronam & dignitatem nostram, yet the indictment is good*. Mich. 15 Ja. B. R. adjudged in one Holebrook's case. ]

See contra formam statuti.

12 Mod. 51. in case of the

King v. Tucker.—\* Inquisition taken of a riot contra form. stat. generally is good. 6 Mod. 140. Pasch. 3 Annæ, B. R. the Queen v. Pugh.—† The words contra coronam & dignitatem regis are used in all the precedents in Coke's Entries, which lay the offence contra pacem, yet they are omitted in Rastal's precedents; and it has been resolved, that an indictment for a riot is good without them; neither do I find the contrary any where adjudged. 2 Hawk. Pl. C. Abr. 223. f. 59.

[ 2. If a man be indicted upon the statute of 8 H. 6. for entry into certain land *contra pacem coronam & dignitatem, and does not say contra formam statuti* it is not good. Mich. 10 Jac. B. R. per Curiam. ]

[ 3. If an indictment be upon the statute of forgery, and the conclusion is *not contra formam statuti* it is not good. Mich. 9 Car. B. R. Smith's case such indictment quashed per Curiam. ]

[ 4. If an indictment be because he *riotosè cum baculis, &c. guer-rino modo arraiatus in quoddam clausum vocatum S. intraverunt, and his servants and sons, then and in the same meadow menaced, &c.* This indictment is good, though the word (*illicite*) be not in as is usual before the word (*riotosè*); for it is not necessary, inasmuch as the act itself contained in the indictment, appears to be apparently unlawful as the menacing. p. 5 Ja. B. R. per Curiam, Worbell's case. ]

The word illicite has been adjudged not to be necessary in an indictment for a riot, because the fact indicted ap-

pears to be unlawful, and the same may be said as to all other indictments at common law; but if a statute, in describing a thing prohibited, uses the word *illicite*, an indictment thereon is not good without it. 2 Hawk. Pl. C. Abr. 224. f. 61.

[ 5. If



Vid. 12  
Mod. 51.

[ 5. If a man be indicted *for barretry contra formam statuti*, and it is *not contra pacem* it is not good. Zachary Periam's case resolved, and the indictment quashed. M. 6 Car. B. R. ]

Cro. C. 340.  
S. C. —

Barretry  
was an of-  
fence at  
common  
law, yet it  
is good to  
conclude *contra formam diversorum stat.* per Cur. 12 Mod. 99. Trin. 8 W. 3. the King  
v. Bracy.

[ 6. If an indictment of *barretry* be *contra formam statuti*, it is good, though there is *not any statute against barretry directly* but collaterally, as for good behaviour, &c. Tr. 8 Car. B. R. per Curiam, Hill. 9 Car. B. R. Chapman's case per Curiam in writ of error upon such indictment. ]

[ 7. If an indictment be *juratores pro domino rege, scilicet, A. B. &c.* and doth *not say probi & legales homines*, it is not good. This is common experience; for several indictments have been quashed for this cause. ]

Many in-  
dictments  
in inferior  
courts have  
been quash-  
ed for want  
of the words  
proborum  
& legalium

[ 8. But if the sheriff returns an indictment in this manner, *juratores pro domino rege pro comitatu prædicto*, such, &c. and then certifies the indictment, in which is *juratores pro domino rege super sacramentum suum, &c.* and it is *not probi & legales homines*, whether this be good or not in this special manner. Trin. 11 Car. B. R. in one Carnelew's case. Dubitatur, per Curiam and advised. ]

& legalium hominum, in the caption of the indictment, setting forth by what persons it was found; but this is said to be an exception to an indictment found in B. R. or grand sessions or counties palatine, and has been often over ruled as to indictments in other courts, because all men shall be intended to be honest till the contrary appear. 2 Hawk. PL. C. 215. cap. 25. l. 16.

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An indict-  
ment was  
for *erecting  
a barn upon*

[ 9. If an indictment for a common nuisance, though it be in doing of a thing, be not *vi & armis*, or *contra pacem*, yet it is good because it may be in his own soil. Mich. 15 Car. B. R. resolved. Wardall's case. ]

parcel of the highway, &c. and concluded *ad grave nocumentum, &c.* omitting the words *contra pacem* and Crooke and Berkley J. being only in court, held the indictment to be ill. Cro. C. 584. Trin. 16 Car. Leyton's case.

[ 10. If an indictment be certified and the names of the indictors not certified, it shall be quashed. Mich. 15 Ja. B. R. Worfield's case, indictment per Curiam quashed. ]

[ 11. If an indictment of *forgery contra formam statuti* has not in it *contra pacem* it is not good. Mich. 14 Car. B. R. Perryman's case adjudged in writ of error, and the judgment given at the assizes revert from this cause. ]

At the com-  
mon law,  
the words  
*vi & armis*  
were neces-  
sary in indict-  
ments for of-  
fences,  
which amount  
to an actual

12. 37 H. 8. 8. enacts that *these words vi & armis, viz. baculis, cultellis, arcubus, & sagittis, or such like shall not of necessity be put in any indictment, nor shall the parties indicted of any offence have any advantage by writ of error, plea or otherwise, to avoid any such indictment, for that the said words, or like words, shall not be in the indictments; but the same, lacking the said words, shall be as good in law as indictments having the same words.*

disturbance of the peace, as rescues and assaults, &c. but it seems that they were never necessary where it would be absurd to use them, as in indictments for conspiracies, slanders, cheats, escapes, and such like, or for nuisances in the defendant's own ground: however, certainly the omission of them in such indictments is no fault since this statute. Yet since this statute, exceptions to indictments of *treason*, and such like, for want of the words *vi & armis*, where they have not been implied by other words, as *rescussit manus forti*, &c. have sometimes prevailed, but have been often over-ruled; and it



is not easy to shew how they ever could prevail since the said statute, consistently with the manifest purport of it. 2 Hawk. Pl. C. Abr. 221. f. 57.

13. Though an indictment of battery has *vi & armis* in the beginning of it, yet if those words are *not immediately before the assault* it seems that it is ill; per Cur. Sid. 140. Pasch. 15 Car. 2. pl. 15. Anon.

14. An indictment *founded only upon a statute*, ought to conclude *contra formam statuti*, or otherwise it is ill; and for the want of such conclusion an indictment was quashed. Saund. 249, 250. Pasch. 21 Car. 2. Faulkner's case.

12 Mod. 51. 52. in case of the King v. Tucker.

15. A. was indicted for *selling ale in black pots not marked*, and does not conclude *contra formam statuti*, and held to be good enough for the common law appoints just measures, and though the statute adds this circumstance, yet the crime being at common law, the conclusion is as it ought to be. Vent. 13. Pasch. 21 Car. 2. B. R. Burgen's case.

1 Sid. 409. S. C. by name of the King v. Burgaine.

16. Where a *statute prohibits a thing without a penalty, or makes a new duty to an officer*, the indictment need not conclude *contra formam statuti*. Comb. 205. Pasch. 5 W. & M. the King; &c. v. Wiggot and Petty.

17. Indictment for *preaching to 20 persons not being licensed*, not concluding *contra formam statuti*, was quashed; for they might be the defendant's own family, to which the statute does not extend. 1 Salk. 370. Trin. 5 W. & M. B. R. the King v. Clerk.

18. Indictment was per jurator. *præsentat. existit, that the defendant erected a cottage; & ulterius præsentant quod continuavit contra formam statuti*; and judgment was for the king, but reversed on writ of error; for there is *nothing to agree with præsentant*, and it is a new indictment distinct from the first, the matter whereof is no offence at common law, and the *contra formam* necessarily refers to the *ulterius præsentant*, and no more. 1 Salk. 371. Mich. 6 W. & M. B. R. the King v. Trobridge.

4 Mod. 345. S. C. and says that it is not like the case in my lord Coke's entries, where *contra ligentice sue debitum* went

to the whole indictment, in which, though there were many overt acts laid, yet there was but one treason, but here are two distinct offences.

19. One was indicted for *entring into a warren and hunting and killing rabbits at night*; exception was taken, that by stat. 3 Jac. 1. cap. 13. the offender forfeits treble damages and costs, half a year's imprisonment, &c. and the indictment *not concluding contra formam statuti*, the punishment of the statute cannot be inflicted, and if defendant be fined upon this indictment he may be notwithstanding punished again according to the statute, and so *twice punished for the same offence*; sed non allocatur; for if one has *two remedies the one by statute and the other at common law*, and takes one, he thereby determines his election. 12 Mod. 446. Pasch. 13 W. 3. Anon.

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20. Indictment for a riot concluded *contra formam statuti*; exception was taking that it was a *common law offence indictable independent of any statute*, and therefore the conclusion ill. But per Holt Ch. J. though it be not made an offence by any statute, yet there are divers statutes, directing the manner of punishing it, and

Formerly it was the current opinion that no indictment grounded on a statute,

and concluded-  
ing contra  
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ed as an in-  
dictment at  
common law,  
if it were  
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some sta-  
tute; be-  
cause it ap-  
pears that  
the prose-  
cution is  
grounded

that is reason enough to make the conclusion good. 12 Mod. 502. Pasch. 13. W. 3. the King v. . . . .

21. *As upon the statute of stabbing, the crime was felony before, but clergy is ousted by the statute, and yet indictment for that sort of felony concludes contra formam statuti, though the statute does not make the offence, it being felony before; on the other hand an indictment would be good without concluding upon the statute in that case, and so both ways are good.* 12 Mod. 502. per Holt Ch. J. in case of the King v. . . . .

22. *So in case of barretry an indictment may be concluded contra formam statuti, or diversorum statutorum, or take no notice of any statute at all; for wherever there was an offence at common law and a statute makes a further provision of penalty, an indictment for that offence may conclude contra formam statuti, or leave it out at election; per Holt Ch. J. Ibid.*

on a foundation, which will not support it, but quære, if the law be not now otherwise taken, for in PAGE'S CASE it was adjudged, that on a special indictment on the statute of stabbing, the defendant may be found guilty of general manslaughter at common law; and the words contra formam statuti rejected as senseless, &c. but a judgment on a statute shall never be given on an indictment which doth not conclude contra formam statuti, and therefore if the fact indicted be an offence prohibited only by statute, and the indictment conclude not contra formam statuti, no judgment can be given upon it; for though an indictment, which is redundant, may be helped by rejecting what is senseless, yet an indictment that is defective in a material part can be no way supplied. It is true indeed, that judgment on 8 H. 6. 9. may be given on a writ of *quære* of novel disseisin brought in the common law form; but this depends on a reasonable construction of the statute, which being express that the party may recover by *factum* or *quære*, but giving no new one, may be well intended to give the party a remedy by a writ brought in the old form. 2 Hawk. Pl. C. Abr. 232. f. 73.—S. P. 12 Mod. 99. the King v. Bracy & al.

23. It is a general rule that *unless the statute be recited, neither the words contra formam statuti, nor any periphrasis, intendment or conclusion, will make good an indictment which does not bring the offence within all the material words of the statute; as if an indictment of rape omit the word rapuit, or an indictment of perjury on 5 Eliz. 9. omit the words voluntarie & corrupte; or an indictment for striking in a church on 5 & 6 Ed. 6. 4. omit the words to the intent to strike; or an indictment for forestalling on 5 & 6 Ed. 6. 14. do not expressly allege that the goods were then coming to the market to be sold; or an indictment on the same statute for ingrossing, do not allege that the defendant ingrossed, &c. by buying, &c. or an indictment for treason in compassing the king's death on 25 Ed. 3. have neither the words compass nor imagine, &c.* 2 Hawk. Pl. C. Abr. 229. f. 68.

24. *If the statute whereon an indictment is founded be particularly recited, and the substance of the fact, and the time, and place, and things, and persons concerned be alleged with sufficient certainty, and a circumstance only omitted; the general conclusion contra formam statuti seems to help such omission.* 2 Hawk. Pl. C. Abr. 231. f. 72.

25. *If there be more than one statute concerning the same offence, the latter of which only continues the former, without making any addition to it, or only qualifies the method of proceeding upon it, without altering the substance of its purview, it is safe to conclude an indictment on it contra formam statuti; but where the same offence is prohibited by several independent statutes, or a new penalty is added*  
by

by a subsequent statute to an offence prohibited by a former, it is said to be safer to conclude *contra formam statutorum* than *contra formam statuti*; but in either case to avoid exceptions of this kind, it is advisable to conclude *contra formam statut.* which shall be taken either for *statuti* or *statutorum*, as will best maintain the indictment. 2 Hawk. Pl. C. Abr. 233. f. 74.

26. It was moved to quash an indictment *for not performing an order of justices of the peace concerning a bastard child*, because it did not conclude *contra pacem*; but it was held, that it ought not to be, this being but *for a non-feasance*. Vent. 108. Hill. 22 & 23 Car. B. R. Anon. So for non-payment of a poor-rate; it was moved to quash it, because it did not

conclude *contra pacem*. Sed non allocatur; because it was not for a male-feasance, but a non-feasance. Vent. 111. Hill. 22 & 23 Car. 2. Anon.

Inasmuch as all offences which are punishable by a publick prosecution, tend to the disturbance of the quiet and peaceable government of the king over his people, it seems a good general rule that all indictments and criminal informations, ought to conclude *contra pacem* of the king or kings, in whose reign or reigns the offence was committed; indeed there are some precedents without this conclusion, but I find no resolution to warrant them, except only where the indictment is for a bare non-feasance, as the not performing the order of justices of peace. But it seems clear, that neither informations *qui tam*, nor informations for an intrusion, or other wrong of a civil nature done to the king's lands, goods, or revenues, need this conclusion. 2 Hawk. Pl. C. Abr. 222. f. 58.

27. A man was indicted because he *such a day and year at D. &c. stole a horse of J. N.* and because it wanted *felonice* it was adjudged trespass, and not felony notwithstanding this word, (*stole.*) Br. Indictment, pl. 36. cites 18 E. 4. 10.

28. *Existens ætatis 16 annorum &c.* in an indictment on the statute of recusancy, may be referred to the time of absence from church and not to the indictment. Mo. 606. Talbot's case.

29. Where an indictment is preferred *for a thing which is unlawful in itself*, there if it concludes *ad commune nocumentum* it is sufficient; but if a thing is lawful in itself, as the erection of an inn; but by reason of some circumstance becomes unlawful; in such case, the particular circumstance must be alleged, as if the same be erected in a dangerous place, or that it harbours thieves; &c. the same must be alleged. Palm. 367. Trin. 21 Jac. B. R. Anon. Palm. 374.

30. If a word be left out in an indictment which is but only in matter of form, yet the indictment is good; but if it be in matter of substance it is not good. Trin. 24 Car. B. R. For it is the substance of pleadings that is most regarded, though formality be not to be neglected. 2 L. P. R. 42.

31. The caption was *jurator. pro domino rege pro corpore comitatus ad inquirendum ad largum*; exception was taken to it, for the uncertainty of the inquiry, viz. inasmuch as it is (*ad largum*;) yet the court held it well enough. Sid. 140. Pasch. 15 Car. 2. pl. 15. Anon.

32. If an indictment be *jurat. & onerati dicunt*, without saying *super sacramentum dicunt*, it is ill; per Cur. Sid. 140. Pasch. 15 Car. 2. pl. 15. Anon. And Twissden J. said that it had been so ad-

judged where the indictment was (*sacrum*) without any dash upon it. Ibid.

33. Indictment was quashed because it was *R. R's* with a dash over the *R's* for *regni regis*. Sid. 140. pl. 15.

34. So because it was *pace domini & pace regia*, where it should be in *pace regis* only. Sid 140. pl. 15. Anon.

S. C. Sid. 247. Pasch. 17 Car. 2. 35. Indictment taken *at the general sessions of the peace in London*, and quashed because it is not *sessionem pacis domini regis*. 1 Lev. 175. Trin. 17 Car. 2. the King v. Dudeney.

says it was quashed, though there are precedents both ways; but the court said that where the indictment is for a small offence as here, they will quash it for this omission and that so they did in another case the same term, between the KING and SWETLAND on an indictment for using a trade not having been an apprentice.—S. P. Sid. 175. Hill. 15 & 16 Car. 2. B. R. Dubitatur.—So where the words were *justitiaris ad pacem conservand. assign.* but not *ad pacem domini regis*; and had it said *ad pacem publicam* it would not have been sufficient. Vent. 39. Trin. 21 Car. 2. B. R. Anon.—S. C. Sid. 422. and Twissden J. said he knew one quashed for want of (*nunc*) *domini regis nunc conservand.* because it might be a former king.

[ 393 ] 36. Indictment was quashed, because it was *ad sessionem (in) com. tent.* and not (*pro*) *com.* Vent. 39. Trin. 21 Car. 2. Anon. But where the indictment was *ad generalem sessionem pacis com. civitat. præd. tnt apud Guild-hall, &c. in Guild-hall*, and so is not *pro com. civitat. præd.* per curiam, it is supplied by the first words, *sess. pacis com. civitat. præd.* Sid. 247. Pasch. 17 Car. 2. B. R. the King v. Warren.

\* Vent. 51. 37. Indictment upon 5 Eliz. cap. for exercising a trade in C. not having been an apprentice to it for 7 years; exception was taken, that there wanted these words, viz. \* *ad tunc & ibidem onerati & jurati*; for which all the 3 judges, Keeling being absent, conceived it ought to be quashed. 1 Mod. 26. Mich. 21 Car. 2. B. R. the King v. Turnith. So where the indictment was *comptum fuit per sacramentum duodecim proborum & legalium hominum, &c.* because it was not *jurat. & onerat.* and the clerk of the crown office informed the court, that that was always the course; also it must be, *ad tunc et ibidem jurat.* where the caption is recited to be taken. Vent 60. Hill. 21 & 22 Car. 2. B. R. Anon.—But in an indictment for a riot, no heed was taken to such exception, and Holt said, that it was not usual to quash indictments for a nuisance, riot or any other publick offence, on motion; but in case of petit riots, upon a contest of right of common, it had been often done. 12 Mod. 502. Pasch. 13 W. 3. the King v. . . . .

S. P. Sid. 175. Hill. 15 & 6 Car. 2 B. R. 38. Indictment was quashed for this fault, viz. *præsentant. existit* for *præsentatum.* 1 Salk. 370. Mich. 3 W. & M. B. R. the King v. Franklin. the King v. True.—So of (*dn*) for (*d'no*) Ibid.—But *existit* for *existit* has been held good. Sid. 140. Pasch. 15 Car. 2. Anon.

39. It was moved to quash an indictment taken before justices of peace, for that it was only *justiciar. ad pacem* without *conservand. assignat.* but refused; for the court said, though it were an old exception, yet they did not like it. 12 Mod. 235. Mich. 10 W. 3. Anon.

40. R. was indicted for opening a letter sent by the post, and the caption was, that per *juratores jurat' pro domino rege extit indictam'*, and quashed for that. 12 Mod. 514. Pasch. 13 W. 3. the King v. Russell.

41. Indictment was ordered to be quashed nisi causa; for that it was *præsentatum existit quæ billa est vera*, instead of *quod billa est vera*; and no cause being shewn that indictment was quashed for that fault. 8 Mod. 296. Trin. 10 Geo. the King v. Reeves.

42. The words in *contemptum regis* are sometimes used in indictments of inferior crimes, and in informations of intrusion, and in actions upon

upon statutes, and sometimes omitted; but I find no authority relating hereto, except in the year book of 4 H. 6. wherein it seems to be admitted that it is necessary in an action on a statute. 2 Hawk. Pl. C. Abr. 223. f. 60.

(O. 2) Mistaken Words, Names, Times, or Place; in what Cases it shall abate the Indictment.

1. **E**Xception was taken to the caption of an indictment, that it was *presented per jurator. elect. triat. jurat. & onerat. ad inquirend. pro domina regina (and) corpore com.* instead of *pro corpore com.* which was agreed per Cur. to be the right way, but they held it well notwithstanding; for it is good sense that they were charged to inquire for the queen, and in behalf of the county. 6 Mod. 180. Trin. 3 Annæ, B. R. the Queen v. Cotesworth.

2. Indictment for that the defendant with others at the parish of S. *riotously assembled et quoddam cubiculum S. S. in the mansion house of David James fregit, & intravit, and 30 yards of stuff took and carried away.* Upon the evidence it appeared to be the dwelling house of *David Jamson and not of James*; Parker Ch. J. held that this did not maintain the indictment; for part is local, and part not; the cubiculum is local, but the taking and carrying away is not local, whereas here all is put together as one entire fact, under one description, and you cannot divide them, 1 Salk. 385. Mich. 11 Annæ, the Queen v. Cranage.

(O. 3) Find. What the Jury must find, or what [ 394 ] shall be a good finding.

1. **A**. Was arraigned of the death of a man and acquitted, and the jury was compelled to present who killed the man, by which they indicted another; quod nota. \* But at this day it is not put in ure, but only where the judgment is taken before the coroner upon view of the body, and not the indictments taken before the justices of peace. Br. Corone, pl. 39. cites 21 E. 3. 17. S. P. Br. Corone, pl. 117. cites 37 Aff. 13. per Grene. —S. P. if before the coroner, contra of other indictment which is not before the coroner. Br. Corone, pl. 32. cites 11 H. 4. 93. and Trin. 10 R. 2.—Ibid. pl. 52. cites 14 H. 7. 2. S. P. as to the coroner, contra before the sheriff or justice of peace. So it seems, where he is acquitted at the suit of the king.

(P) Judgment. No Damages to the Party grieved.

Fol. 83.

[ 1. ] **I**F a man be indicted for a tort done to J. S. and upon this judgment is given against him to be *fined and imprisoned*, yet no damages may be given to J. S. Hill. 14 Car. B. R. and P. 15 Car. B. R. between Powell and Shield a prohibition granted to the marches of Wales to give damages to the party grieved upon a criminal bill. ]



See Nu-  
fance (B. a)

(Q) Nufance [and other Things.]

Other things.

[ 1. A Man may be presented, *because certain monies came to his hands which were found by J. S. (for this concerns the interest of the king and so not private)* 27 Ass. 16. ]

[ 2. A man may be inquired of such things as are withdrawn from houses which are of the foundation of the king. 27 Ass. 20. ]

[ 3. As a man may be presented for withdrawing of certain rent of a prior and covent, which is of the foundation of the king. 27 Ass. 20. ]

[ 4. But a disseisin to their frank-tenement cannot be presented 27 Ass. 20. ]

Private in-  
terest.

[ 5. If a man has a way over the land of J. S. and J. S. stops it, he cannot be indicted for it; for this concerns private interest, and a man cannot do a thing *vi & armis*, & *contra pacem* in his own land, and therefore cannot be indicted of it as for a trespass. Mich. 15 Ja. B. R. ]

[ 6. So if a man has a gutter through the land of J. S. and J. S. stops it, he cannot be indicted for it for the cause aforesaid; but he who ought to have the gutter is put to his action upon the case. M. 5 Ja. B. R. adjudged. Smith's case. ]

[ 7. A presentment for sur-charge of a common is not good; because it concerns private interest. Mich 12 J. B. adjudged between Bere and Storer. ]

1 Saund.  
435.

[ 8. A presentment for inclosing of a croft, in which the people of a vill have common, in a nufance of all the people of the same vill, is not good; because it is private, of which assise lies. 27 Ass. 6. adjudged. ]

[ 9. A presentment for laying dung and other ordure against the wall of another man, is not good; because it concerns private interest. 12 H. 4. 8. ]

Nufance par-  
ticular inter-  
est.

[ 10. If a man be indicted for disturbing of a watercourse running to the mill of J. S. *ad grave damnum* of the said J. S. & *tenentium suorum*, it is not good, without saying, *omnium ligeorum domini regis*. Tr. 15 Ja. B. R. William Hughes's case. Such Indictment quashed. ]

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An indict-  
ment doth  
not lie for  
a private  
nufance, or  
other in-  
juries, be-

[ 11. If a presentment be for making a nufance, *ad grave damnum omnium ligeorum domini regis prope inhabitantium*, it is not good; for it ought to be a nufance to all the lieges of the king. Mich. 15 Ja. B. R. Jarvis's case. Adjudged. And the indictment for nufance to a way quashed accordingly. ]

because the nufance or injury done is not done *ad commune nocumentum*, but *ad privatum*; and therefore an action upon the case doth only lie for the party that is damaged by this nufance or injury. Hill. 22 Car. B. R. 11 Maii, 1651. For indictments are to punish publick offences only, and those done against the publick peace; and not to punish private trespasses, for which the law gives particular actions. 2 L. P. R. 44.

1 Saund.  
435.

[ 12. So if a presentment be for inclosing of a croft, in which the people of a vill have common in a nufance of all the people of the same vill it is not good; for the people of the vill may have an assise. 27 Ass. 6. adjudged. Hill. 14 H. 4. B. R. Rot. 86. Adjudged. ]

[ 13. So



[ 13. So if an indictment be for *incroachment of so many rodd of land appertaining to the borough of Launston, ad nocumentum of the borough \* and of divers others*, it is not good; because it is only for private interest. Mich. 15 Ja. B. R. per Curiam. Langdon's case. ]

Fol. 34.

[ 14. But if a man be indicted for *breaking and digging of the wall of the church of Launston; ad nocumentum burgi legiorum domini regis*, it is good; for this is not of private interest; and though the church be spiritual, yet the offence is temporal. Mich. 15 Ja. B. R. Kingdom's case; this was moved, but not resolved. ]

[ 15. If a man be convicted of a *nusance done to the king's \* highway*, he shall be commanded by the judgment to remove the nusance at his own costs. Tr. 32 E. 3. B. R. Rot. 15 & 23. ]

Nusance Judgment.

16. An indictment for a nusance doth lie against the owner or proprietor of a ship that is sunk in a haven or port. 21 Car. B. R. For thereby the trade of that place, where the haven or that port is, and also navigation, is hindered, which is prejudicial to the commonwealth; for it is chiefly maintained by navigation. 2 L. P. R. 43.

\* See Chimin.

## (R) Pleadings to the Indictment.

1. [ T was presented, that A. B. justice of oyer and terminer, caused a certain indictment to be entered upon the roll of felony, which was presented as trespass only; and he, being arraigned of it, demurred upon the indictment, and by the justices the indictment is void; for this goes in defiance of the 1st. record. Quod nota. Br. Indictment, pl. 14. cites 27 Ass. 18.

2. Indictment of felony done in D. where there was no such vill in the same county; therefore the justices would not arraign him, but let him to mainprise, and awarded *capias* against the lord of the leet and his steward for taking of such indictment. Br. Corone, pl. 193. cites 41 Ass. 30.

3. A felon arraigned upon indictment shall not be suffered to relinquish a general pardon by parliament, and to plead to the felony. Br. Indictment, pl. 2. cites 11 H. 4. 41.

4. One was indicted of trespass by the name of J. N. of D. The defendant said, that in the county are D. magna & D. parva, absque hoc that there is any D. in the same county without addition; Prist. and by the opinion of the court it shall be reversed. It seems that the party was outlawed upon the indictment; for such exception of the vill is not good, if \* a man appears, and pleads and be condemned; he cannot assign it for error after as it seems; for of matter in fact, if he appears he must plead it; contra where he is outlawed or loses by default. Note a diversity as it seems; but in this point 35 H. 6. & 5 E. 4. vary. Br. Error, pl. 69. cites 7 H. 6. 39.

One was indicted with a wrong addition, and attainted by outlawry in high treason; the defendant came in and assigned error, viz. et

*prædictus R. F. dicit, that he is the same person mentioned in the record of the indictment; and the question was, whether the prædicti did not admit the addition as in the indictment? It was argued, that it admitted no more than identity of the person, and not the truth of the addition; the falsity of which, as well as the omission, is error. But Holt Ch. J. said, the true answer is, that there could be no estoppel; for the outlawry was returned, Hill. 1 W. & M. at which time he stood indicted*

Indicted by a wrong addition, but not rendering himself till long after, he had no opportunity to plead it, but could only use the king's pardon, or say he was not the same person mentioned in the indictment, especially it being confessed by the king's attorney general. 12 Mod. 199. Trin. 10 W. 3. the King v. Robert Fielding.

5. After an indictment by a grand jury a *plea* is not to be received in the office, unless the defendant gives security to try it at his own charges; but if the defendant comes into court, and pleads, his plea shall be received; but he shall be committed if he does not give security to try it. If he gives security to try it, it must be at his own charge; if he goes to gaol, it must be at the prosecutor's charge. Per Cur. 6 Mod. 114. Hill. 2 Annæ, B. R. the Queen v. Tracy.

6. If an offence sufficient to maintain the indictment be well laid, it is enough, though other facts are ill laid. Salk. 385. Hill. 10 Ann. B. R. the Queen v. Ingram.

7. The defendant may plead any plea in abatement of an indictment of felony, and also plead over in bar, and take the general issue also in the same manner as an appellee may do. 2 Hawk. Pl. C. 259. cap. 25. § 152.

### (S) Quashed. In what Cases, and for what Faults.

1. **I**F one be indicted for doing of any thing, which he is not by the law to be indicted for, as for the inclosing of a common, or some other trespass for which an action at the common law is to be brought, or for calling a man a rogue or thief, &c. such an indictment is not good, but may be quashed. Pasch. 24 Car. B. R. for indictments are to be preferred for criminal, and not for civil matters; and then likewise the delinquent is liable to be twice punished for one offence, which is against magna charta. 2 L. P. R. 42.

2. Where the party indicted is outlawed upon the indictment, the court will not quash the indictment, although it be erroneous, but will force the party outlawed to bring his writ of error to reverse the outlawry; for before the outlawry reversed, the party outlawed can have no benefit of the law. Mich. 24 Car. B. R. 2 L. P. R. 45.

3. If an indictment be of two things, one whereof is not indictable, so that as to that part the indictment is ill; yet if it be good as to the other part, it shall not be quashed. Per Dodderidge J. to which Whitlock agreed. Lat. 173. Intratur. Trin. 2 Car. Willow's case.

4. It was moved to quash an indictment, because the caption is dated 25 Jan. 18 Car. 2. and the certiorari was of Mich. term last, and the indictment is subsequent to the certiorari; and the court said, that the indictment was not removed, but remained in pais. Note, if so, the party is safe, because the clerk entered (mittitur in banco) and so they cannot proceed in pais. And no person prayed new certiorari. Sid. 317. Hill. 18 & 19 Car. 2. the King v. Buck.

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If it were  
ad sessionem

5. Indictment quashed because it was *ad generalem sessionem facis tent infra burgum de Leicester*, not being said *pro burgo*; and

and two other indictments quashed the same term for the same fault. *in a borough incorporated, it had been*  
 1 Lev. 304. Trin. 22 Car. 2. the King v. Page.  
 good, though it were not *pro bugo*. Vent. 39. Trin. 21 Car. 2. Aucion.

6. The defendant was indicted *for not attending at the ward-mote-inquest, being chosen of the jury for such a year*. Exception was taken to the indictment; 1. because it is a thing not known at the common law, that a man should be of a jury for a whole year. 2. The indictment was, that the defendant was an inhabitant of such a place, and *elected a juryman, but doth not say, that he ought to hold the office to which he was elected*. It was quashed, 3 Mod. 167, 168. Hill. 3 Jac. 2. B. R. the King v. Sellars.

7. The defendant was *convicted of manslaughter at the Old Bailey, and the record being removed into this court by certiorari, he pleaded his pardon, and had judgment quod eat inde fine die*; but the dean and chapter of Westminster having seized his goods as forfeited by that conviction, (though he was out of the court by that judgment) he moved to quash the indictment, because it was *per sacramentum duodecim proborum & legalium hominum jurat' & onerat' presentat' existit modo & forma sequen'* Midd. ff. juratores pro domino rege presentant, &c. That there was no precedent to warrant such an indictment; for this may be the presentment of another jury, it being very incoherent to say, that it was presented by the oaths of 12 men that the jury do present. It ought to be *presentat' existit quod*, &c. and so is the form of this court, as the clerk of the crown informed them; wherefore the indictment was quashed, 3 Mod. 201, 202. Pasch. 4 Jac. 2. B. R. the King v. Griffith.

8. It was moved to quash two indictments, which were *quod cum an order was made, that the parishioners should receive a bastard child, they in contempt did refuse to receive it*; and because it was not positively said, that it was ordered that they should receive it, but only by recital with a *quod cum*, they were quashed. 1 Salk, 371. Trin. 5 W. & M. B. R. the King v. Whitehead.

9. It was moved to quash an indictment, *for selling low wines in a cellar, without giving notice to the exciseman, against the stat. 3 & 4 W. & M.* because it is *returned in English*, and ought to be in Latin. Per the Ch. J. I cannot tell that; no writ of error lies on it; the remedy is by appeal. 5 Mod. 12. Mich. 6 W. & M. the King v. Lammas, Comb. 325, Pasch. 7 W. 3. S. C. the exception not allowed, for it is a special authority.

10. A miller was indicted for taking of *excessive toll*; it was moved to quash it, because it was not said *jurat' nor onerat', nor the jurors named*; per Cur. it is against the course of the court to quash an indictment for extortion or oppression; we cannot do it, demur to it. 5 Mod. 13. Mich. 6 W. & M. B. R. the King v. Wadsworth.

11. A motion was made to quash an indictment, which set forth, that the defendant, being qualified to be a *constable*, was *debite modo electus* to serve that office at I, and that he had notice of it, but did not take the oath to execute that office. The objection was, that the indictment *should set forth, that he was chose by one who had sufficient authority*, and that he was summoned before a justice of peace

peace to take the oath, and therefore, it not appearing how he was chosen, and that he had notice, the indictment ought to be quashed. 5 Mod. 96. Trin. 7 W. 3. The King v. Harpur.

• 6 Mod.  
245. Pasch.  
3 Annæ,  
B. R. in  
case of the  
Queen v.  
Leech.

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12. It is not the course to quash *indictments* of *perjury*, \* *nusance*, or the like, but to put the party to plead to them; per tot. Cur. Vent. 370. Anon.—So of *forgery* or crimes concerning the highways, or *enticing away another's servant*. 1 Salk. 372. Hill. 8 W. 3. B. R. King v. Belton, Inhabitants.—Or *conspiracy* to swear a bastard, or *barretry*, or keeping a *bawdy house*. 6 Mod. 137. Pasch. 3 Annæ, B. R. Queen v. Best.—So of *fishing in ponds*. 6 Mod. 183. Trin. 3 Annæ, B. R. Queen v. Steer.

12. An indictment *against overseers of the highways for not repairing, or causing to be repaired* the highways was quashed; because such indictment *must always be against the parish*, the overseers not being bound to repair the ways, but only to give notice to the parish to come and repair them. 12 Mod. 198. Trin. 10 W. 3. The King v. Dixon & Hollis.

13. Indictment *for causing an apprentice to absent himself from his master, and detaining him in that absence*. It was moved to quash it, because *not a thing of a publick nature*, being no other than an action of the case; but the court said, it was a great offence, and refused to quash it, but left the party to demur if he would. 12 Mod. 195. Trin. 10 W. 3. the King v. Kitchner.

14. The caption of an indictment was *præsentat. existit quod separalia indictamenta huic schedulæ annexa sunt billæ veræ*. Exception was taken, that if there be 20 indictments, one half true, the other false, it is within this finding; sed Cur contra; *separalia indictamenta*, imports all the several indictments. But then it was objected, that they are *not indictments 'till found*, and 'till then they are only bills; and for this cause they were quashed. 1 Salk. 376. Trin. 12 W. 3. B. R. the King v. Brown.

15. Indictments for *conspiracies* are never quashed. 8 Mod. 321. Mich. 11 Geo. in case of the King v. Edwards & al.

16. The quashing indictments is a *discretionary power of the court*; and if the matter is *doubtful*, the defendant must plead or demur; per Cur. 8 Mod. 321. Mich. 11 Geo. the King v. Edwards & al.

## (S. 2) Quashed on Motion, what Indictments.

1. **O**RDER by justices of peace made upon conviction of force upon the view may be quashed upon motion. Sid. 156. Mich. 15 Car. 2. B. R. the King v. Challoner.

2. The court would not quash an indictment of *manslaughter* on motion; for they said, it was not their course to do so in this case, but ruled the party to plead to it. 1 Vent. 110. Hill. 22 & 23 Car. 2. B. R. Sir Tho. Pettus's case.

It is never  
done before  
the guilt or  
innocence

3. It was said by Sir Samuel Aftree, that indictments for *perjury*, *forgery*, and *maintenance*, were never quashed on motion, but the party is always put to plead to them; but as to † *riots*, or other offences

*offences of a publick nature*, the court indeed is very tender of quashing them, yet they do it daily, if they find it *for a frivolous matter*, 12 Mod. 231. Mich. 10 W. 3. Anon. of the party is tried, and therefore  
 motion to quash them ought to be *after verdict*, if they will, and not before. Sid. 54. Mich. 13 Car. 2. Anon.—† 12 Mod. 99. Trin. 8 W. 3. The King v. Bracy & al.

4. An indictment for *common nuisance* is never quashed upon motion. 12 Mod. 234. Mich. 10 W. 3. Anon. But indictment, concluding *ad nocumentum* of the inhabitants of a certain vill, was quashed for the special conclusion. 12 Mod. 504. Pasch. 13 W. 3. Anon. — It was not usual to quash indictments for a *nuisance*, riot, or any other publick offence, on motion; but in case of *petit riots* upon the contest of right of common it had been often done; per Holt Ch. J. 12 Mod. 502. Pasch. 13 W. 3. The King v. . . . .

5. Indictment was for extortion against an *officer for taking money for not carrying his prisoner to a spunging house*, and the court looked upon it to be so ill a practice, that they would not hear a motion to quash it. 12 Mod. 255. Mich. 10 W. 3. the King v. Beechcroft.

6. So of an *indictment for disturbance in the church*. Sid. 54. [ 399 ]  
 says, it was so held. Mich. 15 Car. 2.

7. A. was indicted for *lying with another man's wife*, and moved to quash it as a matter not indictable; but per Cur. we will not quash an indictment for matter of this nature on motion, but demur if you will. 12 Mod. 413. Trin. 12 W. 3. the King v. Sellinger.

## (T) Quashed; and Exceptions taken, at what Time.

1. **O**NE that is convicted upon an erroneous indictment cannot move *after his conviction* to have the indictment quashed, but must bring his writ of error to reverse the judgment given against him upon the indictment. Mich. 22 Car. B. R. for after judgment it is too late; for an indictment is quashed for the insufficiency in it, or because no good judgment can be given upon an erroneous indictment; but if judgment be given upon an erroneous indictment, it is good, till it be reversed by a writ of error. 2 L. P. R. 43.

2. An indictment may be quashed, if it appear vitious, *after issue joined*; per the Ch. J. Cumb. 21 Pasch. 2 Jac. 2. B. R.

3. An indictment was removed by certiorari, and a recognizance taken on the awarding it; on a motion to quash the indictment, the court refused to hear it, because it appeared that the *recognizance was forfeited*. Holt Ch. J. said, the practice was, or ought now to be, altered by the late act, before which the defendant came soon enough at any time to quash, but should not be allowed to do it now, after his recognizance forfeited *by not carrying the record down to the next assizes to be tried*; and for the same reason the court refused to let any exception be taken, either to the certiorari or return. 1 Salk. 380. Mich. 2 Annæ, B. R. Anon.

4. One cannot move to quash an *indictment* for a fault in the *caption*, the same term it comes in. 6 Mod. 221. Mich. 3 Annæ B. R. Queen v. Franklin.

(U) Quashed

## (U) Quashed for Part.

1. **W**. Was indicted, that he *being of ill fame, &c. was a night-walker, and further, that such a day, &c. he frequented a brothel-house.* The indictment is good for the being a night-walker, W. being laid to be of ill fame, &c. and though the other part be ill, yet indictment shall not be quashed, and W. was fined 40 s. Lat. 173. Trin. 2 Car. Willow's case.

2. H. was indicted for *riotously entering the close of J. S. and cutting down and carrying off 20 ashes and 30 oaks ibidem crescentes, de bonis & catallis of J. S. and his wife; per Cur. judgment for the queen, as to entering the close, and the indictment void as to the rest.* For trees growing cannot be called bona & catalla, 11 Mod. 113. Pasch. 6 Anne, B. R. the Queen v. Harris.

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## (U. 2) Process against Indicttee.

1. 13 Ed. 1. 13. **E** Nacts that *sheriffs in their tourns, and in other places where they have power to enquire of trespasses, shall cause inquests to be taken by twelve lawful men at least, who shall put their seals to such inquisitions; and if they shall imprison any that have not been indicted by such inquests, the parties imprisoned shall have their action against the sheriff; and so of bailiffs of franchises.*

2. 1 Ed. 3. 17. enacts that *indictment in sheriffs tourns or in franchises, &c. shall be taken by roll indented, whereof one part shall remain with the indictors, and the other with him that taketh the inquest.*

## (U. 3) Indulgence to Persons indicted.

*But in appeal, it is otherwise.*  
Ibid.—

1. **T** H E defendant in indictment of *felony* shall not have counsel against the king, if it be not *matter in law.* Br. Corone, pl. 54. cites 9 E. 4. 2.

In the case of the KING v. THOMAS, 2 Bull. 147. Ld. Ch. J. Coke observes, that the Jesuits have much slandered our common law, in the case of trials of offenders for their lives, in the manner of their trial, in regard that counsel, and also examination of witnesses upon oath, is had and admitted against a delinquent, but a delinquent to have no counsel to speak for him, nor to have any examination of witnesses upon oath against him. In answer to this he says, the law of England is a law of mercy; *the judge, before whom the trial is, is to look unto the indictment, and to see that the same be found, and good in point of law; the judge ought to be for the king and also for the party indifferent; it is far better for a prisoner to have a judge's opinion for him, than many counsellors at the bar; the judges are to have a special care of the indictment, and to see that the same be good in all respects, and that justice be done to the party.*

2. A man, *outlawed of felony, was brought to the bar, and demanded what he had to say why he ought not to die; he said, that at the time of the outlawry, he was in prison in the castle of Oxford, and did not say in whose custody, nor in what county Oxford is, nor did he aver his plea & hoc paratus est, &c. therefore no plea; and after [it was said] there, that the justices by their discretion may assign him*



him *counsel* to plead his plea as the order is in the pleading of it; but because he was of *ill fame* he had no counsel. Br. Corone, pl. 127. cites 1 H. 7. 13.

3. One attainted of *high treason* pleaded that he was drawn out of sanctuary of C. and prayed counsel to plead it; and by all the justices of both benches, counsel was assigned him, and day given. Br. Corone, pl. 128. cites 1 H. 7. 22, 23. 25. ¶ Humfry Stafford's case.

3 Inst. 29. cites S. C. —and says that upon plea of *not guilty* only, the

prisoner shall not have counsel to plead it for him, or to say any thing for him relating to the same, unless it be in *appeal*, which is the suit of the party. For when he is put to answer to an indictment of treason or felony, he ought to do it himself in person, and then if his answer be such as exceeds his cunning to plead it, he shall have counsel assigned him, though against the king. For this plea of *not guilty* goes to the fact, which himself knows best, and can therefore answer to it; and should his counsel plead this plea and defend it for him, they would perhaps be so covert in what they say, that it would be a long time before the truth would appear. Besides if the party himself defends it, his conscience may prick him to utter the truth, or at least † his gesture or countenance may shew some signs of it; but should that be otherwise, yet his manner of speaking may be so undisguised that the truth may be easier discovered, than by the artificial speaking of counsel; and these may be the reasons of their not having counsel as above. —\* S. P. 3 Inst. 137. cap. 63. And says that in no case the party arraigned of treason or felony can pray counsel learned generally, but must shew some cause. Because in the case of life, the evidence to convict him should be so manifest, as it could not be contradicted. And also, that the court ought to see that the indictment, trial, and other proceedings be good and sufficient in law; for otherwise they should, by their erroneous judgment, attain the prisoner unjustly. —In SIR WILLIAM WITHPOLE'S CASE, Cro. C. 147. Hill. 4 Car. B. R. counsel was denied to be allowed him upon an indictment of murder, unless he should shew some exception in law; but upon shewing such, counsel was allowed him. —Jo. 198. S. C. —Ley. 81. S. C. —† 2 Hawk. Pl. C. 400. cap. 39. S. P. —¶ St. Pl. C. 151. cap. 63. cites S. C.

4. One was outlawed upon an indictment of manslaughter, and brought a writ of error, and assigned for error, that he was over the seas at the time of the outlawry, viz. at Utrick, in partibus transmarinis. Hereupon counsel was assigned him; Jones J. moved it, as doubtful, whether he might have counsel upon his trial, but all the other justices held clearly that he should have it when the trial is not upon the fact in the indictment but upon collateral matter, (viz. of his being beyond seas.) Cro. C. 365. Trin. 10 Car. B. R. Burges's case. —als. The King v. Burges.

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So in error to reverse an outlawry in high-treason, the defendant pleaded a like plea, and

prayed counsel to be assigned him for the trial of the issue taken by the attorney general. But the court said, it is not necessary to assign counsel; for upon this collateral matter, any person may be of counsel, with the prisoner without assignment. 2 Jo. 180. Mich. 33 Car. 2. B. R. The King v. Drugh O Caruy.

5. One was indicted of high-treason done before the king's return, and excepted out of the general pardon; and after the indictment was read to him, he desired it might be read a second time, which was done; and then desired that it might be read in Latin, which was denied, it being never done; then he desired a copy of it and counsel, which was denied; but the court said, if he takes any legal exception, he shall have a copy of so much thereof, as concerns the exception, and counsel to argue it. Lev. 68. Trin. 14 Car. 2. B. R. Sir Henry Vane's case.

Sid. 84, 85. S. C. by name of the King v. Sir H. Vane and Jo. Lambert. — But by 7 W. 3. cap. 3. s. 1. All persons that

shall be indicted for high treason, whereby any corruption of blood may be made to such offenders, or their heirs, or for misprision of such treason, shall have a copy of the indictment, but not the names of the witnesses, delivered unto them five days at least before they be tried, to enable them to advise with counsel, their attorneys or agents requiring the same, and paying the officer his fees for writing thereof, not exceeding 5 s. and every such person shall be admitted to make his defence by counsel, and to make any proof that he can produce by lawful witnesses upon oath for his just defence, and in case any person so accused, shall desire counsel, the

*the court, before whom such person shall be tried, or some judge of the court, shall immediately upon request assign such counsel, not exceeding two, as the person shall desire, to whom such counsel shall have free access at all reasonable hours.*

*S. 12. provides, that neither this act, nor any thing therein contained shall any ways extend to any impeachment or other proceedings in parliament in any kind whatsoever.*

*Nor by S. 13. to any indictment of high-treason, nor to any proceedings thereupon, for counterfeiting his majesty's coin, his great seal, or privy seal, his sign manual, or privy signet.*

*Nor can they offer any in stay of judgment but matters arising upon the indictment, and not matters de hors.*

6. The statute of W. 2. cap. 31. which gives *bills of exceptions*, does not extend to any case where prisoners are indicted at the suit of the king. Resolved. Sid. 85. Trin. 14 Car. 2. The King v. Sir H. Vane and Lambert.

*Resolved. Ibid.*

7. Upon indictments, the court will never refuse to assign a prisoner counsel, to argue a doubtful point of law, happening to arise at or after his trial; as where it shall appear questionable, whether the facts proved, if true, fully amount to the crime charged against him; or whether the persons offered to be evidence against him be legal witnesses, in respect of such or such exceptions against them; or whether certain persons returned of his jury can be lawful jurors, in respect of certain objections against them; or whether the indictment or process, &c. be strictly legal: in all which cases, the prisoner must propose the point, and if the court think it will bear a debate, they will assign him counsel to argue it. 2 Hawk. Pl. C. 401. cap. 39. f. 4.

8. After a prisoner has had a counsel assigned him, the court will not discharge such counsel without the prisoner's consent, though they desire it, but will sometimes add others to them. 2 Hawk. Pl. C. 401. cap. 39. f. 8. cites 2 vol. State Trials, 711, 712.

## [ 402 ] (U. 4) Error. Writs of Error in what Cases, and How.

\* The first part of this plea is altered by the year book the same being seemingly obscure in Brook, wherein the words are as follows, viz. (Et quite devant) Herle ou an, jour, &c. † This should be 75. b. 76. pl. 99.

1. ERROR assigned, because the plaintiff and J. S. were indicted of conspiracy in oyer and terminer, &c. and in the indictment no year, day nor place were alleged where the conspiracy was made; and also it was that they imprisoned A. B. and C. D. till they made fine, &c. which sounded in oppression, and not in conspiracy; and this was awarded to be conspiracy; and so error, &c. And though the plaintiff in error had made fine to the king by this conviction, yet upon this, the judgment was reversed. Quod nota, notwithstanding that they pleaded not guilty, and did not take exception at the time; for it is said, that it is the office of the court to see if the matter shall serve in things apparent or not; and yet it was alleged, that the other, with whom he conspired, was dead, so that now he cannot be punished again for the conspiracy, and that the king now shall lose his fine, and yet non allocatur. Br. Error, pl. 87. cites 24 E. 3. 35. † 74.

2. Error to reverse a judgment upon an indictment, because the award of the *venire* was entered, *præceptum fuit vicecomiti*, &c. which is more like an history of the record, than the record itself; for it ought to be *præceptum est*, and so are the precedents; and for this 'cause it was reversed. Vent. 170. Mich. 23 Car. 2. B. R. the King v. Alway & Dixon.

2 Saund.  
393. S. P.  
the King  
v. Perin.  
—S. P.  
Vent. 172.  
in case of  
the King  
v. Green & al.

3. Several were indicted for refusing to take the oath of allegiance contained in the statute of 3 Jac. tendered to them at the sessions of the peace. One appeared, and the entry was *nihil dicit*, &c. *ideo remansit dom' rex versus eundem indefensus*. And the others were convicted. They brought error, and assigned, that in the entry of the *nihil dicit*, it was *ideo remansit*, &c. whereas it ought to have been *remanet*, and so the record itself must express. And it was held to be error, per Cur. Vent. 171, 172. Mich. 23 Car. 2. B. R. the King v. Green & al.

4. The court will not order a writ of error in a criminal case, as for not coming to church, to be sealed, till it is *first signed and allowed by the attorney general*. And Lord Keeper took it, that a writ of error in a criminal matter was *ex gratia regis* in all cases, but where provision is made for the same by the statute, and is not due *ex debito justitiæ* or *de cursu*. But if there were real error in the case, and a writ of error was not sought for delay, their way was to \*petition the king, and he would give directions for inspecting the proceedings, to see if there was real error, or whether a writ of error was sought purely for delay: and Mr. Attorney said, that Crawley being indicted upon the statute 3 Jac. no error could avail him; and the indictment could not be quashed, nor the proceedings avoided, otherwise than by conformity. Pasch 1683. Vern. 170. Crawley v. Crawley.

S. P. per  
Ld. North,  
who said,  
he had a  
collection  
of several  
cases out  
of the old  
books, that  
were given  
him by  
Hale Ch.  
J. which  
shew that  
writs of er-  
ror in cri-  
minal cases  
are not  
grantable,

*ex debito justitiæ*, but *ex gratia regis*. And he said, that upon application to the king, he will refer it to his council, and if they certify that there is error, the king will not deny a writ of error. Trin. 1683. Vern. 175. in the rioters case. — S. P. 24 E. 3. 25. b.

5. 7 W. 3. cap. 3. s. 9. provides, that any judgment given upon indictment of high-treason, or upon misprison of such treason, shall and may be liable to be reversed upon a writ of error, in the same manner, and no other, than as if this act had not been made.

(W) Abated by what. Misnomer or Addition, &c. [403]

1. IF a man be arraigned upon indictment, he shall not plead *misnomer*, but plead, not guilty, and shall give in evidence that he is not the same person; but if he be the same person, then no matter for the misnomer. But *contra in appeal*; for there misnomer is a good plea, and if he be outlawed upon misnomer, it seems to be error. Br. Indictment, pl. 201. cites 1 H. 5. 5.

A person  
attainted by  
the name of  
Major Gen-  
ral Thomas  
Gordon  
Laird of  
Auchin-

toule pleaded that his name was *Alexander*. It was adjudged by the commissioners of the forfeited estates in Scotland, that this was no attainder of Alexander; and the commissioners of the forfeited estates in England, appealing to the House of Lords, who took the opinion of the judges, which was delivered by the Lord Ch. J. Pratt, viz. That the attainder of Major General Thomas Gordon

Don did not attain Alexander, and that if upon such attainder he had been brought to the bar of B. R. and had made this matter appear, that court could not have awarded execution against him, the lords affirmed the decree. Wms's Rep. 612. 616. Hill. 1719. Grantham and al. commissioners, &c. of the forfeited estates v. Alexander Gordon.—S. P. in December following, in the House of Lords, the attainder being by the name of *Patrick*, whereas his name was *Alexander*. Wms's Rep. 617. in a note added by the editor, cites it as the case of Grantham & al. v. Farquarson.

2. A man was indicted of felony the 4th of May, anno 21 H. 7. and A. B. was indicted for suffering him to escape the first day of May, anno 21. supra dicto; and because it appears that it was before the indictment therefore he was discharged. But Brook says, it seems, that it appears *that the escape was before the felony done*; for the defendant might have him in ward for the felony, and permit him to escape before he was indicted of it. Br. Corone, pl. 62. cites 21 H. 7. 34.

3. A. was indicted for striking in St. Paul's church-yard. He pleaded that he was by the queen's patent created Garter King of Arms, and demanded judgment, because he was *not so named*, and because it was a name *parcel of his dignity and not of his office only*; for the patent is *creamus coronamus & nomen imponimus de Garter Rex Heraldorum*, therefore in all suits against him he is to be named by this name; and for this cause he was discharged of the indictment. Cro. E. 224. Pasch. 33 Eliz. B. R. Dethick's case.

### (X) *Non-Pros*, entered. In what Cases.

1. **THOUGH**, the record of the outlawry of the defendant, and all other proceedings against him, be in B. R. yet by the statute of 6 H. 8. 6. we may *send them down to the Old Bailey*; but we could not send them a record of an indictment before that statute, and such cases have been sometimes tried at nisi prius. And Holt quoted the CASE OF ONE TURNER, in my Ld. Hale's time, who was brought hither from the Old Bailey to reverse his outlawry; and the court were clear for sending him back, if the prosecutor had not desired he should be tried here. And in *all cases whatsoever*, where the indictment happens to come hither, *though it be not by certiorari*, we may, in our discretion, send it back: And so it was ruled here; per Holt Ch. J. 12 Mod. 562. Mich. 13 W. 3. the King v. Young.

[ 404 ] 2. An indictment was for perjury; the defendant entered into a recognizance to try it, and *was desirous to carry it down to try*, but the prosecutor entered a non-pros. Per Cur. It was an ancient but illegal practice, that if an indictment had lain still for a long time, to enter a non pros upon it. But that *ought not to be without leave of the attorney general*, nor even at the request of the prosecutor; for it would be of intolerable mischief, that it should be at the discretion of the prosecutor to make an end of the king's suit, and also to get a bill for an infamous crime found of record against one, and by such entry of non pros deprive him of the means of clearing himself by trial. And for those reasons the court set it aside; and if the indictment be vitious, an acquittal in it will be no bar to a new one. 12 Mod. 648. Hill. 13 W. 3 the King v. Cranmer.

(Y) *Tried*

## (Y) *Tried How.* Where there are *several Indictments* for the same Thing.

1. **I**F there are *two indictments against H. for the same fact*; viz. *one found by the coroner's inquest*, and the other by the grand jury, and H. is acquitted on the one; yet he must be tried on the other to which he may plead the former acquittal; but the usage of the Old Bailey is, and indeed, so is the fairest course, to try him on both indictments at once. 1 Salk. 382. Mich. 3 Annæ, B. R. the Queen v. Culliford.

S. C. 6  
Mod. 19,  
220. by  
name of  
Culliford's  
case.

See for more matter relating to several divisions of *Indictments* under *Forgery*, *Forcible Entry*, and other proper Heads.

# Indorsement.

## (A) Indorsement. The Effect thereof, and Pleadings.

See Bills of  
Exchange.  
—Facts (G)  
—Informa-  
tions (F)  
pl. 11.

1. **W**HERE it is written on the back of an obligation, (*received 10 l. in part of payment*) it may be *pleaded*; per Browne. Quære. Br. Facts, pl. 32. cites 21 H. 6. 5.

condition indorsed, that *pates in dorso obligationis quod si, &c.* Quære inde. Br. Pleadings, pl. 25. cites S. C. — And as to the point of payment as above, he shall plead that *p. s. i, &c. that 10 l. is paid, &c.* Quære. Ibid.

And by  
him it is  
good plead-  
ing of a

2. And upon a sheriff's bond of 20 l. indorsed thus, *to save the sheriff harmless*, he shall *plead it as a condition*. Br. Pleadings, pl. 23. cites 21 H. 6. 51.

3. If a man delivers a single obligation to J. N. and after J. N. indorses a condition upon it; this shall serve the obligor to plead; per three justices; quod nota. Br. Obligation, pl. 2. cites 26 H. 8. 9.

Br. Con-  
ditions, pl.  
3. cites 26  
H. 4. 9.  
[but it  
should be  
H. 8.]

4. An *indictment* of forcible entry was preferred to the grand jury, who returned thus, (*viz.*) \* *as to the entry with force, ignoramus; as to the detainer with force, billa vera.* But this indorsement not being *spyed*, but being taken by the justices of the peace for a full indictment in both points, they award restitution; but upon certifying this indictment in B. R. by certiorari, and the indorsement returned as above, they award re-restitution. It was moved that they ought not to regard the indorsement; for the court did not send for that, but only for the indictment; and this indorsement makes it to be no indictment at all, and so the clerk of the peace has done more than he was commanded to do. But

\* See For-  
cible entry.  
(L. a) pl. 4  
& 8.

[405]



per Cur. the indorsement *is parcel of the indictment, and the perfection of it*; and the court sent for the indictment, cum omnibus id tangent. and the indorsement touches it principally; for it is the life of it. And per Cur. after such finding, the prosecutor ought to have preferred a new indictment for the forcible detainer only; for now, being made one intire indictment, and the jury finding only the last, it is no indictment at all. Yelv. 99. the King v. Ford & al.

5. A lease may be determined by force of a *condition indorsed on the backside thereof*, if it be before the enfealing and delivery, as well as by force of a condition within the deed. Cro. J. 456. Mich. 15 Jac. B. R. Griffin v. Stanhope,

6. A. *devised lands to trustees for a term of 60 years, to pay legacies, remainder to B. his daughter in tail, &c. J. S. with consent of friends, married B. at 16. By marriage articles J. S. covenanted to pay the legacies, being 1500 l. within six months after the marriage. And B.'s friends covenanted in her behalf, that B. when of age should settle her estate on J. S. for life, &c. and J. S. gave a statute and also a mortgage of his own estate to secure payment of the legacies, and by indorsement on the mortgage the same was to be void unless B.'s estate was settled on J. S. Afterwards B. died an infant, the legacies not paid. It was held that the indorsement on the mortgage only was sufficient to discharge the statute and articles also, all being executed at one and the same time, the same witnesses and part of the same agreement, and all to be looked upon as but one conveyance. Hill. 1703. 2 Vern. 457. Lawrence v. Blatchford.*

See Constable-Pleadings—Facts (M. 2) pl. 28. 29.—Trespass.

## (A) Inducement.

1. **I**N replevin, the defendant justified for damage feasant by a lease made to him by B. and the plaintiff pleaded a bar which was not good, *absque hoc*, that B. leased; and per Cur. he ought to make a good plea to induce the *absque hoc*, or further plead, and say *ne lessa pas*. Br. Pleadings, pl. 35. cites 9 E. 4. 5.

S. P. And therefore in trover, where the defendant justified, for that

2. So in every other case, where the defendant or plaintiff pleads a plea or title, and traverses by an *absque hoc*, the plea or title, which induces the traverse, ought to be good; quod nota, because it is no plea to say, *absque hoc*, that he leased, &c. without more; quod nota. Br. Ibid.

one J. W. was seised in fee of land in D. and granted a rent charge during the life of M. Wife of A. which A. died intestate, and M. was his administratrix, and the defendant, as servant, took a distress in the said land for the said rent, by command of M. and impounded them there, and traverses the taking in any other place, it was held ill upon demurrer; for the inducement is not sufficient cause of justification for taking the distress; because this rent was determined by the death of A. by reason there cannot be an occupant of rent, and M. is not assignee by the taking of administration. For none can make a title to rent to have it against the tenant, unless he be party to the deed, or convey a sufficient title under it. And so judgment was for the plaintiff. Cro. E. 901. E. 44 Eliz. B. R. Salter v. Butler.

So in false imprisonment in London from the 10th to the 29th of September, defendant justifies that he was mayor and justice of peace in P. and that a robbery was done there, and the plaintiff was suspected and brought



brought before him, and because he seemed suspicious, he detained him in his house, during the time in the declaration mentioned, to examine him and one J. S. who was not apprehended, concerning the said robbery, and afterwards, upon the 29th of September, delivered him over to the new mayor, and traverseth the imprisonment in London; and adjudged upon demurrer, that the inducement to the traverse was not good; for a justice of peace cannot detain in prison a person suspected, but during a convenient time only, to examine him, which the law intends to be three days, and within that time to take his examination, and send him to prison, and ought not to detain him as long as he please, as here he did 18 days, neither ought he to detain him in prison in his own house, but to commit him to the common-gaol of the county; for otherwise, when the justices come to deliver the gaol, he is not in the gaol, and may not be delivered, and so should lie longer than is reasonable. See the statutes 5 H. 4. 10. 2 E. 4. 8. and here he took not any examination, but delivered him over without, which was not lawful; and therefore adjudged for the plaintiff. Cro. E. 829. Pasch. 43 Eliz. C. B. Scavage v. Tateham.

\*[406]

3. If a record be pleaded in bar, it ought to be entirely and certainly recited; because the record only is the matter of the substance, and the effect of the bar, the which ought to be full and perfect; but where the recital of the record is only a conveyance to the benefit of a statute (as in the case of sheriff's bond by 23 H. 6.) and not the effect of the bar, but an inducement and conveyance to it; in such case, it is not necessary that such conveyance and inducement be so certainly pleaded, as the effect itself ought to be. Pl. C. 65. b. Arg. Mich. 4 E. 6. in case of Dyve v. Manningham.

S. P. And so where it is the foundation of the plaintiff's suit, he must allege it certainly and truly; otherwise where it is only conveyance.

Co. Litt. 303. a. (m)——In debt for an escape, the plaintiff declared that the prisoner was committed and escaped, and because he did not say *prout patet per recordum*, the defendant demurred generally, but adjudged for the plaintiff; for the gist of the action was the escape, and the commitment was only inducement: and by G. Eyre J. the matter here is grounded on the fact, and not on the matter of record; for nihil debet is a good plea. And the rule in Co. Litt. 303: Where the difference is taken between cases, where the record is the very foundation, and where inducement is a good diversity. 2 Salk. 565. Mich. 6 W. & M. B. R. Waites v. Briggs.——5 Mod. 8. S. C.——And by Holt Ch. J. In debt on a judgment it was said, *quod cum recuperasset*, &c. and though it did not say *prout patet per recordum*, yet it was good, and so it has been held; for it was but inducement, and yet it was agreed, that in such case, the defendant may plead *nul tiel record*. 5 Mod. 9. in S. C.——2 Salk. 565. in S. C.

4. It is a general rule in the case both of the king and a subject, that nothing can be an inducement to a traverse but what is traversable. 2 Le. 32. pl. 37. 31 Eliz. in the Exchequer; per Manwood, in Norris's case.

As, in information upon intrusion defendants pleaded a descent in bar.

The court held clearly, that a descent is no plea, nor any title against the queen. And they all held, that a scoffment might be an inducement to a traverse, but not a descent; so that a traverse in this case, being induced by the descent, which is not traversable, is not good. See Ibid. Norris's case.

5. That which is alleged by way of conveyance, or inducement to the substance of the matter, need not be so certainly alleged as that which is the substance itself. Co. Litt. 303. (k).

6. Where a promise is but inducement, to the bringing of an action, it need not be set forth precisely; but otherwise where it is the very ground of the action brought. Reg. Plac. 21. cites Stile's Pract. Reg. pag. 30.

7. In sci. fa. upon a recognizance of bail on a writ of error of a judgment in debt given in C. B. conditioned, that if the plaintiff be nonsuit, the writ of error discontinued, or judgment affirmed, then he should pay, &c. defendant prayedoyer, and pleaded that the plaintiff in error did prosecute the writ of error, and assigned errors, et quod placitum super prædict. breve de errore adhuc pendet indeterminatum,

&c. The plaintiff replied, that the judgment was affirmed, *absque hoc quod placitum pendet indeterminatum*, &c. Defendant demurred, and adjudged for the plaintiff in C. B. But upon error brought in B. R. the court held the replication naught; because it *makes that a matter of inducement, which should have been the point in issue*; and also, because the traverse puts a matter in issue to be tried by the country, and was going to reverse the judgment, but an exception was started to the writ of error, for which it was quashed. 2 Salk. 529. Pasch. 4 Annæ, B. R. Fanshaw v. Morrison.

[ 407 ]

## (A) Infidels.

1. **A** *League mutui auxilii* cannot be between a christian king and an infidel. Arg. Skin. 204. in case of the East-India Company v. Sandys.—— cites 4 Inst. 155.

Quære, if this explanation would not disable many to be witnesses that are not objected to.

2. It seems to be agreed to be a good *exception to a witness*, that he is an infidel. 2 Hawk. Pl. C. 434. cap. 46. s. 26. The Serjeant there says, that he takes this to be, that *he believes neither the Old or New Testament to be the word of God*; on one of which our laws require the oath should be administered. Ibid.

## Information.

## (A) Antiquity thereof, &amp;c. and how considered.

1. **A** N information *bath not only somewhat in it of an indictment* to lay down the offence, but hath *the nature of an action also* for the party to demand his due as in another action, which is his office to demand certain, and not the court's to assign; and therefore, if he makes no demand, or demands what appears not to be due, his information is insufficient. Hob. 245. Trin. 16 Jac. Per Hobart Ch. J. in case of Pie v. Westley.

Comb. 141.  
S. C.——5  
Mod. 459.  
2 W. & M.  
seems to be  
S. C. by the  
name of  
Mr. Pryn's  
case.——  
Holt's Rep.  
362. S. C.  
——But see  
a long argu-  
ment of Sir  
Bartholo-  
mew Show-  
er, as to the  
antiquity  
and legality

2. Information was brought by the Attorney General against several persons, for a riot in pulling down fences, &c. On a demurrer to the information, Sir Francis Winnington shewed cause the last term, viz. That the defendants ought not to answer to the information, but it ought in this case to be by presentment of a jury. Holt Ch. J. said, we cannot impeach the justice of several of our predecessors. Informations were *frequent in the time of the Lord Hale*; but agreed, that informations *for batteries, &c.* are oppressive; that the Star Chamber was an ancient court at common law, and they proceeded by information, and therefore so may we; that the statute of 32 H. 8. of maintenance, supposeth informations to be as lawful as actions by bill or plaint, and it was not a new way of suing, &c. Dolben J. said, that informations *were before 1 Car.* There is an information mentioned in the institutes to be against Plowden and others, in the time of Queen Eliz. Holt Ch. J. said  
obiter,

**Obiter**, that no information could be quashed, *fecus* of an indictment. In another term, Eyres and Dolben held, that informations are more ancient than 5 Car. and per Dolben, the statute of 5 Eliz. mentions that informations were more ancient. Holt Ch. J. informations *were at common law*; for there is no statute that gives them. This court cannot take indictments out of the county in which it sits; but this court hath all the lawful power that the Star Chamber had, and therefore may punish offences committed in other counties, which for the greater part would be unpunished, if informations for them would not lie in this court. Per Dolben J. there are several informations in the books of entries of *perjury, extortion, &c.* Per Cur. Clearly, the information lies, and judgment for the King, *nisi, &c.* Holt's Rep. 361. Mich. 1 W. & M. the King v. Abraham, & al.

of informations. 1 Show. 106. to 125. Mich. 1 W. & M. and seems to be S. C. but is by the name of the King v. Berchet, & al.

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(B) For what.

See Bridges.—Guardian (D. a).—and other proper heads.

Comb. 38. S. C. Holt

1. **UPON** the statute of 2 E. 3. of Northampton, for going *armed*, as walking about the streets, and going to church with a gun terrifying the king's subjects, *contra formam statuti.* 3 Mod. 117. Mich. 2 Jac. 2. B. R. Sir John Knight's case.

Ch. J. said, that this offence had been much greater and better laid *at common law*; but that though this act be almost gone in *desuetudinem*, yet *where the crime shall appear to be malo animo*, it will come within the act, though now there be a general connivance to gentlemen to ride armed for their security; but afterwards, he was found not guilty. Yet he was afterwards bound to the good behaviour. Ibid. 40.

2. Upon complaint made to the court of B. R. against an officer of the marshes of Wales, for *arresting a juror sworn to inquire for the king at a leet* there held for the king, in disturbance of the king's court, and praying aid of B. R. as the fountain of all courts leet, by granting an attachment upon affidavit produced, it was denied; but had an officer of B. R. done in like manner, then this court had had ground to grant this motion. But the court advised him to file an information against the officer for this *disturbance to the leet.* Lat. 198. Anon.

3. An information was moved for against the defendant for *bribery at an election of a new mayor for a corporation*, and because, when he found he could not succeed in the choice of the defendant, the old mayor *withdrew himself on the day of the election, so that a new mayor could not be chosen*, though the common counsel did all in their power to proceed to an election, by appearing on the stairs in the town hall for that purpose, but the door was locked by the defendant (the old mayor) and a book belonging to the corporation was taken away; so that for want of choosing a mayor on the day of election, the corporation was dissolved; and a rule was made to *shew cause why, &c.* and afterwards in Hillary term it appeared that there was *bribery on both sides*, so informations were filed against both parties; and the court agreed that bribery was a sufficient cause to remove a man from his office, and was an offence by which the very constitution of the government might be altered. 8 Mod. 186. Mich. 10 Geo. the King v. the Mayor of Tiverton.

S. P. Carth, 465. Mich. 10 W. 3. B. R. the King v. Galle. — 1 Salk. 372. S. C. — Holt's Rep. 363. S. C.

4. Upon the statute of 5 & 6 E. 6. 14. for *buying live cattle and selling them again*, not having kept them 5 weeks. Skin. 110. Trin. 35 Car. 2. B. R. Anon.

35 Car. 2. B. R. Anon.

1 Salk. 372. S. C. — Holt's Rep. 363. S. C.

5. For offering to *buy votes* in order for *election to parliament*. 12 Mod. 314. Mich. 11 W. 3. the King v. Taylor.

6. In an information for sending a *challenge to a commissioner of the land tax*, in order to deter others from executing the said office pursuant to an act of parliament, &c. the defendant demurred, and judgment was given for him by reason the *statute was misrecited*; for though this was an offence punishable at common law, yet being tied up by a particular relation to the statute as done to a commissioner created by that statute, if there was no such statute, there could be no such commissioner, and consequently no offence. Comb. 477. Pasch. 10 W. 3. B. R. the King v. Dove.

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7. Information for a *cheat by obtaining judgment in debt indirectly and by undue practice against a feme while sole, but now the wife of L. and whose lands are extended upon this judgment*; the evidence was that P. one of the defendants, who was a shop-keeper in London, became acquainted with the same feme who was well born but had no portion, and undertook to provide for her a husband of a good estate; and for this purpose he went to L. who had an estate, and informed him that the said feme had 4000 l. portion, and also told the said feme that L. had a greater estate than in truth he had; and the day before they were to be married, got the feme to a tavern, where he told her that for her better provision after her marriage in case the baron would not maintain her well, she ought to seal certain papers, which as it seems were a warrant of attorney and release of errors, and thereupon he paid her about 100 l. before witnesses, and immediately had her into the next room, and took it away from her again. And upon evidence given by the feme of this matter P. was found guilty, and thereupon the court set aside the said judgment, and P. was committed and fined for pretending this to be a true debt due to him without any trust. Sid. 431. Mich. 21 Car. 2. B. R. the King v. Parris & al.

8. An information was filed against one for *cheating several by drawing them in to play with him for money and putting false dice upon them*. 7 Mod. 40. Trin. 1 Annæ, B. R. Anon.

9. For combination among several button-makers not to sell under such a price; and per Holt it is fit that all confederacies by those of a trade to raise their rates be suppressed. 12 Mod. 248. Mich. 10 W. 3. Anon.

Sid. 174.  
S. C.

10. Information was against several for *conspiring to depauperate the farmers of the excise*, by agreeing among themselves not to make any gallon-beer for such a time to be sold to the poor, nor any ale but of such a price, and so to disable them to pay their rent to the king, being 118000 l. a year. Lev. 125. Hill. 15 & 16 Car. 2. B. R. the King v. Sterling & al.

5 Mod. 218.  
11. S. C.

11. An information was brought for *conspiring to marry an infant under 18, son and heir apparent of R. M. Esq; to C. H. a woman*

*man of ill fame and no fortune*, and he married her accordingly; the court said it was a great crime and worthy to be punished, and that so it should be if they could any way get at it; adjournatur. Comb. 456. Mich. 9 W. 3. B. R. the King v. Thorp.

and the pleadings. —Leave was given to file an information

pro male-gestura against two for procuring a gentleman's son to marry a woman of infamous reputation. 7 Mod. 39. Trin. 1 Annæ, B. R. the Queen v. Blacket and Robinson.

12. A coroner having sworn the jury to inquire of the death of one supposed to be a *felo de se*, and finding the evidence very strong, took off some of the inquest; and though it was said that this coroner was a weak silly man, yet Holt said, there was no reason why an information should not be against him. 12 Mod. 493. Pasch. 13 W. 3. the King v. Stukeley.

13. An information was granted against one for counterfeiting or pretending himself to be bewitched by a poor woman who was thereupon indicted for witchcraft and acquitted, and the whole discovered to be a cheat. 12 Mod. 556. Mich. 13 W. 3. B. R. Hathaway's case.

14. Against a dyer for wadding his cloth only to the third stall (whereas the custom of dyers was to woad it to the fourth stall) and then marking it with the company's seal as if it had been woaded to the fourth stall; he was found guilty of wadding it only to the third stall, but not of setting such mark to it, for which reason the court was of opinion no judgment ought to be against the defendant. Skin. 108. Pasch. 35 Car. 2. the King v. Worrall.

15. For disturbing riotose clamoribus & vociferationibus the election of bailiffs and burgeses of a corporation; but judgment was arrested upon the pleadings. Holt's Rep. 353. Trin. 6 Annæ, the Corporation of Bewdley's case.

16. Information was upon stat. 8 & 9 W. 3. cap. 19. l. 63. against K. late receiver general of the customs, that the defendant in order to get great gains to himself, did fraudulently and falsely indorse 20 exchequer bills as if they had been received for customs, and paid them into the exchequer the same day, as if they had been truly indorsed, in deceptionem & defraudationem dicti domini regis; upon not guilty pleaded, the defendant was convicted; but for faults in the pleadings judgment was arrested. 1 Salk. 375. Hill. 11 W. 3. B. R. the King v. Knight.

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17. For oppressively taking and extorting several sums of money exceeding the ancient rate and price for passage over a river; but judgment was arrested for a fault in the pleadings. Carth. 226. Pasch. 4 W. & M. B. R. the King v. Roberts. Show. 389. S. C.—Holt's Rep. 363. S. C.

18. An information was filed for a false return by a mayor to a mandamus, it being made in the name of the major part of the corporation without their consent. 12 Mod. 308, 309. Mich. 11 W. 3. the King v. the Borough of Abington. S. P. and though upon a consultation, the majority be against him,

and make a return in his name; yet it shall be taken to be his, if he does not come and disavow it. 6 Mod. 152. Pasch. 3 Annæ, B. R. the Queen v. Chapman, late mayor of Bath.

19. An information was filed against a gaoler for suffering one taken up upon an *excom. capiendo* to go at large. 12 Mod. 434. Mich. 12 W. 3. Anon.



5 Mod. 296.  
S. C. but  
there it is  
not by way  
of informa-  
tion but of  
indictment.

20. An information was filed against certain persons for that they as enemies, &c. to the government hired a boat during a war with France in order to go thither, intending to aid and assist the king's enemies, though they did not actually go thither, but only intended it. Skin. 637. Pasch. 8 W. 3. B. R. the King v. Cowper and al.

21. So for writing a letter to another to moderate his zeal, for that the king, meaning King James the 2d. would be soon restored, and that for further satisfaction herein, he would soon hear that many lords would repair to him to France, and what to do there he might guess. 12 Mod. 311. Mich. 11 W. 3. the King v. Lawrence.

22. An information was against a justice of peace for not convicting persons for being at a conventicle; several exceptions were taken, but the court gave judgment, because he refused to administer an oath which he is bound and required to do by the 22 Car. 2. 1. though not bound to convict them upon that oath unless he see reason. Skin. 60. Mich. 34 Car. 2. Smith v. Langham.

23. Upon a motion to file an information against a justice of peace for sending the prosecutor to the house of correction without sufficient cause; upon a rule to shew cause, he shewed that the prosecutor's master complained to the defendant that his said servant was saucy and gave his (the master's) horses too much corn; but the court holding this not a sufficient cause for sending a man to the house of correction; leave was given to file an information. 8 Mod. 45. Pasch. 7 Geo. the King v. Okey.

24. It was moved for leave to file an information against a justice of peace being mayor of S. for denying a warrant to the prosecutor who was beaten by T. S. as being for neglect of publick justice; but a rule being made to shew cause, it was shewn that the mayor had several people then before him to be examined concerning a riot which happened on that same day, and it being late at night he desired him to come the next day, which is the denial complained of, and thereupon the rule was discharged; because the mayor had done what justice he could; and the prosecutor's intent being to bring the mayor into disgrace and inflame the corporation against him, the prosecutor was ordered to pay the costs of the motion. 8 Mod. 337. Mich. 11 Geo. the King v. Nicholls.

25. An information was against one for killing a nobleman's dog, setting forth, that Lord S. was riding in the vill of D. in com. Middlesex, and that his grey-hound being then and there following him the defendant drew his sword, and then and there killed the dog. 12 Mod. 377. Pasch. 12 W. 3. the King v. Challoner.

26. Information was filed against one for building of locks on the river Thames to the obstructing of navigation. 12 Mod. 615. Hill. 13 W. 3. the King v. Clark.

27. An information was filed against a man who set up a lottery, and after run away without drawing it. 12 Mod. 495. Pasch. 13 W. 3. Anon.

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See Guar-

dian (D. a) the King v. Twisleton.

28. For taking and marrying a daughter without consent of the father, which is offence at common law. Sid. 387. Lev. 257.



29. If the *marshall of the King's Bench misbehave himself in his office to the prejudice of any*, he who is prejudiced by his misdemeanor may prefer an information against him in this court. 2 L. P. R. 59. cites Hill. 23 Car. B. R. and if he be found guilty upon a trial thereupon, he may be fined by this court and shall make satisfaction to the party also. Ibid.

30. An information was moved for against a *mayor for taxing several persons who lived out of the corporation to contribute to the building a bridge and other charges within the corporation*; the mayor shewed for cause that though they lived not within the corporation, yet they dwelt within the liberties thereof, and were intitled to the like privileges of those who lived within it, one whereof was to be exempt from all taxes in the county at large, so that it is reasonable that they should be contributory to the charges within the corporation when they had the benefit of all the privileges thereof, and that the *tax now in question had been paid by such out-dwellers time out of mind*. But the court directed that this matter should be tried upon an information, and that for two reasons, the one because a single person might not be able to contest this matter in an action against the whole corporation; and the other because if a verdict should pass for or against such single person, it would not end the contest which might happen against the rest. 8 Mod. 114. Hill. 9 Geo. the King v. the Mayor of Tenterden.

31. A clerk in Chancery was committed by the Lord Keeper for a very high *misdemeanor in sending writs into the country with soft yellow wax upon them without being sealed by the great seal as if they had been actually sealed*, and this was said to be a misdemeanor next to counterfeiting the seal; and he was bound in 1000 l. himself and two more in 500 l. each, for his appearance in order to an information. 12 Mod. 355. Pasch. 12 W. 3. Hatcher's case.

32. An information was exhibited for selling an ink-horn made of *mixed base metal for sterling but without any mark put to it*, as for an offence at common law; and the court was of opinion that if he sell such metal, though but *for a reasonable price*, yet it is an offence and that no such metal ought to be made, cited Arg. Skin. 109. as Pargiter's case. See Inten<sup>d</sup> (D).

33. An information was for not taking the *oaths*, and *acting as an alderman after the time lapsed for the taking them*. Skin. 583. Trin. 7 W. 3. the King v. Haines.

34. On a motion to file an information against the mayor and burgeses of M. upon an affidavit of the town clerk of M. for admitting one H. not having taken the *oaths* of abjuration and supremacy at the time, *to be a capital burges of M. which was in 1714*; per Cur. If he took not the oaths at the time, he is not qualified to be a burges, and the length of time wherein he continued to be so, will not obstruct the filing an information against him, but then, after so long time, there ought to be *clear proof of his wilful refusal, or voluntary neglect*, to take the oaths; but certainly an information ought not to be granted on the oath of the town clerk himself, because it is his fault that H. did not take the oaths, and it was likewise his duty to discover the not taking them, which for so many years together he

he had not done, and therefore that *length of time shall gain a presumption* in his favour, especially as in this case it is *proved by other affidavits, that he took all the oaths he believed to be requisite* for him to take at the time of his election. And so the information was not granted. 8 Mod. 55. Trin. 7 Geo. 1722, the King v. the Mayor and Burgeses of Malmesbury.

4 Mod. 269.  
S. C.—  
A motion  
was made  
for an in-  
formation  
in nature of  
a quo war-

ranto, against one for refusing to take upon himself the office of *common council-man of Bristol* after he was chosen. But the court denied the motion, and said, their remedy was to proceed by their by-laws, in order to compel him, he *not being a public officer, as a sheriff is, &c.* But had they applied to the court for a mandamus, they should have had it. 11 Mod. 142. Mich. 6 Anne, the Queen v. Hungerford.

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36. Information was brought against a *popish recusant, who conformed, and afterwards came not to church.* Skin. 114. Trin. 35 Car. 2. Anon.

37. Upon a motion for an information against the overseers of the poor of the parish of W. for *removing a poor person, ill of the small pox into another parish, from W. where she was an inhabitant, and the sessions refusing to give relief.* The Chief Justice said, that where a person is visited with sickness by the act of God, he *ought not to be removed* from the place where he is sick, to the farther endangering his health, *without an order of two justices; and if such order is made by the justices, knowing him to be sick, an information shall go against them;* whereupon a rule was made to shew cause. Afterwards, upon shewing cause, they denied the fact alleged, and moved that the rule might be discharged; for that this woman who was really settled in that parish to which she was removed, would, upon the trial of this information, be evidence against the parish of W. and gain a settlement there. But the court was of opinion, that the fact being controverted, and carrying such barbarity with it, it is requisite it should be tried upon an information, and then the jury would be proper judges of the truth. 8 Mod. 326. Mich. 11 Geo. the King v. Edwards.

38. Upon a suggestion to the court, that *rescous is made to the sheriff, coroner, &c.* the court will award process against the rescuer; per Nottingham Attorney General, Arderne Ch. B. and Laicon did not deny it. And it was agreed clearly by the reporter, that *upon suggestion thereof, they will award process.* Quære, if this be in the exchequer only, or in all courts of record? Br. Surmise, pl. 3. cites 39 H. 6. 41.

Se for ref-  
cusing a per-  
son from  
the sheriff  
in the temple,

39. An information was filed against an ensign of the guard, for *rescuing one arrested in the Park by the Ld. Ch. Justice's warrant.* 12 Mod. 256. Jourdan's case.

(as it seems.) See 12 Mod. 556. Mich. 13 W. 3. . . . . v. Tracy.

40. Information for a *scandalous narrative licensed by the defendant Speaker of the House of Commons, being Dangerfield's narrative, reflecting*

*reflecting on a nobleman*, (the E. of Peterborough); the defendant pleaded, that he did it *by order of the House of Commons*, and demanded judgment if this court will take conusance of it. The Att. Gen. demurred, and afterwards the defendant pleaded the common plea, *quod non vult contendere cum domino rege*, and was fined 10,000 l. Comb. 18. Pasch. 2 Jac. 2. B. R. the King v. Williams.

41. For *scandalous words of a justice of peace*, concerning his office, and the exercise of it; for it glances on the government, and defendant was fined 100l. Carth. 14. K. v. Darby.

42. It was moved for leave to file an information against a *school-boy* at Winchester School, *about 15 years old, for assaulting, beating, and challenging* one Eyres a clergyman, who was then the *second master* of that school; for no other cause, but reproving the defendant for something done at school. And a rule was made to shew cause. 8 Mod. 283. Trin. 10 Geo. the King v. Sir Cha. Holloway.

43. In an information for *spiriting away a child, and carrying him to Jamaica*. - Pemberton Ch. J. declared the law to be against him, it not being lawful to take a child under age, though he pretend to *have no friends, &c.* and carry him away; for that the parish might have bound him out, and he may have a master; and if not, he ought to be bound by a justice of peace, and for a reasonable time. Skin. 47. Pasch. 34 Car. 2. the King v. Willmore.

44. An information upon the statute of 1 Jac. cap. 22. because the defendant *allocavit & sigillavit vigint. coria tannat. Anglice tanned skins, not being good and sufficient*. Skin. 366. Mich. 5 W. & M. Leonard v. Beech.

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45. An information was moved for against one for building a *wharf contrary to a private act of parliament for making a river navigable*; the court said, that though it was not an act of so publick a nature, as that they ought ex officio to take notice of it, yet because it was *for the publick good, and the matter* [complained of] *directly against it*, they gave leave to file an information; but they held, that an *information will not lie for the violation of a private statute*. 12 Mod. 398. Pasch. 12 W. 3. Anon.

46. Leave was given to file an information against the defendant, by whom the plaintiff's *wife was inveigled away*, and who *procured merchants and tradesmen to sell goods to her, in order to saddle the husband with the debt*, he agreeing with the sellers to deliver the goods back again. 12 Mod. 454. Pasch. 13 W. 3. Pocock v. Thornicroft.

47. A *will was proved in a consistory court, and taken away by one* in order to cheat legatees, (as he thought). And per Holt Ch. J. the probate is authority enough for the legatees to go upon, though the will be lost, and the offence need not go unpunished; for they may have indictment or information. 12 Mod. 325. Mich. 11 W. 3. . . . . v. Deer.

48. An information was brought upon 35 H. 8. 17. for *converting wood-land into arable and pasture*: exception was taken because it was not shewn in the information, that the land was set apart and used for wood-land, according to the words of the statute; but

but it was not allowed, it being said boscos, &c. and said, that for cutting down timber, growing sparsim, and turning it into arable, no information lies on this statute; but the court would not quash it, it being an information. Skin. 52. the King v. Ld. Stafford.

49. Leave was moved for to file an information against the defendant for these words spoke of a justice of peace, viz. *He is an old rogue for sending his warrant for me.* Holt Ch. J. said, that he deserved to be bound to his good behaviour, though it be not proper for that justice to do it, but rather to get one of his brothers to do it for him; and leave was denied, the court desiring them to go by way of indictment if they would: 12 Mod. 514. Pasch. 13 W. 3. the King v. Lee.

50. *Writing a scandalous, provoking letter to a person that was in debt, and gone into the King's Bench prison.* Raym. 201. Mich. 22 Car. 2. King v. Sanders.

Vid. Actions, Qui tam (A.) &c.

### (C) In what Cases.

1. **I**F a man be bailiff of the king by parol, so that he cannot be compelled to account, yet if information be given thereof in the Exchequer, he shall account; per Vavisor. And so see, that where the king has no record to aid him, he shall be aided very often by information. Br. Prerogative, pl. 94. cites 15 H. 7. 17.

2. That information would serve instead of office, see Br. Surmise, pl. 30. the latter part.

S. C. but not exactly. S. P. is in 3 Inst. 264. by name of Nanny and Rowland ap Eliza.

3. An information was brought in the Exchequer for an intrusion into the lands of the king, and cutting 1000 oaks, &c. The defendant pleaded not guilty. The witnesses swore that the land was a great wast, parcel of the king's possession, and N. and others had cut down 1500 oaks, every one worth 20 s. Upon which N. was found guilty to the value of 1500 l. Afterwards N. brought his bill of perjury in the Star Chamber against the witnesses, alleging the land not to be the king's, that they cut down no trees, and that any there was not of that value. This matter being referred out of the Star Chamber to the 2 Chief Justices, they resolved, that the now defendants ought not to answer to the \*right of the land; for it would be inconvenient to examine it in that court; but to the rest, which were matters of fact, they ought to answer. Cro. J. 212. Mich. 6 Jac. Nanne v. Rowland ap Ellis & al.

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\* See 2 Hawk. Pl. C. 262. cap. 26. s. 9. but cited at (F) infra.

4. An information will not lie when a statute doth barely prohibit a thing. Vent. 63. Hill. 21 & 22 Car. 2. Crofton's case.

\* On a motion to file an information in nature of a quo warranto against the

5. 4 & 5 W. & M. cap. 18. recites, that malicious persons had, more of late than in time past, procured to be exhibited and prosecuted informations in the King's Bench for \*trespasses, batteries and other misdemeanors, and after the parties so informed against had appeared and pleaded, the informers had seldom proceeded any farther, whereby the parties so informed against had been put to great charges, and although ver-

*dicts had been given for them, or a nolle prosequi entered, they had no remedy for their costs.*

*what authority they admitted persons to be freemen of the corporation who did not live within the borough,* the motion was pretended to be on behalf of the freemen, who by this means were incroached upon; and an information was granted, because it was a *question of right*, and there was no other way to try it, nor to redress the parties concerned. In a quo warranto, the judgment is to seize the franchise into the king's hands; but in an information as here, it is to oust the defendant of the particular franchise. 1 Salk. 374. Hill. 10 W. 3. B. R. the King v. the Mayor, &c. of Hertford.——But afterwards a motion was made to set aside the process, because *no recognizance was given according to this act*; and this being to try a right, the question was whether it was within the words of the statute, trespasses, batteries, and other misdemeanors; which are frivolous wrangling matters of an inferior nature. But per Cur. this usurpation here pretended was a *misdemeanor*, and the information might be as vexatious in this case, as in trespass or battery; that this is a *remedial law to prevent vexation, and must be construed accordingly*. And therefore the process was ordered to be set aside, but the information stood. 1 Salk. 376. Pasch. 12 W. 3. S. C.——Carth. 503. Mich. 11 W. 3. B. R. S. C.

6. A *mandamus* was granted to the surgeon's company, to choose officers, who made a return under their common seal, and a rule being moved for, and granted to file an information against some particular persons for that return, Holt Ch. J. said, the court must proceed by way of information; for being a matter concerning publick government, no particular person is so concerned in interest as to maintain an action, and the information must be granted against particular persons, though the return be under their common seal; for there is no other way to try their right, and if it be found for the king, there must be a peremptory mandamus. Perhaps we shall set a small fine. 1 Salk. 374. Trin. 11 W. 3. B. R. The case of the Surgeon's Company.

## (D) At what Time; and before whom.

1. **A**N informer must commence his suit within a year after the offence done, otherwise he shall not have a moiety of the penalty. And if he has put in his information, though the party is not served with process to answer it, yet the same appropriates the penalty to him. Godb. 158. pl. 216. Mich. 6 Jac. B. R. Anon. The party grieved is not restrained to a year after the offence committed, but that restraint did only extend to common informers. 3 Le. 237. Mich. 32 & 33 Eliz. in Scacc, Broughton v. Prince.

2. No information by common informer can be brought before justices of the peace, justices of assize, or justices of oyer and terminer. Jo. 193. Mich. 4 Car. B. R.

3. After the attorney-general has informed upon a penal law, no other can. Hard. 201. Mich. 13 Car. 2. Att. Gen. v. . . .

4. When an informer hath attached his action in a court, another informer cannot inform for the same thing. Sti. 417. Pasch. 1654. B. R. Anon. [415] Cro. E. 325. S. P.

debated. Green v. Edwards.——5 Rep. 38. b.—The former information is a good bar if it be bona fide, and if it be not bona fide, the plaintiff may aver the fraud. Noy. 118. Chalmers v. Wright.—If there be 2 informations in the same day for the same offence, the court can give judgment for neither. Hob. 128. Pye v. Cook.—If he would plead that other information was exhibited in the same term, he should plead that this information was exhibited *tali die* in the term, and that at another day before in the same term, the other information was exhibited. 2 Lev. 141. Trin. 27 Car. 2. B. R. Hutchinson v. Thomas.

## (E) Proceedings



## (E) Proceedings in general.

1. **T**Hough an information be faulty in the body of it, yet the court will *not quash it on motion*, but the defendant *must demur to it* for its insufficiency. 2 L. P. R. 59. cites Pasch. 1650. B. R. 24 May. But it is otherwise of an indictment. The difference seems to be, because informations use to be preferred for greater offences, and more pernicious to the common-wealth than indictments usually are.

2. Note, that it was said by Keeling J. for law, and agreed by the court, that if any information be *exhibited by the attorney general, or the master of the crown office, the court will quash it upon motion, if there be cause*; for this is *ex officio*; but *otherwise it is of an information exhibited by other common persons*; for this shall not be quashed by motion, by reason in this case there shall be costs. Sid. 152. Trin. 15 Car. 2. B. R. Fountain's case.

3. It was said by serjeant Mainard that *after evidence given in an information the king's counsel may, without the party's consent, withdraw a juror and try it over again*. Vent. 28. Pasch. 21 Car. 2. B. R. Anon.

4. An information being upon an ancient statute of continued use, and general good; though the *time of making the statute be mistaken*, yet the information was held to be good. Skin. 111. Trin. 35 Car. 2. B. R. Anon.

5. If a man be *bound by recognizance to appear the first day of the term*, and is charged upon his appearance with an information; in case the information be *laid in Middlesex*, the party has *time to plead* during all that term, so that it cannot come to trial in the term; *but in case it be laid in any other county*, the party shall have time to plead till the next term; for he is as much concerned to defend himself in those cases as in any civil action; and since the law allows him counsel, the law allows him time likewise to consult with them. 2 Salk. 514. Mich. 1 W. & M. B. R. Anon.

Note, at common law informations might be filed without motion, in the name of the master of the crown office, but since this statute of 4 & 5 W. & M. c. 18. it cannot be without leave of the court, and that to avoid frivolous and

6. 4 W. & M. cap. 18. §. 3. enacts, that *the clerk of the crown in the court of King's Bench shall not without express order given in open court file any information for any trespass or misdemeanor, or issue any process thereupon before he shall have taken a recognizance from the person procuring such information, with the place of his abode, title or profession to be entred, to the person against whom such information is to be exhibited, in the penalty of 20l. that he will effectually prosecute such information, and abide by, and observe such orders as the court shall direct, which recognizance the clerk of the crown, and also every justice of peace (where the cause of such information shall arise) are empowered to take; and the clerk of the crown shall make an entry thereof upon record, and shall file a memorandum thereof in his office; and in case any person against whom any information shall be exhibited shall appear and plead to issue, and the prosecutor shall not at his own costs within one year after issue joined procure the same to be tried, or if upon such trial a verdict pass for the defendant, or in case the informer procure a noli prosequi, the court*



*is authorized to award to the defendant his costs, unless the judge before whom such information shall be tried shall at the trial + certify upon record that there was a reasonable cause for exhibiting such information; and in case the informer shall not, within three months after the costs taxed and demand made, pay to the defendant the said costs, the defendant shall have the benefit of the said recognizance.*

vexatious matters; and that the party in case of acquittal or nonsuit have costs.

12 Mod. 398. Pasch. 22 W. 3. Anon.—† Holt Ch. J. said, he took it, that where this act speaks of a certificate to be made by the judge that there was probable cause of such information, it is intended that such certificate shall be entered upon the postea, else the defendant being acquitted must have his costs taxed. Comb. 345. Mich. 7 W. 3. B. R. Anon.

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S. 7. *Nothing in this act shall extend to any other informations than such as are exhibited in the name of their majesty's coroner or attorney in the court of King's Bench, commonly called the master of the crown office.*

7. If a man be outlawed by process in an information, and comes in and reverses the outlawry, he must plead *instanter* to the information. 1 Salk. 371. Mich. 7 W. 3. B. R. the King v. Hill.

8. The court refused to *quash* an information, filed by the attorney general, upon a motion. 1 Salk. 372. Hill. 8 W. 3. B. R. the King v. Gregory.

9. If rule be for filing information, and *non-pros.* be thereupon for non-appearance of the defendant, a new one cannot be without a *new-rule*; for the first was executed; and here the court gave a new rule, upon payment of costs. 12 Mod. 319. Mich. 11 W. 3. the King v. Warburton.

The solicitor general moved for leave to enter a *non-pros.* upon an infor-

mation in order to file another, and Sir Samuel Ashtree the master of the crown office said, the course was to come to him and pay costs upon the information and then enter a *non-pros.* and per Cur. you shall not file a second before the first be discharged. Mich. 11 W. 3. 12 Mod. 325. Anon.

10. In the case of the information against the town of Hertford, after it was filed at another day the court was moved to stop it, if there were not *security for costs* according to the late act of parliament. Holt Ch. J. said he doubted it was too late *after the information filed*, especially by motion, but perhaps they may plead it. 12 Mod. 325. Mich. 11 W. 3. Anon.

11. Information against a corporation; the first process out of the crown office was a *venire facias* in nature of a summons, which was made *returnable in Easter term*, anno 11 W. 3. upon which a *distringas* issued *returnable crast. Trin.* and upon that return a *second distringas* was made *returnable in 15 days in the same Trinity term*, and upon the return thereof a *third distringas* was made *tested in that term*, and *returnable in this present Mich. term*, anno 11 W. 3. And now it was moved in behalf of the corporation that those two last *distringas's* might be discharged for irregularity; for that the process in these cases are to be *returnable de termino in terminum*, and not quicker; but that in Trinity term there issued two *distringas's*, which ought not to be. This matter being referred to Sir Samuel Asty, the master of the crown-office, he reported that the proceedings were regular, and that no more than 15 days is required to be between the teste and return of these processes; but it

1 Salk. 374. Hill. 10 W. 3. B. R. S. C.

it was still insisted for the corporation, that there were above 40 precedents in the office in such informations against corporations where all the process was made *de termino in terminum*; but Holt Ch. J. answered, that crown office work was like church work, very slow in its progress, it being usual for the clerks to make all such process out together, and of the same teste and return from term to term; but no law requires that it should be so. Whereupon the prosecutors moved for a special rule to estreat the issues upon these processes, but no such rule was made, but the jurors were left to be estreated in due time, according to the course of the court. Carth. 503. Mich. 11 W. 3. B. R. the King v. Hertford (Town.)

12. In a motion for an information against A. an *affidavit in a motion against another* cannot be read; because the swearer cannot be prosecuted for it, if it be false. 11 Mod. 141. Mich. 6 Anne, the Queen v. the Mayor of Thetford.

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13. It seems to have been the general *practice not to make an order for an information without first making a rule* upon the person complained of *to shew cause* to the contrary; which rule is never granted but upon motion made in open court, and grounded upon *affidavit* of some misdemeanor, which, if true, either implies some enormity or dangerous tendency, or other such like circumstances [as] seem proper for the most publick prosecution; and if the person upon whom such a rule is made, having been personally served with it, *do not*, at the day given for that purpose, give the court good satisfaction by *affidavit*, that there is no reasonable cause for the prosecution, the court generally grants the information, and sometimes, upon special circumstances, will grant it against those, who cannot be personally served with such rule, as if they *purposely absent themselves*, &c. 2 Hawk. Pl. C. 262. cap. 26. s. 8.—But upon shewing a reasonable cause, as that he was acquitted on an indictment before for the same cause, or that it is intended to try a civil right, as the title to the land, &c. not yet determined, or that the complaint is trifling, vexatious, or oppressive, the court will not grant the information unless there are some extraordinary circumstances, which are left to the discretion of the court. Ibid. s. 9.

See Fore-  
stalling (G)  
pl. 5.—  
Trial (E. f.)  
pl. 11, 13.

## (F) Pleadings.

1. Information was made by a searcher for shipping 200 l. in groates to carry beyond sea, contrary to the statute of 2 H. 4. The information was good, without shewing to whom they belonged; quod nota; and they were forfeited without suing execution by sci. fa. for the reason aforesaid, and this by proclamation in the Exchequer; and the Exchequer shall have the third part for the king by the said statute of 2 H. 4. 5. Br. Surmise, pl. 30. cites 5 E. 4. 4.

2. Information in the Exchequer, for that the defendant bought wool of W. N. against the statute, &c. where he is no draper, nor did he make cloth or yarn thereof; it is no plea, that he did not buy of W. N.

*W. N. but shall say, that he did not buy modo & forma, &c.* for if he bought of *W. N.* or of *J. S.* it is no matter, nor traversable, but the buying against the statute. *Br. Traverse per, &c. pl. 367. cites 33 H. 8.*

3. Information in the Exchequer; if the defendant pleads a plea, and traverses a material point in the information, upon which they are at issue, there the king cannot waive this issue as he may in other cases, where the king alone is party without an informer, as above; per the king's attorney and others. *Br. Traverse per, &c. pl. 369. cites 38 H. 8.*

*Br. Prerogative, pl. 65. cites 7 E. 6. contra.*

4. An information was for uttering flesh 30 days forbidden, unde petit advisamentum Cur. & quod forisfaciat 5 l. for every offence unde ipse petit medietatem. After verdict against the defendant upon not guilty pleaded, it was moved, that there was a statute which gives 5 l. for an offence but then it divides it, one third to the king, another third to the informer, and the other to the poor; and the court took time to advise; but *Hobart Ch. J.* was of opinion, that it was insufficient, because an information hath something of the nature of an action, and here is a demand of what appears not to be due. *Hob. 245. Trin. 16 Jac. Pie v. Westley.*

5. Information was for importing 20 pottacoes of tobacco of foreign growth in a vessel not belonging to any of this nation, but it is not said that the goods imported belonged to them, as the act runs, but concluded generally, contra formam statuti; after verdict it was moved in arrest of judgment, that the most material part of the act is omitted, viz. (to them belonging;) for if the goods imported do not belong to the people of this nation, but to a stranger, then they are not forfeited within that clause of the late act; and the words contra formam statuti will not aid substantial defects, as this is; and of this opinion was the court, it being the most material part of the act which creates the offence, and therefore ought to be punctually pursued; and judgment was arrested; but the court would advise whether the judgment should be, that the party eat inde sine die, without the assent of the attorney general. *Hard. 20, 21. Mich. 1655. in Scacc. Rook's case.—als. the King v. Rook.*

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6. Information for importing 32 bags of spices, &c. being of the growth of Asia, Africa, or America, from Holland beyond the seas, not being the place where such goods were first or most usually shipped for transportation, contra formam statuti (being the act for navigation;) the defendant pleaded, that he did not import them contra formam statuti; it was found for the plaintiff, and moved in arrest of judgment, that it was not alleged that those commodities were not of the growth of Holland; but it was answered, that that is supplied by the verdict; for if they were, the verdict ought not to be for the plaintiff, and the information alleging them to be of the growth of Asia, Africa, or America, and imported from Holland, implies that Holland is not within any of those parts; especially it being laid contra formam statuti; et adjornatur; but afterwards they held

the exception good, and judgment was arrested upon it. Hard. 217. Mich. 13 Car. 2. in Scacc. Pitcher v. Jones.

2 Hawk. Pl. C. 261. cap. 26. f. 4. cites S. C. and says, it must be confessed that this is the most reasonable construction; and asks how it can be intended that it could be contained in the record of the trial that such an oath was taken at it, or that it was false.

7. In information of perjury in giving evidence in B. R. and verdict for the king; it was moved in arrest of judgment, because the information was *memorandum quod T. F. miles dat curie hic intelligi & informari quod termino Sti. Hillarii in rotulis continetur sic (viz.) that D. brought his action*, and recites the whole record and trial, and that defendant *falsum præstitit sacramentum at this trial*; and he moved that this is not positive that defendant took a false oath, but that *continetur sic that he took a false oath*, where he ought to have said after the recital, thus, *et ulterius dat curie hic intelligi that the defendant took a false oath at that trial*; but after consideration the court gave judgment against the defendant, because *the late precedents are so*; and now after verdict it shall be taken a distinct sentence betwixt the recital and the *et quod*. And by Windham, the record recited being in this court, the judges shall take notice how far the record recited extends, and what that is which is positively rehearsed; and judgment was given accordingly. Raym. 34. Mich. 13 Car. 2. B. R. the King v. Read.

Lev. 126. S. C. and says that Hide, Twisden and Keeling held that the bare conspiracy in this case to diminish the king's revenues without act done is finable, and cites 27 Ass. 24. 43 Ass. 26. But Windham J. said, that if there was no more than conspiracy without any act done it had not been punishable, but this is more, viz. a confederacy

8. Information was against several for a *confederacy and conspiracy to take away the gallon trade*, by which the poor are supplied, and to cause them to mutiny against the farmers of excise; and it further recited, that *where the excise is settled upon the king by parliament, and part of his revenue, the defendants have by combination and confederacy endeavoured to depauperate the farmers of it*; upon not guilty pleaded, the defendants were found guilty of the conspiracy to depauperate the farmers, but of nothing more. It was moved to quash the information, 1st. Because it was *not said vi & armis*, but this was over-ruled; for confederacies and conspiracies are not properly with force, but secret and occult without open power; and several informations are in the Exchequer without those words. 2dly. That the defendants are not found guilty of any offence; for they are acquitted of all but the impoverishing the farmers, and this is no crime to depauperate another to enrich oneself, and such general charge cannot be any offence as appears 29 Ass. 45. Stamf. 95. (F) but after several debates the court adjudged the verdict good, upon which judgment shall be given for the king; for the *verdict relates to the information, and the information recites that the excise is parcel of the king's revenue*; and though there cannot be a conspiracy without some overt act of several, yet they all agreed that the confederacy here is an act punishable, for which judgment shall be given for the king; and after they were fined in 2000 marks, viz. one in 500 and the other in 100 each. Sid. 174. Hill. 15 & 16 Car. 2. the King v. Starling and 15 others.

and coadiunion by assembling themselves for this purpose, and he cited 45 E. 3. 19.

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\* It was insisted by

9. An information against a ferryman for *extortion*, was that he extorted \* *from diverse of the king's subjects unknown to the attorney general passing that way divers sums of money, exceeding the antient rate*,

rate, &c. The court held that this was *too general and uncertain*, and by Holt Ch. J. in every such information a *single offence ought to be laid and ascertained*; because every extortion from every particular person is a separate and distinct offence, and therefore they ought not to be accumulated under a general charge; for each offence requires a separate and distinct punishment according to the quantity of the offence, and unless it be singly and certainly laid, the court cannot proportion the fine or punishment; and judgment was arrested. Carth. 226. Pasch. 4 W. & M. B. R. the King v. Roberts.

the counsel for the informer that *de quibusdam ignotis* was good, and this was admitted by the defendant's counsel if the offence were

shewn certainly, which was not done in this case. Comb. 193. S. C.

10. But Holt Ch. J. said, it is true, that *all informations of the Exchequer are general*, as in case above, but the reason is, *because they are for certain penalties*. Ibid. 227.

11. Information upon the statute 8 & 9 W. 3. cap. 19. §. 63. was, that Exchequer bills were issued according to the form of the statute, and that the *defendant existens nuper receptor generalis, &c. did fraudulently and falsely indorse 20 bills at the custom house quasi receptæ essent pro custumis, & eodem die paid them into the Exchequer, as if they had been truly indorsed, in deceptionem & defraudationem dicti domini regis*. Defendant was convicted; and this being moved in arrest of judgment Holt Ch. J. delivered the opinion of the court, 1st. That *nuper receptor* does not import that he was officer at the time of indorsing and paying, and if he was then only a private person, as he must be taken to be, the indorsement would hurt no body but himself, it not being set out, that there were any contractors for them. 2dly. The word (*indorse*) is not sufficient; the words of the act are, that *he who pays the same into, &c. shall put his name to the said bill, and write the day of the month, &c.* and the information should have been, that the *defendant set such a person's name on the back of the bill, ubi revera there was no such person, or ubi revera no such person ordered him to put his name to the bill*; for *indorsavit* imports a writing on the back of a thing, but not putting his name upon it, as *petit auditum indorsamenti*, and adding the words *quasi receptæ essent pro custumis*, is no explanation but by argument only; and *argumentative informations are naught for that very cause*; for all charges ought to be set certainly out in pleadings; nor will the laying it *falso indorsavit in deceptionem regis*, and the jury's finding it so, help it, here being no charge, and it is not enough to say, that the king is cheated, but he must appear to be so, as well as be said to be so. 3dly. The saying *indorsavit, quasi receptæ essent pro custumis, &c.* is ill; and it should have been, that the defendant *made a false indorsement, continens, &c.* Here is a falsity but nothing charged that is criminal; for that falsity could not hurt, nor tend to hurt, any but himself; and judgment was arrested. 1 Salk. 377. Hill. 11 W. 3. B. R. the King v. Knight.

12. In information for a riot it is not necessary to say, that *they assembled with an intent to commit a riot*; for to say that they *assembled riotose & routeose & committed an unlawful act* is sufficient; for



that is a riot. 11 Mod. 117. Trin. 6 Annæ, B. R. in case of the Queen v. Soley.

13. Regularly the *same certainty is required* in an information *as in an indictment.* 2 Hawk. Pl. C. 261. cap. 26. s. 4.

[For more of Informations, see Actions, and under the several proper Titles.]

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## Inhabitants.

See Prohibition, (H) &c. Robbery.

## (A) Who shall be said to be Inhabitants.

2 Inst. 702. explains the word (inhabitants) thus, viz. 1st.

Though a man dwells in a house in a foreign county, riding, city,

or town corporate, yet if he hath lands or tenements in his own possession and manurance in the county, riding, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands or tenements in his own possession, within this statute. Nota, Habitatio dicitur ab habendo, quia qui propriis manibus, & sumptibus possidet, & habet, ibi habitare dicitur. 2 Inst. 702.

If a man dwelleth in a foreign shire, riding, city, or town corporate, and keepeth a house and servants in another shire, riding, city, or town corporate, he is an inhabitant in each shire, riding, city, or town corporate within this statute. Ibid.

Ex vi termini, every person that dwelleth in any shire, riding, city, or town corporate, though he hath but a personal residence, yet is he said in law to be an inhabitant, or a dweller there, as servants, &c. but this statute extendeth not to them, but to such as be householders, and this is gathered by the words of the fourth branch of this act, that giveth the distress, viz. *and to distress every such inhabitant, &c. in his lands, goods, and chattles*, and besides, it were in a manner infinite and impossible to tax, by the next branch of this act, every inhabitant, being no householder. Ibid. 703.

Every corporation and body politick residing in any county, riding, city, or town corporate, or having lands, or tenements, in any shire, riding, city, or town corporate, *quæ propriis manibus & sumptibus possident, & habent*, are said to be inhabitants there within the purview of the statute. Ibid.

An infant, that hath house or lands by descent or purchase, is liable to this publick charge, and so is the husband of a feme covert. Ibid.

2. The word (inhabitants) includes *tenants in fee-simple*, tenant for life, years, by elegit, &c. tenant at will, and he who has no interest but only his habitation and dwelling. 6 Rep. 60. a. Hill. 4 Jac. C. B. Gateward's case.

3. He that hath a house in his hands in a town may be said to be an inhabitant; per Tirrel J. Cart. 119. Mich. 18 Car. 2. C. B.

See Prescription (U)

But if it be for their own private profit,

## (B) What they may do or claim as such, and How.

1. Inhabitants of a vill, without any custom, may make ordinances and by-laws for reparation of the church, or of a highway, or any such thing as is for publick good generally, and in such



such case the *major part* shall bind all others without any custom. as for the  
5 Rep. 63. Mich. 32 & 33 Eliz. B. R. in the Chamberlain of well order-  
London's case.——cites 44 E. 3. 19. ing of  
their com-

mon of pasture, &c. there, without custom, they cannot make by-laws, and if there be a custom, yet the major part shall not bind the rest, unless there be a custom to warrant it. 5 Rep. 63. in the Chamberlain of London's case.——8 Ed. 2. tit. A life 413.——5 Rep. 67. b. in case of Jeffry v. Kenthley.

2. In *trespass*; the defendant justified that every inhabitant in any ancient messuage within the vill, by reason of his commorancy, therein hath used to have common in the place where for all his great beasts at all times of the year, &c. and so justifies as an inhabitant. It was resolved, upon demurrer, not to be a good prescription; for inhabitants, unless incorporated, cannot prescribe to have profit in another's soil, but only in matters of \* easement, as in a way or causeway to church, &c. so in matters of discharge as to be discharged of toll or tithes, or in modo decimandi, &c. but not to have interest; for that must be by persons enabled who are always to have continuance; for should such prescription be, then if any of the inhabitants depart from their ancient houses, and such house continues empty, the inheritance of the common should be suspended, which cannot be; nor can such common be † released; for though one inhabitant should release, a succeeding one might claim it, which is against the rules of law, that an inheritance in a profit should not be [capable of being] discharged; and by such prescription a maid-servant or child, who resides in the house, is said to be an inhabitant, and to have the benefit of common, which would be inconvenient; and resolved by all, that such a custom alleged ‡ by way of usage (not otherwise) is not good; and judgment for the plaintiff. Cro. J. 152. Hill. 4 Jac. B. R. Smith v. Gatewood.

S. C. shortly argued, but no judgment. 3 Le. 202.

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\* S. P. 3  
Mod. 294.  
in case of  
Pain v.  
Patrick.—  
2 Roll. R.  
289. per  
Dodderidge  
J. cites 18  
E. 4. . . .  
17 E. 4.—  
Per Holt  
Ch. J.  
Show. 257.  
in case of  
Pain v.  
Patridge.—  
In both  
cases they  
ought to

allege an usage; per Gawdy J. but Wray contra. Cro. E. 180. Foxall v. Venables.——They can prescribe in neither case but in matter of easement as a way to the church, or common fountain, &c. they ought to allege custom per Anderson Ch. J. Cro. E. 441. in case of || Gooday v. Mitchell.—cites 7 E. 4. 26. 15 E. 4. 29.—Ow. 72. in || S. C.

† They cannot prescribe for an interest; because they cannot release it. Arg. Gibb. 296. Trin. 5 Geo. 2. cites S. C.——But a prescription may be against an inhabitant for matter of charge. Arg. 2 Bulf. 195. cites 8 E. 3. 37.

‡ S. C. 6 Rep. 59. b. and there 60. b. a diversity was agreed between a prescription, which ought always to be alleged in the person, and a custom, which ought always to be alleged in the land. Hob. 86. cites S. C. and says that common, being an interest, must inhere in some body, and so cannot be pleaded by way of custom, nor can it stand by way of custom, where it cannot stand by way of prescription, as for inhabitants.

3. Inhabitants have not capacity to take an inheritance, as in S. P. Jenk. 15 E. 4. to have \* common. 12 Rep. 120. Pasch. 12 Jac. in 326. pl. 44.  
Dungannon's case.——D. 71.—  
The same

of an house-keeper. Bulf. 183. Ordway v. Orme.——\* 2 Bulf. 88. in case of Whittier v. Stockman.—Cro. E. 362. Fowler v. Dale. S. P. and the judges were all of that opinion; but no judgment was given.

4. A grant was made some hundred years ago of land to trustees and their heirs, that as many inhabitants of D. as were able to buy 3 cows might turn them to common in the said lands from such a time to such a time; decreed that if this had been by prescription, or usage; none but inhabitants of ancient messuages could be intitled to it; but here it is otherwise appointed by the grant, and every in-

habitant

habitant that has 3 cows may put them to grafs in these lands as in the original grant. Mich. 10 Geo. 9 Mod. 65. Wright v. Hobert.

5. The inhabitants of an *hundred* have a capacity to *sue for costs of a nonsuit* upon the *stat. of Winton*, and by the 23 H. 8. 15. Gibb. 296. Trin. 5 Geo. 2. C. B. the Inhabitants of Laurels Hundred. v. ....

## Inhibition.

### (A) The Force thereof.

[ 422 ] 1. **A.** And M. his feme brought *writ of dower* against J. S. of the dowment of B. late baron of the same M. who *said*, that she was *ne unques accouple*, &c. wherefore it was sent to the *bishop of N.* to certify, and now he *certified*, that *he could do nothing by reason of an inhibition which came to him out of the arches*, which is not sufficient for the bishop; for he ought not to surcease the commandment of the king for any inhibition; wherefore it was prayed that the bishop be amerced, and a writ to make the archbishop to come for the disturbance which he has made. But the court denied it; for they would not allow his return to be sufficient; therefore bid them sue a *sicut alias* to the bishop of N. &c. 39 E. 3. 20. 2.

2. If the king recovers his *presentment* to a church, and has a writ to the bishop, &c. to remove the other's incumbent, for which the incumbent *sues an appeal in the archbishop's court*, &c. by reason whereof the archbishop *sendeth a prohibition*, that he do not admit the king's clerk pending the appeal, &c. then the king shall have a writ directed unto the archbishop, and his officers, to take off his inhibition, and that they do nothing nor suffer any thing to be done by others, in derogation of the crown, or of the king's right; and shall have another writ against the incumbent, that he follow not such appeals, prohibitions, or other process or impediments. And also the king may have an attachment directed unto the sheriff against such incumbent, if he go on there after such prohibition directed unto him. F. N. B. 43. (A.)

3. An inhibition is either *hominis* or *juris*; it is *ne visitationem facias, vel aliquam jurisdictionem ecclesiasticam contentionem vel voluntariam habeas*. Thus when an archbishop visits, he inhibits the bishop; when a bishop visits, he inhibits the archdeacon; and the reason is to prevent scandal and distraction; and this continues till the relaxation of the inhibition, which is not till the last parish is visited, and then it is entered *nulla parochia restat visitanda*, for he may hear of no faults till he come to the very last parish.

3 Salk. 201. cites P. 13 Car. Lunne v. Dodson.

4. Now after such an inhibition upon a *metropolitcal visitation*, if a *lapse happens*, the bishop cannot institute, because his power is suspended, and therefore the archbishop is to institute; for it is not only penal in the bishop so to do, but the institution itself is void, because it is an *act of jurisdiction* from which he was suspended. 3 Salk. 201. pl. 2.

5. But

But it may be a question, in the case of a *collation*, whether, if a lapse happen, the bishop may collate? because *it is a kind of title*; but the better opinion is, he cannot; because it is *not by way of interest*, but by way of *provision for the cure*, and to supply the negligence of the patron; this appears because the patron may present at any time after a lapse, and before collation. 3 Salk. 202. pl. 3.

## \* Injunction.

### (A) Grantable; In what Cases to stop Proceedings.

1. **M**O. 820. pl. 1108. says nota, that the Lord Chancellor shewed him a note of his own collection, out of the bundle of corpora cum causis in chancery of 20 H. 8. by which it appeared, that an injunction issued at the suit of HENDY v. OWEN and WELLS, *not to pray restitution upon an indictment of forcible entry* of land in Surry, and because they broke the injunction, *sci. fa. issued pro violatione injunctionis*; upon which a fine ought to be assessed for the king.

land; or to restrain one from doing a sudden waste, or damage to the freehold or inheritance of another, by felling timber, plowing meadow, &c. It sometimes precedes, and at other times it is subsequent, to the decree. P. R. C. 196. ——— Curs. Canc. 440. S. P.

2. The attorney for the defendant at the common law is *in open court* enjoined, that neither he, nor any other by his means, do further proceed in an action of trespass commenced against the plaintiff, and depending at the common law, nor call for judgment, until further order shall be therein taken by the Lord Keeper. Cary's Rep. 56. cites 1 Eliz. fol. 212. Sedgewick v. Redman.

3. An injunction was granted *for not appearing*, and to stay proceedings at the common law. Cary's Rep. 56. cites 1 Eliz. fol. 213. Knot v. Jackson.

4. The defendant first exhibited her bill in this court for land conveyed to her in jointure, and evidences of the same land; and after answer, and replication put into this court, made distresses; therefore an injunction is granted. Cary's Rep. 68. cites 2 Eliz. fol. 173. Kidnere v. Agnes Harrison.

afterwards sued the plaintiff in the Common Pleas for the same lands before the matter was determined in the Chancery; therefore an injunction was awarded against him to stay his proceedings in the Common Pleas. Cary's Rep. 70. cites 2 Eliz. fol. 263. Bill and Gifford v. Body.

5. Injunction to stay judgment upon certificate of the justices of assizes. Cary's Rep. 69. cites 2 Eliz. fol. 237. North v. Kelewich.

6. The plaintiff had judgment in B. R. against the defendant upon a bond of 200 l. and another judgment for 300 l. upon an action of debt of arrearages of account in B. R. and ordered they may proceed with execution upon the bond of 200 l. and also to take execution of 100 l. parcel of the 300 l. provided always, and it is ordered,

\* Injunction is either to stay a suit in some other court, as in a court of law, court of admiralty, an ecclesiastical court, or a court of equity. Or it is for possession of

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So the defendant exhibited his bill into the Chancery for certain lands, and

dered, the plaintiff *shall not* in any wise proceed, nor *take execution of the 200 l. residue* of the 300 l. recovered upon the account, without special license of the court. Cary's Rep. 72. cites 3 Eliz. 233. Brook and Ux. v. Apprice.

So where the defendant tendered an assurance to the father to be sealed, who being old and blind desired time to confer

7. The plaintiff desired to be relieved against an *obligation of 100 l.* which had an intricate and *insensible condition* put in suit, for that the plaintiff being desired by the defendant to seal a release, *desired only time to be advised* thereof, which the defendant would not yield unto, but put the bond in suit, though no ways damnified; and now the plaintiff is *ready to seal the release*; therefore an injunction is granted., Cary's Rep. 111. cites 21 & 22 Eliz. Rowles v. Rowles.

with his friends; the plaintiff upon the request sealed the assurance, and his father afterwards sent word to the defendant *he was willing to seal it*, but the defendant answered, *he did not care whether he did or no, because he had but an estate for his life, and the defendant had his bond to enjoy it during his life, which he did accordingly*, and yet nevertheless the defendant put the bond in suit upon his father's said refusal; but stayed by injunction. Cary's Rep. 149, 150. cites 21 Eliz. Knight v. Hartwell.

S. P. Ibid. Calvely v. Phillips.

8. Three bonds were put in suit in B. R. and stayed by injunction by order, because the queen was hindered of her fine. Cary's Rep. 110. cites 21 & 22 Eliz. Paschal v. Smith.

Where many actions at law are brought by the same plaintiff against the

9. A special certiorari [issued] to remove a cause out of London; the plaintiff proves the surmises of his bill; the defendant begins suit in the King's Bench for the same cause; and therefore was stayed by injunction. Cary's Rep. 118. cites 21 & 22 Eliz. Cliffe v. Turner.

same defendant for the same cause; this being in the nature of barretry, the court here will grant an injunction to stay the proceedings in all but one of them P. R. C. 210.

P. R. C. 216. S. P.

10. An injunction was granted to stay suit upon an action brought for perjury, before the cause in question here heard; and concerning a promise to make a lease from the corporation. Toth. 178. cites 22 Eliz. Miller v. Society of Girdlers.

11. An injunction was granted against the issue in tail to stay the reversing of a fine levied by himself, and (I think) his father also. Toth. 179. cites 40 Eliz. Arundell v. Arundell.

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12. Though the court will not proceed against a member who has privilege of parliament; yet if a parliament-man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law till answer or further order. Vern. 329. Trin. 1 Jac. 2. Anon.

13. An injunction to stay a suit at law in an assise or writ of re-disseisin, touching the office of Chester herald, and the profits thereof. Toth. 178. cites 10 Jac. Knight v. Parson.

14. A third person interested, but no party to the bill, prosecutes a suit at law for the matter in question; he was ordered to be made a party to that bill, and suits to stay in the mean time. Toth. 236. cites Trin. 16 Jac. Austen v. Cheney.

15. An injunction to stay proceedings upon a quare impedit. Toth. 179. cites 10 Car. Hewes v. Blewet.

16. An action was brought at law by an administratrix to her late

*late husband*, upon a single bill for the payment of money due to him; the defendant in that action exhibits his bill, suggesting, that in truth the husband was not dead, but concealed himself; and pending this suit, the administratrix got judgment at law; but the court granted an injunction, and directed an issue at law to *try if the husband was dead or not.* 16 Car 2. N. Ch. R. 93. Scott v. Reyner.

17. On motion for an injunction to stay proceedings on a *bond upon offer to give judgment with release of errors*, North K. answered, he did not think that so beneficial an offer as it might be looked upon, because the plaintiff may bring his writ of error, and put defendant to plead his release, and so delay time as long as if no release of errors had been given; but on the plaintiff's offering to be bound by order to bring no writ of error, an injunction was awarded. Hill. 1682. Vern. 120. Anon.

18. In a *cause on the Latin side*, on a motion that the defendant might stand committed for not vacating his letters patents of reprisals, *it was moved, that they might be at liberty to bring a writ of error* in B. R. and cited Dyer, &c. But the Lord Keeper said, all those books were founded only on the single \* opinion of my Lord † Dyer, and that he thought the *jurisdiction of chancery, even of the Latin side, not subjected unto*, not to be controlled by, *the King's Bench*; and that he would injoin all such writs of error. Vern. 131. Hill. 1682, the King v. Cary.

\* Pl. O.  
393. a. cites  
18 E. 3.  
25. that  
where sta-  
tute mer-  
chant was  
made to  
pay anno  
16 E. 3.  
and the  
party sued

execution, and the writ supposed the sum to be paid anno 14, and by the suit the feoffee was ousted, and he sued writ of error in B. R. it was awarded that he should be received to the suit; for it says, that if upon suits in Chancery, according to the order of the common law, there is error, that it shall be reformed by error in B. R. because it is the most high court.——† The case in Dyer is 315. 2. pl. 100. Trin. 14 Eliz. and was a scire facias brought in Chancery to have execution of a recognizance there made; and the defendant pleaded a defeasance made and delivered to him by the plaintiff after the recognizance; but the deed bore date a month before the recognizance, &c. And for this cause the defendant was not received to the plea, but execution awarded to the plaintiff, because the defendant brought writ of error in B. R. where the judgment was reversed; and so note a judgment given in the Chancery which is before the king himself, reversed in B. R. which is also before the king himself, and not in parliament.——4 Inst. 80. (c.)

19. Chancery will grant an injunction to stay an action at law against one for *executing the process of this court*, though it issued irregularly. For it ought to be punished in this court, and can only be examined and determined here, whether regular or not; for at law, supposing the commission of rebellion issued irregularly, they will not allow that as a justification; and therefore the injunction was granted; and it was referred to a master to examine whether the commission of rebellion issued regularly or not; and in case he found it irregular, to tax the defendant his costs. Mich. 1684. Per North K. Vern. 269. Bailey v. Devereux.

20. A. and B. dined at F.'s house, and after dinner *fell into play, and won of F. in ready money 900 l.* which B. carried away with him. When they began to play A. and B. had but 8 guineas between them; F. being somewhat inflamed with wine, *brought down a bag of guineas of about 1500 l. and B. won that also and had it in his possession, but as he was going with it out of the house, F. and his servants seized upon it and took it from him.* B. brought an action against F. for

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for taking from him in a forcible manner this bag of guineas; upon which F. exhibited his bill, charging many circumstances of fraud and circumvention, which B. in his answer denied; it was moved for an injunction, which Ld. C. Jefferies granted till the hearing the cause. Vern. 489. Mich. 1687. Sir Basil Firebrasse v. Brett.

21. If a mortgagor brings a bill here to redeem, it is at law accounted a breach of covenant for quiet enjoyment: but if an action of covenant be in such case brought, this court will grant an injunction. Per Cur. P. R. C. 211.

22. The lord of a manor brings ejectments against his customary tenants, upon pretence of forfeiture: the tenants (or some of them) bring a bill here, praying he may shew what breaches of the custom he designs to insist upon at the trial, upon the general issue in ejectione firmæ: he being in contempt, the court without entering into the merits ordered an injunction. P. R. C. 216.

23. This process is said to have been heretofore very frequently granted to stay suits upon the statute of 2 Ed. 6. cap. 13. for treble damages for not setting out tithes; (because as the book supposes,) it is in nature of a penalty; and the party sent to the ecclesiastical court. P. R. C. 216.

24. If a privileged person of this court is sued elsewhere at law, he may stay the suit by injunction; for he should be sued in the petty-bag office, and not elsewhere. P. R. C. 216.

25. The plaintiff went over the defendant's ground unto his house to serve him with a subpoena of this court, for which the defendant brought an action at law, *quare domum & clausum fregit*; and upon motion here, the action of trespass was stayed by injunction. P. R. C. 217.

(A. 2) Grantable, in what Cases, to stop Execution  
or to \* stay Wast, &c.

\* See Wast  
(Q. 2)

1. **A**N injunction is granted to discharge an execution by elegit taken by the defendant out of this court, for that he being served with a subpoena did not appear. Cary's Rep. 58. cites 1 Eliz. 274. Hobby v. Kemp.

2. The under-sheriff of M. brought into this court the body of the plaintiff, by command of the Lord Keeper, in execution upon a writ of extent of 300 l. together with the said writ, at the suit of J. S. and by order of the court he was taken from the sheriff of M. and delivered upon execution to the warden of the Fleet for the 300 l. and because the defendants shewed no good cause to the contrary upon a day given them, therefore it was ordered, that upon recognizance by the plaintiff, and good sureties, to stand to the order of the court, or else to yield his body prisoner to the Fleet in execution, and there to remain untill the defendant be satisfied, he the plaintiff shall have liberty to go at large; and that the defendant shall not sue for any manner of execution by force of the said execution. Cary's Rep. 71. cites 3 Eliz. Rosse v. Lassels & al.



3. An order was made *to stay the money in the sheriff's hands*, and to be redelivered out of the defendant's hands. Toth. 236. cites 16 Jac. Lupton v. Harman.

4. This process is sometimes granted *to stay execution*, where judgments are entered by assent of parties for security of money borrowed. P. R. C. 210.

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5. *Marsh grounds* were stayed from plowing. Toth. 179. cites Hill. 8 Car. Curteen v. Haveen.

Injunction was denied to stop

*plowing or trading.* Tr. 36 Car. 2. 2 Chan. Cases 165. East-India Company v. Interlopers.

6. An injunction was granted against a *jointress*, [though by the settlement she was] *tenant in tail after possibility*, &c. *to stay waste*; and the court held, that she being a jointress within the 11 H. 7. ought to be restrained from aliening, and so granted injunction against *wilful waste*. Abr. Equ. Cases 221. pl. 2. Hill. 1701. Cook v. Winford.

## (A. 3) Grantable, in what Cases, to quiet Possession.

1. A. Acknowledged a *statute* to B. for 160 l. and B. agreed by *indenture*, that, if A. failed in payment, the 160 l. should be levied in certain lands only. B. after default sued execution of those certain lands, and also of other lands; Sir N. Bacon granted an injunction as to the other lands that A. should quietly enjoy the same. Cary's Rep. 52. cites 1 El. Pulvertost v. Pulvertost.

2. The court being credibly informed, that the plaintiff was in *peaceable possession* at the time of the bill exhibited, and three years before, an injunction is awarded. Cary's Rep. 66. cites 2 Eliz. fol. 173. Sapcote v. Newport.

M.'s trustee contracted to sell her estate to J. S. and M. herself actually

*ally sold it to W. R. The trustee disturbed W. R. in his possession.* It was moved for an injunction to quiet the possession of W. R. but there was no bill filed; and because an injunction for quieting possession is only grantable \* where the plaintiff has been in possession for three years before the bill exhibited, upon a title yet undetermined, or where the cause has been heard, and judgment passed upon the merits by the court; therefore Lord Keeper denied the motion. Vern. 156. Pasch. 1683. the Lady Poinces's case. ——— S. P. and it must be upon the same title, and not upon any title by leave, [or at will] or determined, of which the court must be satisfied by oath. P. R. C. 214. ——— The plaintiff must also have such possession (or rather title continuing) at the time of the motion, and the injunction is to be given only for such a possession (or upon such a title) as he then hath. P. R. C. 214. ——— Cur. Canc. 450.

3. The plaintiff sheweth by his bill, that the parsonage of Thekelye was holden by force, whereby the plaintiff could not be inducted; whereupon a writ of *de vi laica removenda* was awarded out of this court, and thereby the plaintiff put in possession by the sheriff: nevertheless the defendant keepeth the possession of the parsonage house; and for that the plaintiff is bound to pay his first-fruits to the queen's majesty, therefore an injunction is brought against him. Cary's Rep. 72. cites 3 Eliz. fol. 262. Boulton v. Sir George Blunt, & al.

4. The plaintiff made title to the lands by a *lease parol* made by the defendant unto him, whereupon he did sow the ground with corn, and the defendant entered upon him; therefore the plaintiff had

had an injunction *for the corn.* Cary's Rep. 72. 3 Eliz. Harrison v. Chomeley, & al.

See more  
as to pa-  
tents at  
Præroga-  
tive (D.  
§. 2.)

5. An injunction was moved for to stop the *sale of English Bibles printed beyond sea*, and so to quiet the king's patentees in their possession, and in respect of the state, which the chancery was urged to be a court of. But Lord Keeper said, he did not apprehend the chancery to be in the least a court of state; neither could he grant an injunction, but *only where a man has a plain right to be quieted in it*; and though the patent for law books had been adjudged good in the House of Lords; yet that is not the same case with this, though near it. His Lordship directed a trial at law, and the king's patentees to be plaintiffs, and defendants to admit that they have sold 12 Bibles; and when the trial is over, to come back again. Vern. 120. Hill. 1682. Anon.

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6. There being disputes between several persons to whom the profits of a fair belonged, and one of them having recovered in two several actions, though both the verdicts were set aside as gained unduly, and certified by the judges to be contrary to their direction; a bill was brought against the recoverer by two of the several other claimants to quiet them in their possession; but to this the defendant (the recoverer) objected that the bill was not proper, *the right not being settled by law, the verdicts given having been set aside*, Lord Keeper said, he took such a bill to be very proper, being a bill of peace, and in such case, the court ought to interpose, and *prevent multiplicity of suits*. But in this case, the bill praying only special relief, viz. that they might be quieted in their possession, and not having prayed relief or a perpetual injunction, he thought the bill not proper for a decree, and directed the plaintiffs to amend in that particular. Vern. 266. Mich. 1684. New-Elme Hospital v. Andover.

Curf. Canc.  
446. S. P.

7. A lease was made for seven years: the now defendant had judgment in ejectment against the complainant by reason of the statute of frauds; for the lease was only put into writing by one present, without order of the parties; the complainant prayed relief here, and with affidavits produced some acquittances or receipts for the rent, which say, according to an agreement with the defendant. The court said, there might be equity in the matter; for the receipts are evidence of an agreement, and this court will not interpret the statute of frauds so rigorously as the courts of law; and however, it was hard to turn a tenant out, &c. and though the defendant had sworn the agreement was to continue but for the life of the plaintiff's husband, now dead, and that the rent was to be paid in corn, which was cheap; yet the court ordered the injunction to stand, the cause to be speeded, the plaintiff in the mean while to pay the rent, and repair according to the agreement. P. R. C. 209, 210.

**(A. 4) Grantable, in what Cases in general.**

1. **I**NJUNCTION to debtors to a testator's estate not to pay any money to a *pretended executor*, till his title to the executorship is settled in the spiritual court. Chan. Cases 75. Pasch. 18 Car. 2. Smallpiece v. Anguish.

2. Upon a motion in B. R. for an attachment against an attorney, for getting one in a very vile manner turned out of possession, a rule was made that the attorney and all his accomplices attend. It was then moved, to have it part of the rule, that they should not move for an injunction in Chancery in the mean time, because that would hinder the further inquiry of this practice; but the court said, they could not do that; for that would be to send an injunction into chancery; but said, *when the court (of B. R.) has a bank over a man, and he comes to the court for a favour, they often refuse to grant it him, unless he consents not to go into Chancery; and if, after such consent, he goes thither, they will send an attachment against him for a contempt.* And Holt Ch. J. said, that surely Chancery will not grant an injunction *in a criminal matter, under examination of B. R.* but if they should, this court would break it, and protect any that would proceed in contempt of it; and that he thought, that a *copy of the affidavits upon which the rule was made in B. R. and an oath of their being a true copy*, ought to be ground sufficient to stay the Chancery from granting an injunction. 6 Mod. 16. Mich. 2 Annæ, B. R. Holderstaffe v. Saunders.

3. An injunction was granted *against ringing a church bell at five o'clock in the morning*, the parish having received a compensation for the forbearance according to an agreement made at a publick vestry, and articles executed by the parson, church-wardens, overseers, and other inhabitants, and the parties contracting with them. An injunction was first granted by Ld. C. Macclesfield to stay the ringing the bell till hearing, and afterwards by Lords Commissioners Raymond and Gilbert was made absolute for the time contracted for. 2 Wms's Rep. 266. Hill. 1724. Dr. Martin and Lady Howard v. Nutkin.

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4. Where by the answer it appears to be matter of *account* that is in question, and the *demand* is very *uncertain*, the court will commonly grant or continue an injunction. P. R. C. 201.

5. *Money levied on a fi. fa. was in the secondary's hands*: the complainant prays an injunction till answer. The court granted it, and said injunctions had been granted where the money was not secured, as here it was; and that this was the easiest (with respect to the now defendant) that ever was granted. P. R. C. 206.

S. P. Curf.  
Canc. 448.

6. Sometimes pending the suit, the court will order a party the possession, or that the *rents, not already paid, be stayed in the tenant's hands till hearing*; and sometimes it will order both. P. R. C. 215, 216.

7. Other times, it will order a *receiver*, who shall take the rents and profits, and pay them into court, or account for them when the

the

the court shall require; and he to enter into such recognizance as the court directs, to secure his doing so. P. R. C. 216.

(A. 5). At what *Time* it may be granted.

1. **A**N injunction was to stay proceedings *after a judgment*; the defendant, taking out execution notwithstanding, is in contempt. Toth. 178. cites Trin. 6 Car. Bishop of Hereford v. Carpenter.

2. Where a cause *abated by the death* of the Lady Gerard, and the defendant was her executor, who being served with a copy of a bill of revivor, and my Lord Keeper's letter, *would not appear, being in privilege*; upon motion an injunction was granted, *though the cause was not revived*. Abr. Equ. Cases 285. Trin. 1700, Duke of Hamilton v. the Earl of Macclesfield.

It is the settled rule of the court, that on a

3. And the case of ARMSTRONG v. JACKSON was cited, where *before a demurrer determined*, the plaintiff had an injunction on motion. Abr. Equ. Cases, 285.

demurrer one cannot move for an injunction; \* because till the demurrer he argued, it is not certain that the cause is in court. Select Chan. Cases in Ld. King's time. Trin. 11 Geo. 1. Anon. —\* S. P. till when no order ought to be made; so that it was even doubted, whether it could in such case be granted for any special cause. P. R. C. 201.

4. Where the Lord Wharton had an injunction to quiet him in the possession of the mines in question, and upon hearing of the cause, an issue was directed to try, whether the mines in question were within the plaintiff's or defendant's manor; the *issue was tried at bar, and found for the plaintiff*; then the plaintiff died, and a bill of revivor was brought, and before the time for answering was out, or the cause revived, the plaintiffs moved for an injunction to stay the Lord Wharton's working the mines, having affidavits, that since the verdict against him, he had trebled the number of workmen, and between that and Candlemas would work out the mines; and an injunction was granted, *though the cause was not revived*. Mich. 1702. Abr. Equ. Cases, 285. Robinson v. Ld. Wharton.

[ 429 ] (B) *How, and on what Suggestions and Terms granted or obtained.*

But I do not find this course has been used of late. Ibid.

1. **H**eretofore, in case of obstinate disobedience in the breach of a decree, an injunction used to be granted *sub poena of a sum*. And upon affidavit, or other sufficient proof of *persisting in contempt*, fines were used to be pronounced, or set by the Lord Chancellor in open court, and to be estreated down into the hamper by special order. P. R. C. 215.

But no injunction of any nature shall be

2. It is commonly by writ founded on an order of this court; but may be by word of mouth, when the party to be inhibited is actually present in court. P. R. C. 197.

granted, revived, dissolved, or stand upon private petition. Ibid. cites Toth. 35.

3. Injunctions

3. Injunctions for possession, or for stay of suits after verdicts, are to be presented to the Lord Chancellor together with the orders, whereupon they go forth, that his lordship may take consideration of them before they go. P. R. C. 197. cites Toth. 35.

*But no injunction or other writ shall be presented by the register to be*

*signed without the proper hand of the fix-clerk in the cause, or of his deputy subscribed thereto. Ibid. cites Or. Ch. 56. 143.*

4. Where it is prayed to stay proceeding, it is commonly upon some matter suggested in the bill; as that the complainant is not able, for some reasons shewn, to make his defence in the other court, though he hath a good discharge here in equity; or that the other party has a penalty on him, which he proceeds for at law, and threatens to make the complainant pay; or that the other court has not jurisdiction of the cause, but is cognizable here; or that the other court refuses him some rightful advantage, or does injustice to him in the proceedings, or has not power to do him right. Et similia. P. R. C. 197. 198.

*And it is obtained upon matter confessed in the defendant's answer; or upon some matter of record, or upon writing shewn in court, whereby it appears*

there is some probability that the party ought to be discharged in equity, though perhaps, not elsewhere; Or where the defendant is in contempt, or has prayed a dedimus (to excuse his contempt) and has not yet answered such bill; or where the defendant appears to be old, and hath slept long; or the creditor and debtor have been dead long before the suit; or where the defendant cannot be found to be served with a subpoena; in any of which cases, the court will ordinarily grant an injunction. P. R. C. 193.—Curf. Canc. 441.

5. If it be granted before answer, it is commonly till answer and further order. P. R. C. 198.

*Curf. Canc. 441.*

6. Where it is to be obtained by motion for matter in the answer, the counsel must put the case in writing to the court. But I think the practice is not so now. P. R. C. 202.

7. Where there is a verdict at law, and the defendant exhibits his bill for relief here; the money must be deposited here before an injunction will be granted; except in some cases where special matter of equity appears by the defendant's answer, or some former decree, or such like. P. R. C. 202.

*As where the defendant having prayed a dedimus, the complainant moved*

for an injunction, the court, (though the defendant had bail at law) would not grant it on other terms, than that the complainant should bring into court the money recovered at law; because the complainant was going beyond sea. P. R. C. 203.—Curf. Canc. 443.

8. No injunction for stay of suit of law, shall be granted, revived, dissolved, or stayed upon a petition, nor any injunction of any other nature pass by order upon petition, without notice, and a copy of the petition first had by, or given to, the other side, and the petition filed with the register, and the order entered. P. R. C. 203.

*Curf. Canc. 442.*

9. Where the defendant, by his answer, swears a certain sum of money due to him, the court often will not grant or continue an injunction, unless the plaintiff bring the money into court, &c. yet time will be given to bring it in, as the greatness of the sum, or the distance of the party, requires, and proceedings ordered to stay in the mean while. P. R. C. 204.

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*But if the defendant be in contempt, the court will grant it without*

*bringing any money into court, though there have been proceedings at law, P. R. C. 204. cites Toth. 37.—So if matter be confessed, sufficient for a total relief, &c. the court will do the same. Ibid.—Curf. Canc. 444, 445.*

That where  
an executor  
by his an-

10. An *affidavit* is not ordinarily to be made use of *against an answer*. P. R. C. 204, cites Toth. 37.

*swear, swears a certain sum due*, the court upon affidavits of strangers to the suit, continued the injunction, without ordering the money to be brought into court; because there appeared *reason to doubt* whether it were due, and the executor is not privy to the transactions of the testator. And so it was said it would have been, if by writing, or any other matter shewed the court, it might seem doubtful whether the money were unpaid. P. R. C. 204, 205. — Cur. Canc. 445.

Cur. Canc.  
445.

11. *Administrator of a sailor orders A. to receive money due to the sailor. He does, and put it into a goldsmith's hands. A will appears; of which and probate, the executor gives A. notice before the money was paid the administrator, &c. He refuses to pay the money to the executor; the executor sues him at law. He brings his bill. The executor swears notice as aforesaid. The court ordered the money to be brought into court, or the injunction to be dissolved.* P. R. C. 205, 206.

Cur. Canc.  
447. S. P.

12. *Judgment at law on a bail bond. A bill here and injunction. The defendant swears 8 l. due for work done. The money was ordered to be brought into court, &c. though the court inclined to have continued the injunction without that, seeing there was a judgment at law. But in regard it was so small a sum, it was ordered to be brought in.* P. R. C. 206.

13. *If money be recovered at law, and the defendant brings his bill to be relieved here, on condition to pay the money and costs recovered at law, into court here, subject to order on hearing, this court will commonly order an injunction, and will in the mean while stay execution, and give some time for paying in the money; with this further, that the defendant here be at liberty to affirm his judgment if a writ of error be pending; or if there be none, the complainant to give a release of errors.* P. R. C. 207, 208.

14. The defendant here had judgment at law. The complainant had brought a writ of error, and then brings his bill here, and has an injunction. The defendant being in no contempt, but having taken a dedimus, prays leave to affirm his judgment. It was granted him; but he to proceed no further till further order. P. R. C. 208.

15. *Legatees sue in the ecclesiastical court, that the executors might, (as the book supposes) prove the will, and pay their legacies. The executors exhibit a bill here to prove the will, it being of lands as well as personal estate, and to stay proceedings in the ecclesiastical court, and offered by their bill, (as the book supposes) to pay the legatees, if there should be assets. This court ordered an injunction, and that it should continue, the executors giving security here to perform the will, and speeding the cause.* P. R. C. 208.

16. *Exceptions alone are not a sufficient cause for granting an injunction, because they are often put in for delay; but there must be a report also of the answer's insufficiency; per Cur. P. R. C. 208.*

Cur. Canc.  
449.

17. *An injunction to stay waste must be had upon a bill filed to that purpose.* P. R. C. 212.



**(C) To what Court or Place, &c. Injunction lies.**

1. **INJUNCTIONS** lie not for *foreign jurisdictions*, nor out of the *king's dominions*. Pasch. 17 Car. 2. 1 Chan. Cases, 67. Love v. Roll.

2. A *special certiorari* was to remove a cause out of London, the plaintiff proves the surmises of his bill, the defendant beginning suit in the *King's Bench* for the same cause; therefore stayed by injunction. Cary's Rep. 118. cites 21 & 22 Eliz. Cliffe v. Turner.

3. An injunction was granted to stay proceedings in the *spiritual court*. Toth. 178. cites 30 Eliz.

Ibid. cite:  
or 8 Car. 2.  
P. Beaumont  
v. Harvey.

4. An injunction was granted to establish possession, and to stay suits in the court of wards, and an attachment awarded for serving an order of the court of wards, to stay suit here. Toth. 179. cites 33 Eliz. Smith v. Snotsbull.

5. An injunction to stay proceedings in the *arches or admiralty*. Toth. 179. cites 33 Eliz. Aylett v. Aylett.

6. An injunction to stay judgment and execution in the *exchequer*. Toth. 178. cites Hill. 35 Eliz. Catwallell v. Wynn.

Ibid. cites  
9 Car. Tref-  
well v. Guin-  
bon.

7. The defendant sues in the *ecclesiastical court* for a portion due to his wife, this court ordered an injunction to stay proceedings there, till he shall make a competent jointure. Toth. 179. cites 14 Car. Tanfield v. Davenport.

8. Injunction to stay proceedings in the *Stannaries*. Toth. 182. cites 14 Car. Trinick v. Bordfield.

9. Suits in the court of chancery in the *petty-bag* by scire facias or privilege, are not to be stayed by injunction, but by order. P. R. C. 202.

**(D) Perpetual Injunctions. In what Cases.**

1. **A** *Perpetual* injunction against one that sued for money *unfairly won by dice*. Chan. Rep. 89. 10 Car. 1. Blackwell v. Redman.

2. An *issue* was directed out of Chancery, to try *whether a will or no will*, and found *against the will*, and then a perpetual injunction was awarded against the defendant not to prove the will (though it was of a personal estate only) in the prerogative court. Hill. 18 & 19 Car. 2. 1 Chan. Cases, 80. Beverham v. Springold.

P. R. C.  
215.—If a  
trust estate be  
devised to be  
sold, and,  
on a bill  
brought

against the trustees to sell, the heir contests the will, the court after two trials, will grant a perpetual injunction; per Ld. C. Parker. Wms's Rep. 672. Mich. 1720. in case of Leighton v. Leighton.

3. A perpetual injunction was granted to *stay proceedings in the ecclesiastical courts*, and in the *delegates for alimony*, and the husband not to disturb the wife in her person, or meddle with any goods she shall acquire during the separation, or which she shall use for her convenience. Hill. 25 Car. 2. Fin. 73. Turner and Warwick v. Boteler.

Cur. Canc.  
449.

4. Where a bill is *taken pro confesso*, by reason of the defendant's contempt in standing out all process; if the bill prays an injunction to quiet a possession, or to stay the defendant's proceedings at law, the court will decree a perpetual one. P. R. C. 197.

5. A perpetual injunction ought not to go *against an heir at law* to bind his inheritance *without a trial at law*, in case the matter be doubtful. MS. Tab. cites 23 Jan. 1705. Wilson v. Story.

MS. Tab.  
cites 20  
June, 1709.  
S. C. though  
in favour of  
a voluntary  
conveyance

6. After five verdicts for the plaintiff at law against the defendant there, the plaintiff brought a bill for a perpetual injunction, but denied, unless there was fraud or trust, or some accident fell out to give the court \* a jurisdiction; per Ld. Wright. Trin. 1706. Ch. Prec. 261. E. of Bath v. Sherwin.

against an heir at law.——A perpetual injunction to quiet possession is only to be granted, where there has been a long uninterrupted possession. Said in Cur. P. R. C. 215.——But it is sometimes granted upon a decree where there have been several trials at law. P. R. C. 215.——Cur. Canc. 451. S. P.——A. sold lands to B. his brother and the same were many years enjoyed under the purchase. Upon A.'s death W. the son of A. set up an old entail created about 200 years since, and got into possession. B. brought an ejectment, and a verdict found for W. upon producing an old inquisition finding the entail, but there was no deed produced creating the entail. Upon a bill by B. it was decreed by Ld. Cowper, that no trust, term, mortgage, or lease should be set up; but that W. the defendant should make title under the entail only; upon such trial it was again found for W. But the judge certifying against the verdict, a third trial (after two verdicts for W.) was had at the bar of the exchequer, and another after in B. R. in both which the verdict was for B. whereupon B. prayed a perpetual injunction and costs. Ld. C. Parker observed, that B. in this case had no reason to complain of the endlessness of trials in ejectments, the two first having been found against him, but that the two trials at bar, by direction of the court, being for him, his lordship said, he did not see what the court had been doing if it should not grant a perpetual injunction; and that the case in its nature is such, as not to be intitled to any favour, in respect of the purchase, the long enjoyment and the endeavouring to defeat it by such an old entail, and that if there was not the clearest proof imaginable of such an entail (as possibly there was not) the jury was in the right not to find it. Wms's Rep. 671. Mich. 1720. Leighton v. Leighton.——Wms's Rep. 674. says, that this decree was affirmed in the house of lords with 40 l. costs, March, 1720.——Sel. Ch. Cases in Ld. K.'s time 13. reports it to be said, that since the case of SHERMAN v. E. OF BATH, it has been taken, that after three trials had, a perpetual injunction has been allowed. Pasch. 11 Geo. 1. in case of Dalton v. Dalton.

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### (E.) The Force of an Injunction, and Extent and Effect thereof, and what shall be said a Breach.

1. IN trespass, the verdict passed for the plaintiff to the damage of 20 l. and the chancellor awarded an injunction to the plaintiff, that he should not proceed to judgment, by which the plaintiff was long delayed, and after the justices gave judgment, but they would not give damages for vexation in the Chancery by this injunction; quod nota. Br. Damages, pl. 130. cites 22 E. 4. 37.

I do not observe in the year-book any such matter, but only that the chan-

cellor, page 16. b. asked one of the counsel, by way of answer to what he was insisting upon, whether, if an injunction be made to a man, that he shall not sue J. S. and he dies, if his executor shall sue him? And I do not find any further notice taken of it by any one.——\* Orig. (Quo ceo poit estre expresse) but it seems, that (poit) should be (doit).

Where an injunction is disobeyed,

3. The defendant is enjoined in open court, upon pain of 200 l. not to proceed any further in an action upon case by him commenced

*in the King's Bench, against the plaintiff, nor that he procure the jury to be sworn in the issue; but only to record their appearance till to-morrow, at which time further order shall be taken by the court.* Cary's Rep. 53, 54 cites 1 Eliz. fol. 88.

upon oath thereof, process of contempt is to issue against the

contemnor, as in other cases, till he yield obedience: nor is he to be heard in the principal case, till he has yielded obedience thereto. Curs. Canc. 452.

4. In a suit between two for a close, an injunction was awarded for the plaintiff's quiet enjoyment of the said close, with the appurtenances, until, &c. The defendant put his cattle into the close, and thereupon an attachment issued to answer the contempt. He said that he put in his cattle for title of common. This was ruled to be no breach of the injunction; because the common was not in question in the bill, but only the title of the close, and therefore the defendant was discharged of the contempt; and the words (*with the appurtenances*) include not the common to be taken in the said close. Lane 96. Hill. 8 Jac. in the Exchequer. Bent's case.

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5. Defendant obtained judgment in ejectment against the now plaintiff, and had execution awarded, but the under sheriff refused to execute it. The under sheriff was ordered to attend in B. R. and an attachment granted for non attendance. Afterwards the defendant in ejectment brings a bill in this court, and the plaintiff in ejectment praying a *dedimus*, an injunction was granted of course; this injunction was allowed to extend to the under sheriff, who had refused to execute the writ, and was in contempt to B. R. before the bill filed, for not executing the habere facias possessionem on the judgment, and non-attendance upon summons, and for which an attachment was issued against him. Mich. 1681. Vern. 25. Emerton's case.

6. The plaintiff had judgment in ejectment, but was hung up by injunction, so that the term expired. Upon motion to enlarge the term, Holt. Ch. J. said, they could not alter records, and said, he had no mind to build a new clock-house. 1 Salk. 257. Pasch. 12 W. 3. B. R. Anon.

Ibid. Says the same motion was made Pasch. 3 Anne, and denied for the same

reason; and said, that it could not be done without consent, and that in Sir JOHN ROLL'S CASE, which was cited, the term was enlarged, but it was by consent.

7. Execution was stayed by injunction, till after the year, and it being afterwards dissolved, the plaintiff took out execution without a *sci. fa.* and this was referred by the court for irregularity. The plaintiff insisted, that he was stopped by the act of the defendant, and that had the defendant suspended it so long by writ of error, he might take out execution without a *sci. fa.* But the court said, they could not take notice of a chancery injunction; and the plaintiff might have taken out a writ of execution, and continued it by *vicecomes non misit breve*. And a *superfedeas quia improvide* was awarded to the execution. 1 Salk. 322. Mich. 3 Ann. B. R. Booth v. Booth.

This was a judgment with an agreement to stay execution for three months within which time the defendant got an injunction in chancery against the plaintiff. But the

court said, that it had been no breach of such injunction to take out a writ of execution within the time, which might have saved the trouble of a *sci. fa.* after the year, by entering the continuance down by a *vicecomes non misit breve*, but that cannot be done now. 6 Mod. 283. S. C.

Injunction  
for possession  
before hear-  
ing, binders

8. An injunction does not prevent an entry to intitle the party to recover the mesne profits at law; per Ld. Keeper. Mich. 1705. 2 Vern. 519. in case of Tilley v. Bridget.  
not the defendant's suit at law, making a lease, taking a distress, &c. and it may, as in other cases, if the plaintiff delay his suit, be dissolved. P. R. C. 215.—Curf. Canc. 451.

Where the  
matter is  
tried at  
law, this  
process stays

9. Where an injunction is obtained with respect to a suit at law, which is at issue, or wherein a declaration is delivered, it commonly gives leave to go to trial, but stays execution. P. R. C. 201.  
process stays execution. P. R. C. 202.

Curf. Canc.  
4, 8.

10. If goods are taken, or money levied, or paid in execution, and in the sheriff's hands, it will stay them there. P. R. C. 202.

11. Where money was levied, and in the attorney's hands, who would have retained it for money's owing him by his client; yet the money being in dispute, in this court, between the parties at law, the court ordered him to bring it in here. P. R. C. 202.

12. An injunction upon an attachment or *dedimus*, or upon defendant's praying time, does not extend to stay proceedings in the spiritual court, as it does to stay proceedings at law; so that when proceedings in the spiritual court are to be stayed, it is to be moved specially. Wms's Rep. 301. Mich. 1715. Anon.—And the reporter makes a *quære*, whether it be not the same with regard to proceedings in the court of admiralty. Ibid.

## [ 434 ] (F) Dissolved, or made absolute. In what Cases, and How.

Curf. Canc.  
444.

1. **W** H E R E there is an appearance of equity with the complainant, or that his case seems very hard, the court will not easily dissolve the injunction. P. R. C. 209.

And if, at  
the day, no  
cause be  
shown, then  
upon an  
affidavit of  
due service  
of the or-  
der, and  
on motion,  
the order

2. Where an injunction is granted before answer, then if after answer come in the council for the defendant allege, that the defendant has answered and denied the whole equity of the plaintiff's bill, (his contempts, if any, being cleared, and his appearance entered,) and also produce a certificate from the fix-clerk, that the answer has been filed 14 days at least; the court will, on such counsel's motion, order the injunction to stand dissolved at a short day, *nisi causa*, &c. or perhaps without such certificate. P. R. C. 199.

will be made absolute. P. R. C. 199.—If in term time, and a rolls-day, it is usually moved to be confirmed at the Rolls in the evening after the rising of the court at Westminster. P. R. C. 199.—If the counsel, who then moves it, does not shew an affidavit of the service of the order, it must at least be produced to the register before the order be drawn up. P. R. C. 199.—But if the appearance be not entered, contempts cleared, answer filed 14 days, all equity denied; or, that exceptions to the answer are put in; or that the answer is reported insufficient; any of these are good causes to be shewn against dissolving the injunction. P. R. C. 199.

3. If there be two defendants, the court will not ordinarily dissolve the injunction till both have answered. P. R. C. 200.

Where an  
injunction  
is granted  
by motion, it

4. An injunction is never dissolved without motion on the adverse part. P. R. C. 200.

must be dissolved by motion. P. R. C. 201.

5. The

5. The defendant, after having leave for a *dedimus* to take his answer, is bound to take notice of an order for an injunction, though he be not served with the writ. P. R. C. 200.

When the defendant prayed a *dedimus* to take his answer, plea, &c. in the country, the order sometimes was, that the plaintiff's *ex* clerk, or under clerk, might, without motion, draw a docket, and injunction of course, and subscribe his name to the docket, and express in the writ, in usual form, the cause of granting the injunction; both which, so prepared, were to be presented to be signed; and if the injunction issued forth in any other manner, it was void. P. R. C. 200.—But of late such injunction is moved for, (as are all others) and is granted of course, till coming in of the answer, and further order. P. R. C. 200.—Curs. Canc. 442.

6. Upon a *plea* or *demurrers* being allowed, the injunction, that was granted till answer, will commonly be dissolved upon motion. P. R. C. 200.

But in such case, or upon coming in of an answer, the court will not dissolve it absolutely on the first motion (though there be an affidavit of notice) but only *nisi*, &c. P. R. C. 200.—Curs. Canc. 443.

7. Where upon the face of the answer, there appeared a strong presumption in equity for the complainant, the court continued the injunction to stay trial at law. P. R. C. 201.

As where A. made a grant of *post fines* to B. with covenant that he had power to grant, but B. was not to pay rent till peaceable possession; B. brings an action at law, on the covenant of A.'s title or power to grant: A prays to be relieved. The matter being confessed by answer, to be as set forth by the complainant, the court continued the injunction to stay trial. P. R. C. 201.—Curs. Canc. 407.

8. Where it is granted on the merits of the cause, or upon special cause in equity, it is commonly to stand till bearing unless the plaintiff delay his suit. P. R. C. 202.

But delay of proceedings here for along time is good cause for dissolving an injunction to stay proceedings at law. P. R. C. 209.—Curs. Canc. 444.

9. The court would not continue an injunction upon a bill to be relieved against the penalty of a bond prosecuted at law, except either the money sworn by answer due thereon was brought into court, or the plaintiff gave judgment at law, and a release of errors. And if he had not been thought of sufficient ability, the court would have suffered the plaintiff at law to have proceeded there so far as the return of a second *scire facias*, to make the bail liable. P. R. C. 203.

So, if an action on the case be prosecuted at law, and the defendant brings his bill here, &c. and the defendant here by answer swears money due, the court will commonly dissolve the injunction, except the complainant will give a judgment at law in debt for the money sworn due, and a release of errors. P. R. C. 207.

10. A. was bound by obligation to B. for payment of 100*l.* and was indebted to him 100*l.* more for rent. An action was brought at law on the bond, and judgment had on the bail-bond. The complainants pray to be relieved against the bond, judgment, &c. and had an injunction. The defendant, by answer, owns the 100*l.* on the bond satisfied; the court ordered the defendant at law should give a release of errors, and the injunction to stand as to that, but to be dissolved as to the rent. P. R. C. 206.

11. The bill alleges, that the plaintiff is indebted to the defendant 50*l.* and the defendant 50*l.* to him; that the defendant is a prisoner in the Fleet, sues at law, has an interlocutory judgment, and will not pay or allow what he owes. The plaintiff prays an account,

count, &c. and has an injunction: the defendant, by his answer, says, he returned the money due to the plaintiff, to him at London in December last. The plaintiff produced the bond, by which it appeared the money was not payable till April next. The court ordered, that upon the complainant's giving a final judgment at law, for 20l. the sum demanded there, and a release of errors in four days, the injunction stand. P. R. C. 207

But if a report is not procured upon exceptions in a reasonable time, or if the answer be reported sufficient, &c. the injunction will, on motion, be ordered to be dissolved, nisi causa, &c. P. R. C. 209.—Curl. Canc. 449.

12. Where an injunction is already granted, it will be continued on exceptions. And where exceptions came in but the night before the motion, the court has refused to dissolve the injunction. P. R. C. 209.

Curl. Canc. 448.

13. Where there were cross-bills, the court said, if after the first bill is answered, the plaintiff in the first do not answer the second bill in eight days, the injunction should be dissolved on petition. P. R. C. 209.

Curl. Canc. 446, 447.

14. The court ordered money sworn due on an award to be brought into court, or the injunction to be dissolved; for by the award it is become res judicata. P. R. C. 209.

15. Mending a bill never moves or touches an injunction. P. R. C. 210.

Curl. Canc. 444.

16. If an injunction is dissolved, yet if there be cause, it may be revived on motion. P. R. C. 210.

Curl. Canc. 443.

17. The defendant's plea being allowed, he moved to dissolve the plaintiff's injunction. The court said, when the plea is allowed, there is ordinarily an end of the injunction, but not always. The defendant had pleaded only what the plaintiff had confessed and set forth, viz. an award; and though the defendant and referees have denied all practice, and sworn that the plaintiff was heard, and the award was duly obtained; yet it was said, practice and unfair proceedings are often found in awards. The counsel for the defendants said, the other side ought to shew some equity confessed or allowed in the answer. But was answered by the court, that though awards are favoured here, because they tend to settle peace among parties, and although there be notice of this motion, yet an injunction is not to be absolutely dissolved upon this allowance of the plea, but only nisi; because there may be some equity shewn to continue it. The court however, ordered the money awarded to be brought into court by the first seal, or the injunction to stand dissolved without further motion, and the plaintiff to enter up his judgment, (having at law a verdict,) and tax his costs, which were also to be brought in, but to stay execution, though the court seemed willing to forbear entering judgment. P. R. C. 211, 212.

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18. The court does not at the last seal after term ordinarily dissolve injunctions. P. R. C. 217.

19. It was ordered, that the injunction formerly granted against the defendant for stay of his action in the King's Bench be dissolved, and the defendant to be at liberty to take judgment upon his action of debt of 500l. provided, if the plaintiff do bring into court on Monday



Monday next 223 l. then execution for the rest to be suspended, until this court take other order. Cary's Rep. 67. cites 2 Eliz. fol. 176. Stanebridge v. Hales.

20. Injunction to stay felling of timber was dissolved, because the settlement was without impeachment of waste. 15 Car. 2. 1 Chan. Rep. 242. Minshall v. Minshall.

(G) Of the Service of an Injunction.

1. **A**N injunction out of chancery, after three verdicts, to stay the plaintiff from having his judgment. This injunction was served upon the plaintiff. His attorney or council not being served may move for judgment and have it. Pasch. 10 Jac. B. R. Bulf. 182. Ellis v. Parke.

It must be served personally on the party himself, his counsel, attorney, solicitor, &c.

or, &c. or such of them as can be found, or as the case may require. P. R. C. 197. — But leaving it with the attorney or solicitor's clerk or servant is good service. P. R. C. 197. — Curf. Canc. 452. S. P.

2. This writ is served by being shewn under seal and a copy of it delivered. P. R. C. 197.

Curf. Canc. 452. S. P. — Service

of an injunction without shewing the writ, but only delivering a copy, and denying to let the defendant compare the writ and copy, shall bind the defendant to obedience, notwithstanding there was irregularity in the issuing it. Mich. 26 Car. 2. 2 Chan. Cases 203. Woodward v. King.

Inns [and Inn-keepers.]

(A) Who may erect an Inn.

[ 1. **A** Man may erect an inn without any licence of the king, because it is not any franchise, but only a trade, as an alehouse. For it is but a great ale-house, or any other trade. In the parliament of the 18 Ja. upon the patent of Sir Giles Mompesson of inns, this was so resolved by the lower house of parliament, and then Mr. Noy argued it and said, that an alehouse is under the correction of the leet, therefore the inn under the correction of the eire, but there is not any record by which it may appear, that any claim was of it in eire. Therefore it is not a franchise. ]

Erecting a common inn is lawful for any one that will, and is not ad commune nocumen- tum, unless it be alleged, that it is an unfit place, or

that by reason the great number of inns in the same place, it is burthensome, or that it harbours thieves, and others of ill report, per Cur. Palm. 374. Trin. 21 Jac. B. R. Anon. — And such allegations may be traversed, and if it be found to be true, as to the harbouring ill persons, or as to the inn-keeper being of ill fame; though the inn shall be suppressed as to his keeping it, yet it being an inn another may keep it. Hunt. 109. The resolution of the judges concerning inns, June 19, 22 Jac. at Serjeant's Inn in Fleet-Street.

No person is to erect an inn without a licence from the king. 1 Bulf. 109. per Croke J.

\*[437]

[ 2. Objection. In the time of King John, there is a record, Such a man dedit decem marcas hospitare terram in Durham. ]

Noy said that he had seen a

grant in the time of King John to a tenant in Durham, (where this was) hospitari terram, and he understands that this was a licence to guest out his land, viz. to lease it in parcels to several farmers. Palm. 368. Trin. 21 Jac. B. R.

[ 3. Answer. This word (*hospitare*) there intends *dividere*; but at this day, this word *hospitare* in the north signifies *dividere* into parcels. ]

[ 4. Objection. Inn-keeper is *compellable to entertain strangers, and to answer goods stolen, &c.* ]

5. [ Answer. So it is of a carrier and ferryman, and yet it is not any *franchise*. ]

[ 6. In cire there is an *inn seised for entertaining men, who abuse those in forests*. Sir Edward Coke to the same intent. Among *capitula itineris*, there is an article about the beginning, *de illis qui ceperunt dona ab his qui hospitati sunt extraneos contra assensum factam*, which is for the abuse of the inn. There is not any record but of late time, by which it may appear that the king ever gave any *licences* to inn-keepers. By which it appears, that there needs not any. For if there were any, they ought of necessity to be of record. Tr. 20 Ja. B. R. Sherwood of Bath was indicted for the inn there of 3 Tuns, and reversed in writ of error, per Curiam, and resolved that he cannot be indicted for it. Tr. 21 Ja. B. R. other indictment from Bath quashed, per Curiam, for the cause aforesaid. ]

[ 7. In the *statute* which is called *articuli & sacramenta ministrorum regis itinere justiciariorum*. There is such clause *de inde præcipietur quod nullum conducatur hospitium*, (this word *conducatur*, is translated by Raftall, hired) *sed venientibus gratis concedatur*. ]

•Fol. 85. Hawk. 225. cap. 78. l. 3. says, it seems that this has been always clearly agreed. [ 8. If a man has had an inn by *prescription*, time whereof memory, &c. he may enlarge it upon the same land which has \* been always used with the inn, as he may enlarge the rooms upon the curtelage or yard, or may make new rooms upon them, or may convert the antient stables into rooms for men, and make the stables further upon the yard or curtelage, and shall have the same privilege in them as he had in the ancient inn. For otherwise it would be inconvenient. For now the custom is to make handsome and larger rooms, and more lights than were anciently, otherwise he will not have any guests, and there is greater resort now than anciently. Mich. 16 Ja. B. R. Resolved per totam Curiam, upon evidence at the bar in quo warranto against Harding for the Bush in Farnham. ]

[ 9. But a man who has an ancient inn by prescription can not enlarge the rooms upon any land adjoining, which was not anciently appertaining to the inn; for if he so does, he shall not have the privilege of an inn in it. Mich. 16 Ja. B. R. adjudged per totam Curiam, upon evidence at the bar in a quo warranto, against Harding for the Bush in Farnham. ]

## [ 438 ] (B) What Power the Inn-keeper has to retain.

a Roll. R. 449. S. C. 3 Bull.

[ 1. ] F a man rides to an inn, where his horse has eat, the host may retain the horse 'till he be satisfied for the eating. Trin. 15 Ja. B. R. between Robinson and Waller, agreed per

per Curiam and counsel without question. My Reports. Hill. 269. Mich. 14 Ja. ]

inn-keeper may detain the person of his guest, who eats, till payment. Show. 269. Trin. 3 W. & M. per Eyres J. in case of Newton v. Trigg. — But some question was, if he might retain saddle bridle and cloth as well as horse. 3 Bull. 289. Pasch. 15 Jac. B. R. Stirt v. Drungold.

[ 2. If a man takes the horse of a stranger, and rides upon it to an inn where his horse has eat, and after departs without paying for the eating leaving the horse there, and then the horse continues there for half a year. The owner shall not have his own horse. But the host may justify the detaining of it till he be satisfied of all the eating. Because he was compellable to receive him who comes as a guest to him, and he could not take notice who was owner of the horse, and if he could, yet he could not refuse him for this cause. Tr. 15 Ja. B. R. between Robinson and Waller, upon a demurrer, per Montague, Croke and Doderidge. ]

[ 3. But Houghton seemed e contra, for the mischief which might come to the true proprietors in such cases. Mich. 6 Ja. B. R. between Harloe and Wood, admitted and agreed upon a demurrer. But the plea over-ruled for insufficiency. My Reports. 14 Ja. ]

[ 4. If I deliver my horse to pasture, the inn-keeper may detain my horse 'till satisfaction for the eating. Tr. 3 Ja. B. R. per Williams. ]

[ 5. If I put my horse in an inn, though the horse has eat his value, yet the inn-keeper can not sell the horse for the eating. P. 7 Ja. B. between Waldbroke and Griffin, per Curiam. Contra Tr. Ja. B. R. per Popham. ]

he cannot after sell the horse, though he has eat twice as much as he is worth. But where he takes him in of course, he may after reasonable appraisement sell him when he has eat his value. Yelv. 66, 67. Trin. 3 Jac. B. R. The case of an hostler.

[ 6. But by the custom of London, the inn-keeper may sell such horse, and it is a good custom. P. 7 Ja. B. between Walbrooke and Griffin per Curiam. ]

an horse, the defendant pleaded a general custom throughout the realm, that if one puts a horse to livery to an hostler, and the horse remains there so long, that his meat amounts to the value of the horse, then the hostler may call in to him four of his neighbours and appraise the horse, and value also the meat, and if they think that the meat amounts to the value of the horse, or more, the hostler may detain the horse as his own; and pleaded that in fact, &c. upon which the plaintiff demurred in law; and judgment for the plaintiff because there is no such general custom within the realm, but only in London and Exeter. Mo. 876. Pasch. 6 Jac. Watbroke v. Griffith. — 2 Bull. 254. S. C. by name of Warbrook v. Griffin, but says nothing of detaining the horse as his own, but is only of selling him. — Though every inn-keeper may detain a horse 'till he is paid for his meat, yet he cannot sell, for that is good only by custom of London. Note, it was so said. Vent. 71. Pasch. 22 Car. 2. B. R. Anon.

The custom of London, to stop and sell horses for their meat, is only that the same horse may be sold for his own keeping, and not for the keeping of other horses, though of the same owner. Bull. 207. Mosse v. Townsend.

[ 7. But if a man takes my horse and puts it in an inn in London, and there leave it 'till he has eat his value, the inn-keeper cannot sell this horse by the custom of London for the mischief, that then any man may take away the property of the horse of another man. P. 7 Ja. B. adjudged between Walbroke and Griffin. ]

8. In trespass for taking his horse in C. the defendant pleaded, that he was an inn-keeper in St. M. and the plaintiff came to his house and agreed with him to pay 2 s. a week for his lodging, and

[ 439 ]  
Ley Ch. J. said, that  
6 d.

when the inn-keeper detains the horse for his horse-meat, (as he may do) he has the horse but in nature of a distress, and if the distress be rescued, he must make fresh suit and re-take him, otherwise if he

does not make fresh suit he cannot re-take him, but take a new distress; and so, if the horse detained for the provender, be taken by the party or a stranger, the inn-keeper ought to do the like. Ibid.—Nels. Abr. 42. pl. 14. S.C. but misprinted, the word (not) being omitted, and nothing said of the fresh suit, and mentions it as (per Curiam.)

6 d. for a night and day for his horse, and that if the plaintiff paid not the same and 10 s. more, he should retain the horse till paid, and shewed how long, &c. and for non-payment he detained the horse 'till the plaintiff took him at St. M. and rode to C. and he took the horse from him, as he lawfully might. Chamberlain J. thought, the defendant the inn-keeper had no property in the horse, and therefore could not re-take him. Ley Ch. J. thought he had a property by the agreement, and therefore the re-taking justifiable, and that, by the non-payment, the defendant had both custody, possession and property, whereas before such default, he had only the custody. And Chamberlain J. admitted, that the justification would be good, had the defendant had a property in the horse, which he thought he had not. But issue was afterwards taken upon the agreement. 2 Roll. 438. Trin. 21 Jac. B. R. Roffe v. Bramsted.

9. A. had an horse in an inn, but ordered the inn-keeper to give him no more food; for he would not be responsible for it. Holt Ch. J. before whom this cause came at Guildhall, inclined at first, that this was a discharge, and that the horse, (though it might be retained by the inn-keeper) is but in nature of a distress; and it being in the custody of the inn-keeper in his inn, this is a pound covert, and the horse ought to be found and maintained at the peril of the inn-keeper. But after mutata opinione, he directed, that *this was not a discharge*; for then any inn-keeper might be deceived, and it is the lessening of the security of an inn-keeper, who may detain, and by the custom of London sell the horse for his keeping. Skin. 648. Trin. 8 W. 3. Gilbert v. Berkley.

10. By the custom of the realm, if a man lies in an inn one night, the inn-keeper may detain his horses 'till he is paid the expences; but if he gives him credit for that time, and lets him go, he has waived the benefit of that custom by his own consent to the departure, and shall never afterwards detain the horse for that expence, but must rely upon his other agreement, and though he may detain the horse for one night's expences, yet he cannot for the expences of several nights, but in the case of one night he cannot sell the horse and pay himself, for that would be a conversion, and he is not to be his own carver. 8 Mod. 172. Trin. 9 Geo. B. R. Jones v. Thurloe.

### (\* C) Taverns.

Fol. 86.

\* There is no letter to this in Roll.

[ 1. ] IN the statute de pistoribus & braciatoribus, which see in Magna Charta. 24. cap. 5. is contained as follows, *assisa vini secundum assisam domini regis observetur, scilicet, sextertium ad 12 d. & si tabernarii illam assisam excefferint, per majorem & ballivos ostia claudantur, & non permittant vinum vendere, donec licentiam a domino rege obtinuerint.*]

(D) Inn-

(D) Inn-keepers *subject to what Regulation, or Punishment.*

Vid. Actions (F)

1. 1 Jac. 1. **E**NACTS that if any inn-keeper, &c. permit any person dwelling in any city, town corporate, market town, village, or hamlet, where such inn, &c. is, to remain tipling therein, other than such as shall be invited by any traveller, and shall accompany him only during his necessary abode there, and other than labouring and handicraftsmen in cities and towns corporate, upon the usual working days for one hour at dinner time, to take their diet in an alehouse: and other than labourers and workmen, which for the following of their work by the day, or by the great, in any city, &c. shall, for the time of their continuing in work there, lodge, or victual in any inn, &c. other than for urgent occasions to be allowed by two justices of peace, every such inn-keeper, victualler, &c. shall for every offence forfeit ten shillings for the use of the poor of the parish, the same offence being viewed by any mayor, bailiff, or justice of peace, within the several limits, or proved by the oaths of two witnesses, to be taken before any mayor, bailiff, or other head officer, or justice of peace,

If an inn do use the trade of an alehouse, this shall be within the statute of alehouses; per Yelverton J. 1 Bulf. 109. Patch. 9. Jac. B. R. Anon. S. C. cited per Eyres J. Show. 269. in case of Newton v. Trigg. 3 Mod.

329. S. C. and P. — The statutes for alehouses include all (excepting only booths in fairs) not to keep an inn and an alehouse; but to be suppressed [so as] to keep an inn only for relief of travellers, to which the whole court agreed. per Fenner J. 1 Bulf. 109. Anon.

2. 21 Jac. 1. cap. 21. s. 2. enacts that no innholder shall make horse-bread, but bakers shall make it, and the assise shall be kept, and the weight reasonable. And the innholders shall sell their horse-bread, and their hay, oats, beans, pease, provender, and all victuals for man and beast for reasonable gain, without taking any thing for litter.

S. 3. It shall be lawful for every inn-keeper dwelling in any village, being a thorough-fare, (and no city or market-town, wherein any common baker is dwelling) to make horsebread of due assise.

S. 4. If the inn-keepers shall offend against this act, the justices of assise of oyer and terminer, of the peace, sheriffs in their tours, and stewards in their leets, shall have power to inquire, hear and determine the said offences, and the innholders for the first offence shall be fined, and for the second offence imprisoned one month, and the third time he shall stand upon the pillory; and if he offend after judgment of the pillory, he shall be forejudged from keeping any inn.

3. If an inn-keeper \* takes down his sign and keeps an hosterie, an action lies against him, if he denies to lodge a traveller for his money. But if he takes down his sign, and gives over keeping an inn, then he is discharged from giving lodging. Goeb. 346. in pl. 440. Trin. 21 Jac. B. R. Anon.

\* It still remains a common inn though the sign be gone, and is liable to

strangers. Palm. 374. Anon.

4. Inns are under the power of the justices of the peace in the places where they are situated. 3 Mod. 329. Mich. 2 W. & M. B. R. in case of Newton v. Trigg.

Skin. 291. S. P. in S. C. Trin. 3 W & M.

B. R. by name of Luton v. Bigg. — An inn is the same with an alehouse, and therefore several statutes which are made to prevent tipling, and which appoint at what price ale should be sold, have been adjudged to extend to inn keepers. Per Cur. 3 Mod. 329. ut sup.

Proclama-  
tion was  
made in  
court for the county of Middlesex for the rates and prices of hostlers. Raym. 162. Mich. 19 Car.  
2. B. R.

5. *Judge of assise* may set a price upon their goods. 3 Mod.  
329. Newton v. Trigg.

[ 441 ] 6. If inn-keepers set *unreasonable rates*, they are indictable for  
extortion. per Eyres J. Show. 269. Trin. 3 W. & M. in case of  
3 Mod. 329. Newton v. Trigg.  
M. & W. &  
M. B. R. & C. and P.—Skin. 291. S. P. in S. C. Trin. 3 W. & M. B. R. by name of Luton v. Rigg.  
—S. P. Hawk. Pl. C. 225. cap. 78. s. 1.

7. Inn-keepers are bound to receive and entertain guests, and  
therefore may detain the *goods* of guests, *till payment*; per tot. Cur.  
upon a demurrer. 1 Salk. 388. Mich. 3 Annæ, B. R. York v.  
Grindstone.

8. It seems to be agreed, that the keeper of an inn may by the  
common law, be *indicted and fined*, as being guilty of a common  
nuisance, if he *usually harbours thieves*, or *suffer frequent disorders* in  
his house, or *set up a new inn in a place where there is no manner of  
need of one*, to the hinderance of other ancient and well governed inns,  
or *keep it in a place wholly unfit* for such a purpose in respect of it's  
situation. Hawk. Pl. C. 225. cap. 78. s. 1.

9. 2 Geo. 2. cap. 28. s. 11. enacts, that *no licence shall be granted  
to keep a common inn, &c. but at a general meeting of the justices sitting  
in the division where the person dwells, and that all licences granted to  
the contrary shall be void.*

S. 12. Provided, that *nothing in this act shall alter the method of  
granting licences for keeping of common inns, &c. in any city or town  
corporate.*

See Trial.  
(X. 5)

### (E) Pleadings and Evidence.

\* 4 H. 4.  
cap. 25.—  
2 Roll R.  
225. S. C.  
and there  
226. ano-  
ther ex-  
ception is  
mentioned,  
(viz.) *that  
it is said .  
anglice  
busbels, and  
not busbels  
of oats, but  
this was  
not regard-  
ed; for it  
had been  
good  
though  
the anglice  
had been  
omitted.  
And the*

1. J. S. was indicted upon the statutes of 13 R. 2. and \* 4 H. 4. for  
that the common price of oats, in B. S. and other places, between  
the 1 March 15 Jac. and the 1 March 17 Jac. was not above the  
rate of 20 d. a busbel, and the defendant, *existens communis stabularius*,  
sold to divers subjects of our lord the king, within his dwelling house in  
H. 200 busbels for 2 s. 8 d. the busbel, *contra formam statut. &c.* Ex-  
ception was taken. 1. For want of addition, but the court said, that  
when he appears, and does not take exceptions, but pleads to issue,  
and it is found against him, he admits it, and has slipt the advan-  
tage. 2. That it was *quod commune pretium in mercatis, &c. was  
not ultra 20 d. the busbel*, which is uncertain, and the price ought to  
be shewn precisely; for he is to forfeit by the statute of 4 H. 4. for  
every busbel sold above the common market price the quadruple va-  
lue. Sed non allocatur. 3. That it was *quod commune pretium pro  
quolibet medio avenarum non fuit ultra, &c.* where it should be *pro  
medio*, or *pro aliquo medio*, and not *pro quolibet medio*; sed non al-  
locatur. 4. Because it was *quod J. S. existens communis stabularius  
sold, &c.* which infers, that he was a common hostler at the time  
of the indictment, and not at the offence done, and that it ought  
to



to be certain and not by intendment. Sed non allocatur. 5. That it was, *that he sold within his mansion house*, and does *not say within his inn*. Sed non allocatur. For it shall be intended all one. 6. Because it was, *that he sold diversis subditis domini regis* and does *not say hospitibus*, nor *to be expended for provender*, it being otherwise no offence within this statute [of 4 H. 4.] sed non allocatur. 7. Because it is *not shown when he bought or sold them*, which might be many years before, and judgment was given for the king. Cro. J. 609. Hill. 18 Jac. B. R. Johnson's case.—Als. the King v. Johnson.

Attorney General said, that the conclusion of the indictment being contra formam statuti, made it good admitting the excep-

tions before; and also that if diverse indictments are upon two statutes, and one of them more beneficial to the king than the other, that statute shall be taken which is most to the king's advantage. But as to these matters the court said nothing.——Comb. 194. in the case of the King v. ROBERTS, which was of an indictment, in which several extortions were laid together, and for which reason the judgment given against the defendant there was stayed. Pasch. 4 W. & M. B. R. Holt Ch. J. said, that this case of JOHNSON's seemed <sup>to</sup> not to be law.——The two acts upon which the above indictment was founded are repealed, by 22 Jac. 1. 21. s. 2. as to horse-bread, and penalties mentioned in those and other acts, and other penalties inflicted, for which see (D) *supra*. \* [ 442 ]

2. If inns are an *annoyance* and inconvenient for the inhabitants, the same ought to *appear particularly*, otherwise it is a thing lawful to erect an inn. And for want of the words *ad nocumentum*, the indictment was quashed. Godb. 345. pl. 440. Trin. 21 Jac. B. R. Anon.

3. If it be *alleged that the innkeeper harbours thieves, or is of ill fame*, the defendant *may traverse the same*. Hutt. 100. June 19. 22 Jac. at Sergeant's inn in Fleet-street. The resolutions of the judges.

4. In trover and conversion, *denial to deliver is no conversion*, nor evidence of a conversion, unless the plaintiff *tender in particular what the horse has eat out*, and the jury is to judge if sufficient. Per Ld. North. 2 Show. 161. Anon.

## (A) Innuendo.

1. **INNUENDO** cannot supply the uncertainty of that which is *uncertain of itself*; had not the innuendo been put in, per Holt Ch. J. Cumb. 460. Mich. 9 W. 3. B. R. the King v. Greep.

See Actions (I. b) (K. b).

2 Salk. 519. S. C.—5 Mod. 344. S. C.—Per Powel J.

21 Mod. 100. pl. 7.——For a bare and *naked innuendo signifies nothing*, unless the words themselves import the same, or that there be some certain fact to which it may be applied, or from whence it may be inferred, that the man meant the thing, without the help of an innuendo. Per Holt. 12 Mod. 141. Mich. 9 W. 3. S. C. by name of the King v. Griebe.——3 Mod. 35. the King v. Roswell.

2. Innuendo cannot *reduce to a particular*, that which before would bear a more large construction. Per Holt. Cumb. 460. the King v. Greep.

3. In every innuendo, there must be something *precedent to induce it*, something whereby it may be applied, that the man meant so as the

It ought to have some affinity

with the  
matter  
precedent.

the innuendo would have him. Per Holt Cumb. 460. the King v. Greep. — cites Hob. 6. Miles v. Jacob. — 4 Rep. 17. Cro. E. 307. Crouch v. Givers. — 10 Mod. 197. Arg. 198. per Parker Ch. J.

3 Bull. 227.

4. Innuendo may serve for an explanation, where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add or enlarge the importance of it. 2 Salk. 513. Mich. 9 W. 3. B. R. the King v. Greep.

[ 443 ]

## \* Inrolment.

\* Inrolment of a deed is the entering it fairly upon the records of one of the king's courts of record at Westminster, or at the quarter sessions of the peace.

### (A) Inrolment of ‡ Deeds, &c. and How.

1. 34 & 35 H. 8. cap. 22. ENACTS, that all recoveries, deeds inrolled, and releases to be taken and acknowledged before the mayors, recorders or other head officers, as well of the city of London, as of any other city, borough, or town corporate, having power to receive the same according to the customs of the said cities, &c. shall be of like force, as they were before the making of the act. 32 H. 8. cap. 28.

2 L. P. R. 67. — ‡ Bargain and sale (H) — Recognizance (D)

2 Inst. 673. says, that so much is implied when the inrolment

2. If a deed be enrolled according to the statute 27 H. 8. cap. 10. it must be in parchment for the strength and continuance thereof, and not in paper, and so it was resolved in parliament by the judges, in anno 23 Eliz. Co. Lit. 35. b. 36. a. \*

is in any of the king's courts of record at Westminster, (viz.) that the inrolment shall be in parchment, and that so it was adjudged, as Mr. Plowden cited it, before the lords in parliament, anno 23 Eliz. in the great case between HERBERT AND VERNON, which Lord Coke says, he heard and observed — S. P. 2 L. P. R. 68.

3. No deed, &c. can be inrolled, unless duly and lawfully acknowledged. Co. Litt. 225. b.

\* 2 L. P. R. Inrolment, 68. says that, before the 20th year of queen Eliz. it was not used to in-  
dorse the inrolments of deeds upon back of them, as it is now

4. An indenture of bargain and sale was inrolled in Chancery, exemplified under seal, and at the end was a memorandum, viz. that the plea was inrolled, but no time mentioned when the same was done, but plaintiff offered to prove by circumstances, that it was inrolled within the six months; upon which great debates arose, but a clerk being sent by the court of B. R. to the inrolment office to know their usage and custom, as to inserting the time of the inrolment, he certified the court upon his oath, that they informed him, that \* before the 16 Eliz. at which time the inrolment office was erected, they did not use to insert the time, but they use to do otherwise now. 2 Roll. R. 119, 120. Mich. 17 Jac. B. R. Worfeley v. Filisfer.

used to be done. Cites Mich. 23 Car. 1. B. R. But adds, that now it is constantly used, and to good purpose, in respect of the more easy and readier proof of the inrolment upon any occasion: for credit is given to that indorsement without any further proof, as being made by a known officer, and intrusted for that purpose.

5. The

5. The court made a *rule*, that *all deeds should be acknowledged on the plea side* in this court, and not on the crown side; and that the acknowledgment should be *in open court*. 1 Salk. 389. Mich. 11 W. 3. B. R. Lady Anderson's case.

6. *Baron and feme* came to acknowledge a deed by them both in court, and the court ordered an *acknowledgement only for one* of them to be *entered*, viz: the husband. 6 Mod. 263. Mich. 3 Annæ, B. R. Anon.

A deed acknowledged by the husband and wife shall,

by the common law, be inrolled only for the husband, and not for the wife, by reason of the coverture. And though it be inrolled for both, it bindeth her not; but otherwise by custom, and none hath power to examine a feme covert without writ. 2 Inst. 673.

(B) For safe Custody.

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1. A deed of *feoffment* was denied to be inrolled *till after livery made*. Br. Faits enrol, pl. 1. cites 44 E. 3. 7.

2. There was an inrolment *at common law*, it makes an *estoppel*, and the party, in case of a *bond inrolled*, cannot plead *non est factum*; per Holt Ch. J. Comb. 248. Pasch. 6 W. & M. B. R. in case of Smart v. Williams.

3. Note, It is usual (in London especially) to have a *bargain and sale* for safe custody, and also a *lease and release*, &c. Comb. 250. at the end of the case of Smart v. Williams.

4. In case of an inrolment for safe custody, the deed may be said to be recorded; but where a bargain and sale is inrolled pursuant to the statute, the inrolment is a record, so that a copy of it may be read in evidence; per Master of Rolls. Note, afterwards upon a re-hearing, an issue at law was directed, whether such deed of uses was executed, and upon the trial, a *copy of the deed* was allowed to be *read as evidence* on the trial. Mich. 1704. 2 Vern. 471. Combes v. Spencer.——Ibid. 591. Combes v. Dowell. S. C.

Br. Faits enrol, pl. 5 cites 24 E. 3. Aff. —But Brook says, it seems that in London, the deed inrolled is

matter of record, by reason of their custom anciently used. Br. Faits enrol, pl. 5.——Though the inrolment of a bargain and sale by indenture be of record, yet the deed is not of record; for against a deed inrolled, a man may plead *infancy*, although none can plead *non est factum*; per Manwood C. B. 2 Le. 65. in Sir William Pelham's case.

(C) Inrolment. Necessary, in what Cases.

See Bargain and Sale (1).—Prærog. (M. b. 2.) \* Br. Faits enrol, pl. 10. cites 5 E. 4. 7.

1. THE king may have *chattels and choses in action*, which do not touch franktenement without deed inrolled, but not *franktenement*, nor things which touch franktenement. Br. Faits enrol, pl. 6. cites 21 H. 7. 19.

2. Nor can the king be *infeoffed* by deed or otherwise, unless it be by deed inrolled: for he shall not have livery, but it shall pass by the livery of the deed of record. Br. Faits enrol, pl. 12. cites 7 E. 4. 16.

Br. Faits enrol, pl. 10. cites 5 E. 4. 7. —Ibid. pl. 16. cites 29 H. 8.

3. It

3. It is the acknowledgement before a judge of a *recognizance*, which gives it the force of a record, though the inrolment be necessary for the testification and perpetuating of it. Hob. 196. Hall v. Winckfield.

4. A deed shall be inrolled, though it concerns lands in Scotland or Ireland. Toth. 116. cites 7 Car. that it was then so ordered by the king.

5. *Statute merchant and staple* are effectual against executors, though not inrolled. But against *purchasers of the conuser's land*, they are not of force, unless inrolled within three months. Went. of Executor, 159.

If land be conveyed in a deed for money only, then the deed must be inrolled, else the land will not pass by the deed. But if land be

conveyed in consideration of money paid, and also in consideration of natural love and affection to a wife, child, or relation, there it is not necessary to inrol the deed, but the lands will pass, though the deed be not inrolled; for in the former case, is a mere deed of bargain and sale, which passeth nothing without inrolment; but in the latter case, the land will pass by way of use. 2 L. P. R. 69.

6. A. in consideration of blood covenants to stand seised to the use of B. his son, and the heirs of his body, and in default of such issue, then to the use of J. S. in consideration of 100 l. — B. died without issue. The deed was not inrolled; quære if the uses can arise partly by covenant to stand seised, and partly by bargain and sale, or whether it must arise wholly one way, or wholly the other, and not by fractions? Bridgman Ch. J. said, in this case, that there was a *mixt consideration*, and there needed no inrolment. See Carth. 144. Trin. 2 W. & M. B. R. Garnish v. Wentworth.

[ 445 ] (D) *When.* And where the Want thereof, or *Mistakes* therein will be aided.

1. THE plaintiff purchased lands of the defendant anno 2 Eliz. and had a *recognizance* then acknowledged unto him for performing covenants of the bargain and sale, and put one in trust to get both the indenture and cognizance inrolled, and paid him for the same; and now being evicted out of the possession of the lands, came to take out a sci. fa. upon the recognizance, but finds it not inrolled; and therefore desired the same might now be inrolled. It is ordered that a subpoena be awarded against the defendant, to shew cause why it should not; and Mr. Solicitor, who is present at the motion, is to give notice to some of his clients who have purchased (as he alleged) parcel of the lands, to shew cause why it shall not be inrolled. Cary's Rep. 138, 139. cites 22 Eliz. Sidenham v. Harrison.

4 Le. 8. pl. 34. S. C. — Godb. 141. S. C.

2. Conusee of a recognizance, acknowledged before a master in chancery, died before the inrolment. It was the opinion of all the justices of C. B. That the recognizance may be inrolled at the request of the executors. 4 Le. 184. pl. 283. Mich. 30 Eliz. C. B. Halton's case.

3. An inrolment of a deed remains good, notwithstanding omissions by the negligence of the clerk in writing or examining, where the omissions are in matters and words of surplusage, and not in that which

which is of any substance in the deed; as where the deed was (for other good causes) the word (good) was omitted in the inrolment. Poph. 21. Sir Francis Englefield's case.

4. In the inrolment of a deed the *clerk mistook the date*, and dated it the month preceding the date of the deed; this does not make the inrolment void; per Lord Keeper Egerton; for it is clearly the misprision of the clerk, who having the deed before him mistook the date, writing one month for another. Mo. 676. Hill. 45 Eliz. in Canc. Gerard v. the Dean of Rochester and Sands.

## (E) The Intent, Force and *Effect* of an Inrolment at Common Law, or for safe Custody only, &c.

See Conveyances.  
—Dates.

1. *Erroneous inrolment* is not void, but avoidable by error, as in case of a deed acknowledged to be inrolled by *baron and feme*, and therefore quære of inrolment by infant; for he shall have audita quærela, to avoid his statute merchant. Br. Faits enrol, pl. 3. cites 21 E. 3. 43.

Br. Error, pl. 63. cites S. C. and P. —And upon such acknowledgment,

Brook makes a quære; for he says it is not adjudged whether it be error or not, and queries how it is used at this day there.

2. One may *avoid* a deed inrolled by *confessing and avoiding it*; but he cannot *deny it*. Br. Faits enrol, pl. 2. per Thirn. and Hank. cites 12 H. 4. 12.

As to say that nothing passed by the deed, or

that he *had nothing in the land* at the time. Br. Faits, pl. 2. cites 9 H. 6. 60. — Hill. 9 H. 6. 60. a. pl. 8.

3. Inrolment of a deed is to no other purpose, but that the party shall not deny it afterwards; but if he wants the deed to plead it, and loses it he shall not plead the inrolment; for he ought to \* shew the deed itself; per Newton. Quod tota curia concessit. Br. Faits enrol, pl. 4.

\* An inrolment of a fine or other conveyance not being a bargain and sale, though

acknowledged by the parties themselves, is not to be regarded without proof of the deed. Keb. 117. Mich. 13 Car. 2. B. R. in evidence to the jury, in the case of Elden v. Chalkhill.

If a deed be lost; yet the inrolment is good evidence if it can be proved to a jury by circumstances that there was such a deed. Pasch. 34 Car. 1. B. R. For the loss of a record or deed is not the loss of a man's title, if it can be otherwise proved. 2 L. P. R. 68.

4. *Duress* may be pleaded against a deed inrolled. Br. Faits enrol, pl. 17. cites 16 H. 7. 5.

[ 446 ]

See Estoppel. (A) pl. 3. contra.

5. *Feme covert* or *infant* makes a deed; and at full age or *discoverture* inrols it, yet they may afterwards avoid the deed; because it stands with the deed; per Brian; but Keble contrary clearly, yet after release or fine a man may say, that the parties had nothing in the land at the time, &c. and this was the opinion of the court, quod nota. Br. Faits enrol. pl. 17. cites 16 H. 7. 5.

He may say nothing passed. Br. Faits enrol, pl. 17. cites 16 H. 7. 5. per Vavilior.

6. A deed inrolled in London is as strong as a fine: Densh. R. of Fines 3.

S. P. per Thirn. and Hank. Br.

Faits enrol. pl. 2. cites 12 H. 4. 12. — Br. Fines, pl. 110. cites 31 H. 8.

7. *And if it be by conuſance by baron and feme, there the feme ſhall be examined, and ſcire fa. ſhall iſſue there if it be executory, the ſame law in Wincheſter of deeds inrolled, and ſo in diuers other vills. Denſh. R. of Fines 3.*

8. *34 & 35 H. 8. 22. makes recoveries and deeds inrolled, &c. in corporate towns by feme coverts to be of the ſame force as they were before 32 H. 8.*

9. *The inrolment of a deed doth not make it to be a record, but it thereby becomes a deed recorded, and it ſhall operate by virtue of the ſtatute of inrolments; for there is a difference between matter of record, and a thing recorded to be kept in memory; for a record is the entry in parchment of judicial matters controverted in court of record, and whereof the court takes notice: but an inrolment of a deed is a private act of the parties concerned, of which the court takes no cognizance at the time of the doing it although the court give way to it. 2 L. P. R. 69. cites Mich. 22 Car. 1. B. R.*

10. *The inrolment of a deed, if it be acknowledged by the grantor, is a ſufficient proof of the deed of itſelf upon a trial; for every deed before it is inrolled is to be acknowledged to be the deed of the party before a maſter of the court of chancery, (if inrolled in chancery) or before a judge of the court where it is inrolled; and this is the officer's warrant for the inrolling of it. 2 L. P. R. 69.*

### (F) Of Deeds, allowed in what Caſes extraordinary.

Fitzh. Im-  
prison-  
ment, 23.

1. **A.** *Delivered a deed of B. to J. S. who tore it in ſport without malice and by miſfortune and chance; both A. who delivered the deed and J. S. who tore it were imprifoned, and the deed was inrolled immediately. Br. Faits, pl. 88. cites 3 E. 3.*

### (G) Pleadings.

1. **DEED** *inrolled ought to be ſhewn, and not the inrolment, and therefore if the deed be loſt all is loſt. Br. Monſtrons, pl. 137. cites 19 H. 6. 6.*

2. *After feoffment by deed inrolled, he may ſay nothing paſſed. Br. Faits enrol. pl. 17. cites 16 H. 7. 5.*

Sav. 91.  
Holland v.  
Downes  
S. C. con-  
tra, and the  
court were

3. *Averment of primo deliberatum ought not to be received againſt a deed inrolled; for by the ſame reaſon it might be averred nunquam deliberatum, and ſo upon the matter non eſt factum. 3 Le. 176. Mich. 29 Eliz. C. B. Holland v. Bonis als. Bains.*

*of opinion that a ſtranger ſhall not be eſtopped by the inrolment, but the parties ſhall be bound by it; for though the \* inrolment is reputed to be of the record, yet it is not record created by any judicial act; for it is not like to a recognizance, and in all recognizances nul tiel record is the plea. The ſealing and delivery is the force of ſuch deeds, as deeds of bargain and ſale, &c. and not the inrolment; but in caſes of recognizances there they take their force and effect by inrolment and the conuſance only, and not by the delivery, and therefore the time of delivery may well enough be denied which is but matter of fact, but the conuſance before the judge is matter of record, and by that the debt is created. But bonds, and indentures, and deeds, take their force by the delivery, ſo there is a perfect act before the conuſance is taken, and before any inrolment, and judgment was given accordingly.*

\*[447]

x

4. Againſt



4. Against a deed inrolled a man may plead *infancy*, though none can plead *non est factum*; per Manwood Ch. B. 2 Le. 65. Pasch. 31 Eliz. in Sir William Pelham's case.

5. The plaintiff was allowed to plead the *exemplification of a deed* inrolled without shewing it. Toth. 153. cites 1590. Fisher v. Hawkes and Smith.

6. The *acknowledgement* (of a term for years, or a bond) is *evidence* of as high a nature as a recognizance to make it an estoppel, and to prevent the pleading *non est factum*, though the bare inrolment is, not evidence; per Holt Ch. J. Comb. 248. in case of Smart v. Williams.

[See more of *Inrolments* relating to bargain and sale at title *Bargain and Sale*; and as to other matters see the several proper titles, as *Decree*, &c.]

## (A) Insolvent.

See Poor.  
—Prison-  
ers.—Secu-  
rity. Trusts

1. **T**ILL of late the chancery would not put out an insolvent *trustee*; for that he was intrusted by the donor; per Eyres J. Comb. 185. Mich. 3 W. & M. B. R. in case of Hill v. Mills.

2. An insolvent person made *executor* cannot be put out by the ordinary; for he is intrusted by the testator. Comb. 185. in case of Hill v. Mills.

Carth. 457.  
King v.  
Raynes.—  
But Chan-

cery granted an *injunction* against him not to intermeddle with the assets any further than to satisfy the legacy given to himself; for in equity he is but a *trustee for the other legates* (infants) and where a trustee is insolvent, the court of chancery will compel him to give security before he shall enter upon the trust. Carth. 458. Mich. 10 W. 3. B. R.

## Instant.

### (A) What it is and in what Cases allowable.

1. **I**NSTANS est unum indivisibile in tempore, quod non est tempus, nec pars temporis, ad quod tamen partes temporis copulantur. Pl. C. 110. b. Mich. 2 M. 1. at the end of the case of Fulmerstone v. Steward. Co. Litt. 185. b.

2. Every instant has the end of the one time and the beginning of the other. Pl. C. 258. b. Mich. 4 & 5 Eliz. in case of Dame Hales v. Petite. Co. Litt. 185. b.

3. Two informations upon a penal law were exhibited at the same time, and for the same thing; adjudged that he shall answer neither. Mo. 864. Mich. 14 Jac. Pye v. Cook.

4. So, two replevins by two persons at one time for one taking; [ 448 ] the defendant shall answer neither. Mo. 864. Pye v. Cook.

5. In some cases the law allows a *re vñ* as in *remitters, freehold descending and occupancy in instanti*. But in the acts of the party there must be successive motion. Cart. 67. Pasch. 18 Car. 2. C. B. in case of *Geary v. Bearcroft*.

See Forfeiture (R)—  
Grant (G.  
a. 2)

## (B) Instant. Considered How.

An instant  
is not to be

### 1. *PRIORITY of time is respected of things done together.* Fin. Law, 18. a. Max. 111.

considered in law as in logic as a point of time and no parcel of time; but in our law things which are to be done in an instant have in consideration of law a priority of time in them; as *lessee for life makes a lease for years*, they both surrender to him in reversion, though it is made in an instant, yet it shall be understood to have degrees, scilicet, the surrender of the lessee for years to tenant for life, and then the surrender of tenant for life. Arg. Mich. 32 Eliz. B. R. 3 Le. 247.——Co. Litt. 185. b. S. P. in case of a devise by one jointenant of his part; for no devise can take effect but by the death of the devisor, and by his death all the land comes immediately to his companion; and there takes notice that Littleton by the words *post mortem* and *per mortem* (in f. 287.) though they jump at one instant, yet alloweth priority of time in the instant which he distinguishes by *per* and *post*, and says, that the reason of this priority is, because the survivor claims by the first seoffor.——And in several cases a difference is allowed in our law in an instant, as *per mortem & post mortem*, &c. Arg. Show. 415. in case of the King v. Dr. Birch and the Bishop of London.

So, a devise of a term to his son, and that his wife shall have it during the minority of his son; this shall be construed first a devise to the wife, and after to the son when he comes of age. Fin. Law. 18. a.

So where a man grants his reversion of land to A. and by the same deed grants a rent out of it to B. and delivers the deed to both at one and the same time, this shall enure as to the rent first. Ibid.

As where  
mesnalty of  
land held

### 2. *So of things which happen in an instant.* Fin. Law. 18. a. Max. 112.

in chivalry descended to the tenant of the land, though the mesnalty is at the same instant extinct, yet the tenant should pay relief if he be of full age, or should be in ward if he was within age. Ibid. cites 11 H. 7. 12.

So land given to A. remainder to the right heirs of B. this is a good remainder, though he cannot have a right heir during his life: but it suffices that the remainder vests at the same instant that the particular estate determines. Ibid. cites 7 H. 4. 6.

So of exchange of land to have rent-charge out of the same land is good, though it be in an instant (so that the rent shall be merged in the land); for the law accounts the exchange of the land to be first executed. Ibid. cites 9 E. 4. 6.

As where a  
feme is en-  
dowed by

### 3. *Things which relate to time long before are as if they were done at the same time.* Fin. Law, 18. a. Max. 113.

the heir; she shall be said in immediately by the baron, so that if the baron was a disseisor, and the heir is by descent, yet disseisor may enter upon the feme. Ibid. cites Litt. 92.——This is cited out of the small French edition in 8vo. and there it is 92. b. but in Co. Litt. is pag. 240. b. f. 393.

So if goods are taken out of the possession of an executor who refuses, and administration is granted to J. S. In this case J. S. may have an action of trespass and suppose that they were taken out of his possession; for he shall be said administrator from the time of the testator's death. Ibid. cites 36 H. 6. 7.

### 4. *Quæ incontinenti fieri inesse videntur.* Co. Litt. 272.

5. The same person being patron and parson dies; the heir and not the executor shall present; for all is done in an instant, the descent to heir, and the falling of the avoidance to the executor; and where 2 titles concur in an instant the eldest right shall be preferred; as in case of jointenants, if one devises his part, the title of the devisee, and the survivor happen in an instant, the title of the survivor being the elder shall be preferred. 3 Lev. 47. Mich. 33 Car. 2. C. B. Holt v. Bishop of Winton & al.

## Intendment.

(A) Intendment of Law. *What it is, and the Force thereof.*

See Pre-  
sumption,  
(A).

1. **I**NTENDMENT of law is the understanding or intelligence of the law; and regularly all judges ought to adjudge according to the common intendment of law. Co. Litt. 78. b.

2. By intendment of law every parson, or rector of a church is supposed to be resident on his benefice, unless the contrary be proved. Co. Litt. 78. b.

3. One part of a manor by common intendment, shall not be of another nature than the rest. Co. Litt. 78. b.

4. Of common intendment a will shall not be supposed to be made by collusion. Co. Litt. 78. b.

5. The law presumes that every one will act for his best advantage; and therefore credits the party, in whatsoever is to his own prejudice. Fin. Law, 10. Max. 53.

As if tenant  
in præcipe  
quod reddat  
had pl. ad d

that he is villain to J. S. and holds in villenage, the writ should abate, and demandant should have had no further answer to it though it had been false; because by the plea he had bound and subjected his blood to perpetual bondage, which the law presumes he would not have done, had it not been true. Pl. C. 6. b. in Manxell's case.

6. *In facto, quod se habet ad bonum & malum, magis de bono quam de malo lex intendit.* Co. Litt. 78. b. — 10 Rep. 56. in Chancellor of Oxford's case.

7. *Lex semper intendit quod convenit rationi.* Co. Litt. 78. b.

8. There are many maxims reducible to this head: as, *semper præsumitur pro sententia*, — *Judicia in curia regis reddita pro veritate accipiuntur*, & *judicia sunt tanquam juris dicta* — *De fide & officio judicis non recipitur questio*. And many others.

(B) Allowable in what Cases. And what may be intended.

See Grant  
(P).—Fines  
(O. 6).—In-  
dictment  
(M) pl. 20,  
(N) pl. 12.  
in the notes,  
—Trial  
(Z. f) (A.

\* 1. **T**HE intent shall not be construed in trespass; contrary in felony; per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

f. 2)—Uses (B. a. 2) — \* As where a man shooting at bats kills J. N. it is not felony. Per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27. — So where a tyler drops a stone, which kills a man, not knowing it. Per R. de Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27. — But in those cases if they lame or hurt a man, trespass lies; for there the intent is not to be construed. Per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

2. Usury shall not be intended, unless it be expressly found by the jury. Arg. Bridgm. 112. Mich. 14 Jac. cites 10 Rep. 59. Chancellor of Oxford's case.

3. Covin shall not be intended or presumed in law, unless it be expressly

pressly averred. Arg. Bridgm. 112.—Cites the case of Tyrer v. Littleton.

4. A man shall *not lose his goods by intendment*. See Utlawry (A) pl. 2.

5. When *one word may have a double intendment*, one according to the law, and another against the law, that intendment shall be *taken* which is according to the law, and this by a reasonable intendment. 3 Bulf. 306. Mich. 1 Car. B. R.—Yelv. 50. Gamg v. Harvey.

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See Devise.

—Extin-  
guishment.  
(F. 2) —Grant (H.  
13)(G. 2. 2)

—Merger.

—One in-  
tire convey-  
ance.In case of a  
devise.

Lev. 251.

cites Bennet v. French.—It ought to be declared by words certain and consonant to the law. 1 Rep. 85. (d.) Corbet's case.

When by  
reasonable  
construc-

tion it may consist with the rule and reason of the law. 5 Rep. 55. a. b. Knight's case.—cites 29 Aff. 52. 29 E. 3. 39. D. 350. 5 Aff. 6. 7 Aff. 1. 15 Aff. 11.

## Intent.

(A) In What Cases the *Construction* shall be directed by it.

1. **T**HE words of deeds shall be construed according to the intent of the parties, and not otherwise. Pl. C. 160. b. Pasch. 3 M. 1. Throgmorton v. Tracy.

2. The intent shall be destroyed where it does *not agree with the law*. Pl. C. 162. b. Throgmorton v. Tracy.

3. In every agreement the intent is the chief thing that is to be considered, and if by the act of God or other means not arising from the party himself, the *agreement cannot be performed according to the words*, yet the party shall perform it cy-pres the intent as he may. Arg. Pl. C. 290. Trin. 7 Eliz. in case of Chapman v. Dalton.

4. In all matters the intent *ought to be regarded*. Arg. Pl. C. 292, in case of Chapman v. Dalton.

5. *Uses and devises* are construed according to the intent of the parties. Arg. 1 Rep. 101. (g.) Pasch. 21 Eliz. in Schelly's case.

6. *Act subsequent* shall declare the intention of a general act precedent. 9 Rep. 11. Mich. 25 & 26 Eliz. in Dowman's case.

7. A *fine to conusee of a statute* by the conusor *to the use of a stranger* it is not an extinguishment of the execution, for it is saved by the 27 H. 8. 10 of uses which saves all elder rights, &c. which the feoffees then had or after may have. D. 349. pl. 15.

8. *Grant* of the bailiwick of a manor for years to lessee for years of the manor shall not be construed a *surrender* of the lease; because it was not the intent of the parties. Cro. J. 176. Trin. 5 Jac. B. R. Gibson v. Searle.

7 Rep. 41.

h. in BERRIS-  
FORD'S

9. Intention will *not controul the operation of law*. Per Hale Ch. J. See Vent. 379. Trin. 26 Car. 2. B. R. in case of Pibus v. Mitford. case, cites the case of Abraham v. Trigg.—Litt. Rep. 287. cites S. C.—Cro. E. 478. Abraham v. Twigg.—Mo. 424. S. C.—Godb. 127. pl. 147. Green v. Harris.—An intent against law is void. Hutt. 86. in case of HERN v. ALLEN. cites the case of Abraham v. Twigg.

(B) Intent

(B) Intent. Made *appear*. How.

1. **H**E, to whom the deed is made, has *election* given him by the law to use it in the same sense, and to the same purpose to which he says that it was made. Arg. Pl. C. 156. b. Pasch. 3 M. 1. in case of Throgmorton v. Tracy.

2. *Act subsequent* shall declare the intention of a general act precedent. 9 Rep. 11. Mich. 25 & 26 Eliz. in Dowman's case.

3. *Common usage* and reputation frequently governs the matter, and directs the intention of the parties; as upon sale of a barrel of beer the barrel is not sold, but upon the sale of a hoghead of wine it is otherwise. Savil. 124. Mich. 32 & 33 Eliz. in case of MATTHEW als. BISHOP v. HARCOURT.——Hard. 3 Arg. Trin. 1655. in Scacc. in case of Eruly v. Ld. Faulkland and Dodington.

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(C) Intention *favoured* in Equity.

See Gift.

1. **T**HE intention of a man is not always to be pursued in equity as if a man settles a term in trust for one and his heirs, yet it shall go to the executor; per lord North. Pasch. 1683. Vern. 164. in case of D. of Norfolk v. Howard.

2. On a treaty of marriage the man and woman having each of them copyholds of inheritance, they mutually surrender the same to the use of them two and the survivor, and the man dies before marriage. On his death which was about 30 years since, the woman entered and enjoyed the copyhold ever since; it was insisted to be a trust for the husband and his heirs till the marriage; and Jeffries C. decreed a re-surrender, and an account of the profits from the death of the man. Hill. 1686. Vern. 432. Hammond v. Hicks.

3. All deeds are but in nature of contracts and the intent of the party reduced into writing, and the intention is to be chiefly regarded. In an act of parliament the intention appearing in the preamble shall controul the letter of the law; and from the regard that the law itself gives to the intention of the party, it is, that where there is *fine by render* there shall be no dower, and so a rent or recognizance shall not be extinguished by levying a fine to the party. Per Master of the Rolls. Pasch. 1688. Vern. 58. in case of Baden v. E. of Pembroke.

(D) Punished. In what Cases an Intent *without any Act done or compleated*, shall be punished.

See Indictment (H. 5.)

1. **I**F one delivers money to distribute among the jurors for his servant it is maintenance, though he who received it did not distribute it. Br. Maintenance, pl. 52. cites 31 H. 6. 9.

Jenk. 101. pl. 98. S. P. —110. pl. 13. S. P.

that this matter being found upon issue joined, the plaintiff had judgment, and it was affirmed in error. And Jenkins says, the \* defendant's eye was evil.——\* D. 95. b. pl. 38. and pl. 39 cites 30 Aff. that an *assumpsit to maintain*, though he does not maintain in fact, is punishable.

M m 4

2. Upon

Jenk. 87.  
pl. 70. cites  
S. C.—  
S. P. Mich.  
2 E. 3. 11.  
b. pl. 26.  
but in that  
case the  
owner of  
the wool  
shewing

a licence of the king prior to the shipping the goods were discharged.—S. C. cited D. 95. b. and adds, that *though by temp<sup>t</sup> they are driven into the port of Calais, yet they shall be punished for the intent.*

2. Upon the statute prohibiting the *shipping wool, &c. to transport to any place over sea besides Calais*, and giving the mayor of the staple an action, &c. the Chief Baron said to the jury, that if the wool (then in dispute) *were shipped to be sent into Flanders*, and not to Calais, yet *de facto* they *shall be forfeited*, though they were not carried out of the haven, and that the seizing them was lawful; and directed the jurors to enquire of the intent at the time of the shipping of the wool, and not what happened after. 37 H. 6. 12. b.

3. In *decies tantum* it is supposed that the defendant took money *pro credito dicendo*, and also that he gave verdict against the plaintiff. The giving the verdict only is traversed; this is not material; for if he *takes money to this intent*, it is sufficient. D. 95. b. pl. 39.

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4. A. in order to turn one P. out of possession of an house, *caused a lease to be made by J. S. (a stranger who had nothing in the land) to B. for years*; and afterwards *A. caused B. to bring an ejectment against one C. who by A.'s procurement answered to the action, and A. paid the fees to the attorneys both of plaintiff and defendant, as A. himself confessed, and as was also declared by B. and sent a copy of the declaration to C. for which falsity, being plain to the court, and for contempt in refusing to answer to the interrogatories the court were in opinion to send him to the Fleet*. It was insisted that this was no falsity because it was not executed or performed, but rested only in intention; but it was answered, that *intent is material in treasons and transportation of wares*, though no act be executed. Manwood Ch. B. held, that in this case is more than an intent; though there be not any falsity to the party, yet this is an abuse to the court, viz. practice to play all parts, and to abuse the officers, which Clench affirmed, and they said, that this matter is punishable and to be punished severely; so he was awarded to be committed to the Fleet and fined, but as for the pillory they would advise. Sav. 31. pl. 73. Mich. 24 & 25 Eliz. White's case.

\* This is misprinted, and should be 5 & 6 E. 6. cap. 20. according to Rastall.— An action was

5. A. statute was made \* 5 E. 6. 7. *to punish any usury in expectation*. An act of parliament can make the *intent issuable*, though the common law does not allow it; for thought is secret. But at this day an information lies not for usury without a corrupt loan; for it is founded upon the 37 H. 8. cap. 9. which requires such loan and receipt; and the statute of 13 Eliz. cap. 8. makes the contract void, though there be no receipt. Jenk. 88. pl. 7c.

Brought upon this statute, and found against the defendant; but it being moved in arrest of judgment, that the statute was misrecited, being mentioned to be 6 E. 6. instead of 5 & 6 E. 6. and also that the plea made a jeofaile, it being quod non-receptit; whereas the statute says nothing of the receipt, but *forbids the loan for usury to be had or hoped for*, though it be not rendered. But the reporter says it seems well enough, and that when defendant traversed the surplage, viz. the receipt of interest and so much over, this is negativa pregnans, and implies a confession, that the plaintiff lent and delivered the money for usury; and then the office of the court is to give judgment upon this confession; but no judgment was given, though it was long depending. D. 95. a. pl. 36. to pl. 39. Mich. 1 Ma. Whitton v. Maurice Marine.

6. The common law does not restrain any man from *going beyond sea*; unless restrained by the king's writ of *ne exeat regnum*, or by



by the king's proclamation. The writ of ne exeat regnum mentions, that the party prohibited intends to prejudice the kingdom. These writs and proclamations are necessary for such restraint; for the common law allows not the intent to be issuable. Jenk. 88. pl. 70.

7. *Voluntas reputatur pro facto.*

This is to be under-

stood where any act is done or word spoken, or an endeavour used to commit treason, although effect doth not follow; but imagination in treason without act or word is not punishable nor ever was. Jenk. 88. pl. 70.

Three persons were arraigned for misprision of treason in counterfeiting and coining rix-dollars, gilders, and shivers; and upon evidence the jury found that they had mingled much base metal with the silver and conveyed it over sea, and uttered it there, and they were found guilty and pardoned. D. 296. Marg. pl. 20. [but it is misprinted and should be 21.] cites Pasch. 4 Car. B. R. the King v. Plum, Mash, and Gresham.

See more as to Intent or Intention at Devisé, Grant, Aberrment, and the several other proper heads.

Inter alia,

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(A) Pleadings.

1. *PATENT* of exemption from the collection of tenths was pleaded by the abbot, *quod alias inter recorda*, viz. de termino Paschæ *inter alia continetur quod dominus rex, &c. rehearsing the words of the patent and the writ of allowance, et quod viso, et intellecto placito, et processu prædictis, &c. (and did not shew any matter of plea or process against him) and a judgment quod idem abbas de compoto prædicto ab eo exacto erga dominum regem exoneretur, &c. prætextu, &c. and so he has pleaded a judgment, and does not shew upon what matter the judgment was: for he says, de compoto prædicto, and does not shew any account or process against him to account, and because he pleaded by rehearsal, or by the words quod continetur, &c. or quod patet, &c. and did not aver it by matter in fact, nor plead it by matter in fact, therefore, per judicium, the plea was disallowed, and the abbot charged of the collection, pro hac vice; for patent nor record shall be pleaded by rehearsal, but by matter in fact; and he ought to have said, that the king by his letters patents granted to him, &c. and that process was made against him to account, and that upon this his patent was allowed, &c. and then conclude, prout patet in such record, &c. Br. Pleadings, pl. 110. cites 21 E. 4. 44.*

S. C. cited Pl. C. 126. a. that he ought to say precisely, the king granted that he should be discharged; or that he recovered; otherwise it is no plea, any more than if in præcipe quod reddet, he says, quod inter recorda continetur, that he recovered; for it may be contained among the records,

and yet not be a record.—Ibid. 143. b. cites S. C.—So where A. made a lease for years by indenture to B. and therein B. covenanted to pay annually at two feasts, 37 l. rent, at a place off the land, and that in case the rent or any part thereof, should be arrears and unpaid, though not demanded, the lease should be utterly void, and lessor might lawfully enter. The rent was not paid at the time. A. without making any entry, made a lease of the premises to C. B. brought an action of trespass against C. who pleaded the said lease to B. And that further, in the said indenture of lease made to B. it is contained, that if the rent &c. be arrears, &c. the lease should be void, &c. and A. might re-enter; and shewed that the rent was arrears, &c. This was held ill-pleading, it being only by way of recital, and is no precise affirmation that B. had covenanted that the lease should be void, but only that the indenture says so, whereas B. ought to have said, that so it is covenanted, &c. Pl. C. 131. b.

Hill.

Hill. v. Ma. 1. Browning v. Beston.—But if the indenture had been inrolled *de verbo in verum*, then it had been sufficient to have pleaded as here; for by the inrolment it would have appeared to the justices judicially, and then the saying that it is contained in the indenture is a putting of them in remembrance of a thing apparent to them in the record. But as it is here, it is not good. Ibid. 143. b. per Bromley J.

\* Per Brian.—  
S. P. by Holt Ch. J. Comb. 253. Gold v. Barket.—  
S. C. cited by Montague Ch. J. and said that every recovery is intire and

2. Sci. fa. to execute a fine of 200 acres of land; Sulyard said, that pending this *scire facias* J. B. had brought a *formedon* of 100 of the acres of land *inter alia*, and had recovered, and had execution, and prayed that the writ should abate of this parcel; and \* no plea, because he pleaded *inter alia*; for a recovery shall be pleaded *certain* to every intent, and the said words (*inter alia*) are not certain to any intent; for it ought to be said, that he brought *formedon* of † 200 acres, and recovered, and had execution, of which these 100 acres which are now in demand are parcel. Br. Pleadings, pl. 115. cites 22 E. 4. 8.

therefore to say, that *inter alia* he recovered, &c. is not good, but must plead certainly. But where an act of parliament is several and has several branches (as the 23 H. 6.) one to restrain one thing, another to restrain another, &c. so that those branches (though contained in one chapter) make several acts of parliament, and concern several matters, in such case, where one branch only concerns the party, it is sufficient for him to recite that only, and there *inter alia inxritatus* suit, is good pleading. For the recital of this branch only, is a recital of an intire and several act of parliament. But otherwise it is of a recovery; because all contained in the record is only one recovery, and therefore the whole ought to be recited, and so a diversity. Pl. C. 65. a. b. Mich. 4 E. 6. in case of Dive v. Manningham.—S. P. as to pleading an act of parliament. 2 Sid. 86. Per Glyn Ch. J. Trin. 1658.—† Orig. is (100) and so it is in all the editions, and therefore misprinted.

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\* Per Brian.

3. And by \* him, in trespass the defendant said, that the place is 100 acres of land, of which J. S. was seised in fee *inter alia*, and infeoffed him thereof *inter alia*, [it is no plea] but shall say ut supra; and after, Sulyard amended his plea accordingly. Brook makes a quære, if it may not be permitted in a feoffment, though it is not good upon plea of recovery. Br. Ibid.

4. In avowry for rent it was pleaded, that a fine was levied *inter alia* of the rent, to the use of a stranger and also a recovery. The plaintiff, in bar to the avowry, pleaded *nient comprise* in the fine or recovery. The avowant demurred; it was argued that the avowry was not good, because it was double, it being *nient comprise* in the fine or recovery, and it was held not good: then it was urged, that it was not good, because the plea was, that the fine was levied *inter alia* of the rent, but ought to have recited all the record, it being intire, and cited 22 E. 4. 8. But per Cur. contra, because the course is not so. And Coke Ch. J. said, it was well pleaded; for should he be compelled to recite all that is mentioned in the fine, it might, perchance, make a long plea, and nothing to the purpose. And he likewise held it good, though *not said per nomen*. Roll. R. 72. Mich. 12 Jac. B. R. Parvis v. Yeaton.

5. In an *assumpsit* the plaintiff declared, that the defendant, in consideration of a marriage, &c. *inter alia* promised to pay so much; after verdict for the plaintiff, judgment was given against him, because he ought to set forth the whole promise, which is intire. All. 5. Mich. 22 Car. B. R. Powell v. Waterhouse.

A. by

6. *A.* by his will made *B.* and *C.* executors, and appointed that they should dispose of his goods according to a schedule thereto annexed, and died. *B.* and *C.* shewed the will, without the schedule, to the spiritual court, who refused to grant administration to them, unless they would give bond to perform the decree of that court, as to the surplus of the goods after debts paid. They gave such bond. And the spiritual court decreed them to pay to 15 of *A.*'s relations 1500 l. and other monies to others. Afterwards, the money not being paid, the relations brought an action upon the case, and declared, that whereas among other things, it was decreed, without mentioning those other things, or the obligation, which was the foundation of the whole; and this being moved in arrest of judgment, it was answered, and resolved, that this being an action upon the case, it is not requisite to declare specially; for the non performance is the cause of action, and not the special performance. 2 Sid. 85. Trin. 1658. Chambers v. Cooker.

7. And it was held, that an arbitrement as well as a decree may be pleaded inter alia. And the same law of a feoffment upon condition; for the condition remains to be shewn in the replication, as in the principal case, to be shewn in defeasance, but it is otherwise of a condition precedent. Ibid.

8. The old way of pleading a record, was to begin at the original, and not to omit so much as any continuance, summons or severance; but if there are divers matters in a record, it is sufficient to plead any of them inter alia. Per Holt Ch. J. Comb. 253. Pasch. 6 W. & M. B. R. Gold v. Burket.

9. An avowry was, that *J. S.* being seised in fee of such and such parcels of land, did by his deed, &c. grant a rent-charge of, &c. out of them per nomina, &c. inter alia, &c. and exception was taken, that the avowant ought to name all the lands charged, and not by way of inter alia; for the defendant might then plead entry and suspension, extinguishment, &c. in respect of the parcels omitted, and it would be so in an assise; for there all the land must be put in view, and the tenants all named. But it was offered contra, that indeed where the grant is out of several particular parcels in certain, there those parcels ought to be certainly named in the avowry; but where the grant is general, there it would be enough to name one place in certain with an inter alia. And said that multitude of \* precedents would make a law, but seemed to approve of the exception; for he said, that in avowry, it would be ill to say he demised such land inter alia. 12 Mod. 319. Mich. 11 W. 3. Orby v. Pullen. The cases in the margin were cited.

See Co. Ent. 590. —6 Co. 39. Finch's case.—5 Co. 69.—1 Co. 54. 143.—Hearn's Pleader, 761.—1 Sand. 189.—2 Sand. 195.—Thomf. Ent. 273, 276. Winch. 951. 979. 1013. 3 Cr. 326. —Cr.

Car. 520. and Bredon's case.—See 2 Cr. Stoner v. Corbet.

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## Interest.

### (A) *What is an Interest.*

See Estate.  
—Devise.  
—Licence.  
—Trust.

1. **A.** Is bound to pay to B. 20 s. per ann during during 20 years, *towards the education of his son.* Per Monson, those words, (towards the education of his son) are idle words, and the payment shall endure if the son die. Quære. Dal. 116. pl. 7. 16 Eliz.

2. One, that *takes land to halves to sow*, has no interest; for it is only a bargain. Goldsb. 78. Hill. 30 Eliz. Hare's case.

3. An *award*, concerning a *lease* for years of land, was that one of them *should have the land.* It was agreed that this is a good gift of the interest of the term, and cites 12 Aff. 25. but if the award were that he *should permit and suffer the other to enjoy the term*, this does not give the interest in it. Cro. E. 223. Pasch. 33 Eliz. B. R. Trusloe v. Ewer.

4. A *patron* has but *jus presentandi*, and not any interest. Arg. Cro. J. 53. Mich. 2 Jac. C. B. — And therefore, after an avoidance, one jointenant of a next presentation cannot release to the other; for now they have no patronage. Adjudged. D. 283. Marg. pl. 29. cites H. 32 El. C. B. Lincoln v. Brooksby. — Owen 85. S. C. accordingly by the name of Brooksby's case. — Cro. E. 73. S. C.

5. *Lease to three for their lives*, with a covenant that the land shall remain to the survivor of them for 99 years; by this the survivor has a good interest. Brownl. 136. Pasch. 4 Jac. Clerk v. Sydenham.

Collation by  
bishop for  
lapse is not  
by way of  
interest,  
but by way  
of provision  
for the

6. If the *lapse* incur, and then the *ordinary dies*, the king shall present, and not the executors of the ordinary; for it is rather an administration than an interest. Hob. 154. Mich. 10 Jac. in Colt and Glover's case, Hobart, cites F. N. B. 34. (G) 25 E. 3. 24. Dy. 87. is doubtful whether to the King or to the *Metropolitan*.

cure of the church, to supply the negligence of the patron. 3 Salk. 202. cites Pasch. 13 Car. B. R. Lunne v. Dudson.

Godb. 17.  
Ld. Mount-  
joy v.  
Lord Hun-  
tington.

7. The Lord Mountjoy, seised of the manor of Canford in fee, did by deed indented and inrolled *bargain and sell* the same to Brown in fee, in which indenture this clause was contained, provided always, and the said Brown did *covenant and grant to and with* the said Ld. Mountjoy, his heirs and assigns, that the Ld. Mountjoy his heirs and assigns *might dig for ore in the lands* (which were great wafts) parcel of the said manor, *and to dig turf also for the making of allom.* Resolved, that this did amount to a grant of an interest, and inheritance to the Ld. Mountjoy, to dig, &c. Co. Litt. 164. b.

8. At Guildhall, in *ejectment* for a messuage in London, it was objected against the title of the plaintiff, that this was a messuage *above 40l. per ann. rent*, and that the *custom* of the city is, that there ought to be *warning given for the space of half a year*, where  
the

9. A *bailiff* has no interest. Cro. J. 177. Trin. 5 Jac. B. R. in case of Gibson v. Searl.

II. *Licence to use ground or yard* gives an interest in it, so that the licence was not revocable, but it amounts to a lease at will; and this seemed to be the opinion of the court, and that he thereby had such a possession, as not to be turned out by a revocation, but by an ejectment. 11 Mod. 42. Pasch. 1705. B. R. Anon.

12. A mortgage is an interest in land, and on non payment, the estate is absolute in law, and his interest is good in equity to entitle him to receive and enjoy the profits till redemption, or satisfaction, and, on a foreclosure, has the absolute estate both in law and equity. Per Pratt Ch. J. 9 Mod. 196. Roper v. Ratcliffe.

**See Devise.**  
**—Execu-**  
**tory Devi-**  
**ses.—**  
**Portions.—**  
**Remainder.**

Per Pop-  
ham. Yelv-  
85. in case  
of Clerk

Fitzh. Cove-  
ged.—Mo.

**Roll, Ex-  
ecutor (Y)**  
pl. 1. S. C.  
takes no  
notice of a  
devise  
thereof by  
William,  
but says it  
shall go to  
his execu-  
tor. —  
**2 Roll,  
Grant (N.)**

pl. 2. S. C. says that William cannot devise this possibility within the six years.

**(C) Interest**

Vid. De-  
vise.—  
Mortgage.  
—Note—  
Portions  
(C. 2.)

(C) Interest Money. Allowable in what Cases,  
other than Legacies, Mortgages and Portions.

Lands de-  
vised to be  
sold for

payment of debts, decreed accordingly. The creditors, by book and simple contract, moved to have interest for their debts, which had been proved before the master, and to be standing out above 12 years, alleging there was sufficient to pay all. But denied. 21 Car. 2. N. Ch. R. 136. Dolben v. Pritiman. — Contra by Ld. C. Macclesfield, who said it was the daily practice, and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits. Trin. 1722. 2 Wms's Rep. 27. Maxwell v. Wertenhall.

2. Where lands are charged with payment of a sum in gross, they are also chargeable in equity with payment of interest for such sum. Hill. 29 Car. 2. Fin. R. 286. Shipton v. Tyrrel.

3. Interest is recovered by way of damages, where damages are recovered ratione detentionis debiti; but not where damages only are recovered. For interest is not recovered occasione dampnorum; per Powell J. 2 Salk. 623. Hill. 10 W. 3. B. R. Sweatland v. Squire.

Interest to  
be made  
principal,  
from the  
time of  
stating the  
account.

4. A bill was to foreclose an infant, and an account was decreed. The master reports 2600 l. due; a subsequent order being to compute interest from the report, Wright K. doubted if interest should be allowed for the interest. Mich. 1700. 2 Vern. 392. Bennet v. Edwards and Selby & al.

MS. Tab. tit. Interest, cites 28 Feb. 1707. Kelley v. Ld. Bellew. — Stated accounts shall carry interest, especially in case of mortgages, and more strongly when settled by a master of the court pursuant to any order. MS. Tab. tit. Interest, cites 25 Febr. 1717. Stroud v. Moor.

A master's report, computing interest due on a mortgage, makes that interest principal, and to carry interest: for a report is as a judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the party's disobedience to the court, in not complying with the time of payment, ought to subject him to interest; per Ld. C. Parker. Wms's Rep. 653. Trin. 1720. Brown v. Barkham.

But if the mortgagor signs an account whereby he owns so much due for interest. Ld. C. Parker questioned whether this will make the interest principal, because of itself it shews no intention or agreement for that purpose. Wms's Rep. 653. Trin. 1720. in case of Brown v. Barkham.

5. Lands by deed or will subjected to the payment of debts; if there be a bond debt, and the interest has outrun the penalty, it shall not carry interest beyond the penalty; for the design of the settlement was not to increase the debt beyond what is due, but to give a further security: however if devisee or trustee neglects to pay in a reasonable time, he shall after such neglect pay interest beyond the penalty; per Ld. C. Cowper 1707. 1 Salk. 154. Anon.

6. A term was vested in trustees for payment of all debts he should owe at his death, without preferring one debt before another. There were owing debts by bond, and by simple contract. Ld. C. Harcourt declared, that by this trust term, the simple contract debts became as debts due by mortgage and consequently should carry interest, as well as the debts secured by bond. Wms's Rep. 228, 229. Trin. 1713. Car v. Burlington (Countess.)

7. Where by a general and national calamity, nothing is made out



out of lands which are assigned for payment of interest, it ought not to run on during the time of such calamity. MS. Tab. cites 25 June, 1715, Basil v. Acheson.

8. A *recognizance* was entered into to pay 100 l. a year annuity to a third person. The annuity was in *arrear*, several years. Decreed per Ld. Cowper, that, the *recognizance* being in nature of a bond, the arrears were a debt secured thereby, and so must carry interest from the time they became respectively due. Mich. 3 Geo. 1. G. Equ. R. 142. Legate v. Shewell.

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9. No interest to be allowed for *costs*. MS. Tab. cites 6 Feb. 1719, Butler v. Burk.

10. By *marriage articles* the lady's father was to pay several sums at several times for discharging the husband's incumbrances; he advances money to the son in law, and maintains the wife and child for two years; such money and allowance for maintenance, shall be added to the foot of the account, and not carry interest. MS. Tab. cites 1721, Kirkwin v. Blake.

11. Where *excessive rates* are allowed for work in respect of slow payment, there should be no interest allowed; for interest is only allowed to supply the want of prompt payment. MS. Tab. cites 27 Feb. 1723, Dutche's of Marlborough v. Strong.

12. An annuity of 20 l. a year was devised by A. to J. S. out of A.'s personal estate, payable quarterly, and the same being 3 years in *arrear*, it was insisted that it should carry interest. But the court said, that this is only done where there are great arrears, but it is not usual to compute interest for so small a sum. Trin. 1723, at the Rolls. 2 Wms's Rep. 163. Batten v. Earnley.

The arrears of annuity, or rent-charge, are never decreed to be paid with inte-

rest, but where the sum is certain and fixed, and also where there is either a clause of entry, or *nomine pænæ*, or some penalty upon the grantor, which he must undergo if the grantees sued at law, and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other, but decreeing the arrears with interest. Per Ld. C. Talbot. Cases in Chan. in Ld. Talbot's time. 2 Mich. 1733. in case of Lady Ferrers v. Ld. Ferrers.

13. Money due to *testatrix* was out at interest, and the executor laid out considerable sums of his own money, in payment of her debts, before any came to his hands (out of the estate) as he suggested. Ld. C. King decreed him his money, and all just allowances; but it being insisted that he should have interest for the money so laid out, his Lordship said, if interest be a just allowance, the master will allow it; but if not, [and he allows it] except to his report. Though he said, he would not say, that in no case the executor should have interest allowed, yet he should be extremely cautious of doing it for money expended, before he receives it out of the estate, the consequence whereof he very well saw. But the master informing the court, that he never allowed interest, unless a particular order was for that purpose, the court reserved the consideration of interest and costs till after the master's report. Sel. Ch. Cases in Ld. King's time, 50. Mich. 1725. Macarte v. Gibson.

14. Interest was decreed for the yearly balance of a renewing account. MS. Tab. tit. Interest, cites 1 March, 1726 Ashton v. Smith.

15. Judgment

15. *Judgment debts* carry interest. MS. Tab. tit. Interest, cites 28 Apr. 1726, Parker v. Harvey.

16. Interest was allowed upon *demands due by covenant*, though objected, that they were *not liquidated*, and only found in damages. MS. Tab. tit. Interest cites 28 Apr. 1729. Parker v. Harvey.

17. *Devisee for life of a church lease for 21 years* remainder over *renewed the lease*, at the expiration of 10 years, and paid 36 l. for a fine, and a guinea for the lease. Ld. C. King denied to allow interest for the fine, because she was to have her life in the renewed lease, by virtue of the will, and though she might not perhaps outlive the first year, yet she had her chance for it, and so denied interest, but allowed the charges of the renewal. 2 Wms's Rep. 456, 459. Pasch. 1728. Addis v. Clement.

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18. M. a widow, by *settlement and will* of her late husband, was intitled to a jointure of 1000 l. a year, but was kept out of possession by the heir at law, (a son of her husband by a former venter) and therefore insisted upon the arrears and interest from her husband's death. But Ld. C. Talbot said, that interest for the rents and profits of an estate was never decreed yet, the sum being entirely uncertain. And though it may be said, that the lady is intitled to an estate of 1000 l. a year, yet that is not sufficiently certain, being only the perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, and some at another. Cases in Chan. in Ld. Talbot's time, 2 Mich. 1735, Lady Ferrers v. Ld. Ferrers.

Vide (F.)  
pt. 3.—  
Devise.  
—Portions.  
Tender.—  
Vendor  
and Ven-  
dee. (H)  
ex parte  
Manning.  
—\* Inter-  
est was  
allowed  
from the time of calculation of the report to the time of confirming it. MS. Tab. cites 1721. Kirwin v. Blake.

(D) In Cases where Interest shall be allowed, *from what Time* the Allowance shall be.

1. \* **WHERE** a defendant insisted on 800 l. to be due to him, but upon the master's report only 180 l. appeared due, the court ordered interest for the 180 l. from the time of confirming the report, and not before; because till then it was not any liquidated sum. Wms's Rep. 376, 377. Trin. 1717. Att. Gen. at the relation of Islington Overseers v. the Brewers Company.

2. A. having no child, devised to M. his wife, (with whom he had no portion, but had the expectation of a real estate) 500 l. a year out of all his estate, (which was very great) for her life, and made her executrix, and residuary legatee; and subject to the 500 l. a year, devised his real estate to R. L. afterwards there was an agreement between M. and R. L. that on M.'s renouncing the executorship and delivering over the personal estate to R. L. he would indemnify her, and pay her 540 l. a year (instead of 500 l. a year) free from taxes, half yearly. The arrears of the 540 l. a year, were by the master reported to be 820 l. and Ld. C. Cowper decreed interest from the very day of payment. Upon an appeal to Ld. C. Parker, it was among other things insisted, that according to the rule of the court, in

The re-  
porter adds  
a quere,  
and says,  
it seems  
otherwise,  
and that so  
has been  
the rule in  
these cases.  
But (as he  
says) the  
hardship of  
the princi-  
pal case;  
though  
antruly

In case of an annuity, though granted for a jointure, the interest should be computed only from the day when the subsequent payment after the arrear incurred became due. But Ld. C. Parker said, that *interest is a thing pretty much in the discretion of the court*, and that since Ld. C. Cowper, that great master of equity, who heard the merits, appointed payment from the very day it became due, and since it appears to be the widow's bread, the decree shall stand; and said, that he did not approve of the *diversity, that the interest should be carried on from the half year after the default of payment*, and asked if the payment were yearly, whether it should carry interest but from a year after the expiration of the year, when what became due, was *all the widow had to live upon?* Wms's Rep. 541 to 544. Trin. 1719. Litton v. Litton.

suggested) and the weight of Ld. Cowper's decree, before whom the whole merits of the cause were heard, seemed to influence the court in this matter, *ibid.*

544.—A jointure was made of land and houses, leased out at 17 l. a year for 5 years to come, but worth 108 l. a year. The husband covenanted for payment of 22 l. 10 s. quarterly, to make up the present rent 108 l. in case of his dying within the five years. [It seems, though not so stated in the case, that the husband died within the term.] On a bill for payment of several quarters rent and interest, it was insisted that the intent was to put the jointress in as good condition before the rent advanced, as if it actually was advanced; but not in a better, and that therefore she should allow taxes for the quarterly payments. But L. C. King said, he knew nothing what was the intent; but he saw here a specialty, whereby a man obliges himself to pay so much quarterly, for which he did not find any taxes paid; and so could allow none, and this being a personal covenant for payment of a sum in gross, interest must be allowed from the time each respective sum became due. Sel. Ch. Cases in Ld. King's time. 25. Trin. 11 Geo. 1. Lysons v. Vernon.

### (E) Upon Interest, and \* in what Cases it shall exceed the † Penalty [ 460 ]

\* See Mortgage (X. 3.)  
—† Penalty. (C)

1. **I**F one by deed or will, subjects his lands to the payment of his debts, and [amongst the rest] there is a debt due by bond, and the interest has out-run the penalty, it shall not carry interest beyond the penalty. For the design of the settlement was not to increase the debt beyond what is due but to give a farther security. But if devisee or trustee neglects to pay in a reasonable time, he shall after such neglect pay interest beyond the penalty; per Ld. C. Cowper. 1 Salk. 154. Trin. Vac. 1707. Anon.

2. Equity will never carry interest beyond the penalty where there has been no demand for many years. MS. Tab. cites 29 Apr. 1721. Galway v. Ruffel.

3. But where advantage is made of the money, interest shall be carried beyond the penalty. MS. Tab. 8 Feb. 1720. Ld. Dunsaney v. Plunket.

4. So where a bond is only a collateral security, interest may be carried beyond the penalty. MS. Tab. cites 1721. Kerwin v. Blake.

(F) How much ; Where the *Debt* was contracted in a Foreign Country.

1. **T**HE plaintiff, being a merchant, had *sugars due to him in Nevis on a bond with interest at 10 l. per cent. being the common interest of the country*; he intrusted one J. S. his agent there, to receive those sugars, and to return them hither. J. S. receives the sugars, but never returns them, but dies, leaving the defendant his executor, against whom the plaintiff brought his bill; and though it was urged that J. S. being an attorney, should be excused from interest, or at most should only pay the interest this country allows; yet it was held that the defendant should pay 10 l. per cent. interest, and that J. S.'s being only an agent or attorney, did not excuse him, because he had *misbehaved* himself. Trin. 1701. Abr. Equ. Cases, 289. Ellis v. Loyd.

And several precedents were cited to this purpose, as the case of LANE v. NICHOLAS, in which Turkish interest was allowed on a contract made there,

2. J. S. contracted a debt in *Ireland*, for which he gave a bond, and coming into England he was arrested here for the debt; and having brought a bill for relief, he insisted among other things, that he should not be obliged to pay Irish interest, the money being now to be paid here; but the court held, that he must pay Irish interest, and that in all cases interest must be paid according to the law of the country where the debt was contracted, and not according to that where the debt is sued for; but held it reasonable as the money was now to be paid here, that the plaintiff should have an allowance for the return of it out of Ireland. Trin. 1702. Abr. Equ. Cases 289. the Earl of Dungannon v. Hacket.

though both parties had been long in England. Abr. Equ. Cases, 289. in case of Earl of Dungannon v. Hacket. — So Indian interest was allowed on a contract made there between HARVEY AND THE EAST INDIA COMPANY. Abr. Equ. Cases. 289. — And a case on the Earl of Donegall's will, who, living in England, devised a rent-charge out of his estate in Ireland; and it was held, that it should be according to the English value, the will being made here. Abr. Equ. Cases. 289.

S. C. MS. Tab. cites. 1 Dec. 1718. India Company v. Ekins.

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3. A ship and cargo of J. S. were bought by the East India Company's agent in the Indies, of the commander who had no power to sell, and this was done by the treachery of the one, and indirect practices of the other, and seemingly without the privity of the company, though for their use; upon an issue directed, the value of both was found to be 3600 l. and interest being insisted upon for the plaintiff, and that it should be Indian interest, it was objected, that the value being uncertain, it could carry interest only from the time of the value ascertained by the jury, and that the plaintiff had rested 13 years upon his own bill, and so the allowing Indian interest, would make him gainer by his own delay. But Ld. C. Cowper thought the taking a man's goods, which he was trading with a much stronger case, than having money by loan, or even detaining money from him wrongfully, the trading being in order to turn it into money, and directed that the master see what the interest of money was in the Indies during those years, and what the charge of re-  
turning

turning money thence to England, and to allow Indian interest deducting such charge. Wms's Rep. 395. Hill. 1717. Ekins v. East India Company.

## Interrogatories.

### (A) *What they are ; and exhibited by whom:*

1. *ARE* questions exhibited in writing to be asked witnesses, parties, or contemnors to be examined. P. R. C. 217.
2. *Are exhibited by the party or directed by the court*, to be proposed, and asked the witnesses examined in the cause, touching the merits thereof, or some incident therein. P. R. C. 219. Curf. Canc. 242.
3. They are either *direct*, on the part of him who produces the witnesses, or *counter interrogatories* on the behalf of the adverse party. P. R. C. 219, 220. Curf. Canc. 242.
4. Ordinarily, *both plaintiff and defendant may exhibit direct and counter interrogatories.* P. R. C. 220. S. P. for when the parties  
are at issue it is necessary as well to consider what the other side may examine unto, as what we ourselves have to prove; that so counter interrogatories may be exhibited if there be occasion. Curf. Canc. 241.

### (B) Examined on Interrogatories ; in what Cases, and at what Time, on Contempts, &c.

1. **T**HIS court in regard the examining the defendant on interrogatories is omitted out of the decree would not now order it. 20 Car. 2. 2 Chan. Rep. 18. Macklow v. Wilmot.
2. The defendant is sometimes ordered to be examined on interrogatories *to discover fraud and practice*, or a *contempt*, or both. P. R. C. 217.
3. If a *party deny the contempt*, he is commonly by order examined before a master on interrogatories settled by him, who shall certify if the contempt be proved or no. P. R. C. 218.
4. A person in contempt *appeared* on an attachment, *and offered to be examined* on interrogatories; the court ordered them to be hastened and *filed in 4 days*, (though the common time allowed is 8) or the party to be discharged. P. R. C. 219.
5. One who is by the rule of the court to be examined upon interrogatories in the crown-office, ought to *attend the master* of the office, *who is to examine him within 4 days after the interrogatories are put in* for him \* to be examined upon, for the speedier dispatch of justice; and he is not bound to attend before. 2 L. P. R. 73. cites Mich. 22 Car. 1. B. R. Note, upon a motion to be discharged because no interrogatories were put in within 4 days, it was ruled, that the 4 days must be in term. Comb. 8. Hill. 1 & 2 Jac. 2. B. R. Anon.

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(C) *Examined on Interrogatories How. On Contempts, &c.*

A defendant, who after 4 insufficient answers, was to be

examined, had by order of the court (for special reasons) leave for one of her counsel to see the interrogatories (to advise her upon them in point of law) but not to have a copy. P. R. C. 218. ——— Ordered to have a copy. N. Ch. R. 119. 19 Car. 2. Hawtry v. Trollop ——— S. P. if the party be to be examined on a bare contempt. P. R. C. 218.

1. **C**OUNSEL was ordered to have not a copy, but a sight of the interrogatories, to which the defendant was to be examined. Chan. Cases, 66. Pasch. 17 Car. 2. Gower v. Baltin-glass.

2. A man is charged with a contempt; upon interrogatories he clearth himself on his oath; the other party can proceed no further in this matter, but shall take his remedy by action if he will. Comb. 63. Mich. 3 Jac. 2. B. R. Anon.

3. On affidavit of extortion, though the course of the court be to take a recognizance to answer interrogatories, yet in case of great oppression, the court may commit the party, and he must answer in vinculis; per Holt Ch. J. Comb. 448. Trin. 9 W. 3. B. R. Anon.

(D) *Examined on new Interrogatories. In what Cases.*

1. **A**FTER commission taken away no interrogatories are admitted here in court, to cross the plaintiff's examination. Toth. 176. cites Mich. 13 Jac. Berryman v. Berryman.

2. Defendant may be examined in court upon new interrogatories, if it be a joint commission. Toth. 176. cites 13 Car. Lewis v. Owen.

3. When the party has a commissioner present, he can never examine new interrogatories by commission as to the merits; but a commission was ordered on suggestion of alteration and interlineation of exhibits after a former commission; for this has happened since, and was not examined to by the commissioner, not being then in being. Chan. Cases, 273. Hill. 27 & 28 Car. 2. Richardson v. Louth.

4. A defendant, having answered the first interrogatories imperfectly, was ordered to be examined on new ones, which being exhibited, he answered only the former; upon motion the court ordered him to pay costs, to be taxed by a master, as not having obeyed the order of court, but given the plaintiff a needless expence. P. R. C. 218.

5. A defendant ordered to be examined to an account is examined short; the plaintiff prays, that the interrogatories may be amended, which the court denied. P. R. C. 218.

6. When witnesses are examined in court upon a schedule of interrogatories,

But new  
interroga-



rogatories, there shall be no new interrogatories put in to examine the same witnesses. P. R. C. 221.

rogatories may be exhibited in court

for examining *new witnesses*, at any time before publication, though there has been a joint commission executed in the country; and the court will on motion give leave, on a supplemental bill, to add to the first interrogatories, so as the new interrogatories contain nothing but what relates to the supplement. P. R. C. 22. cites Ord. Ch. 126.—Curs. Canc. 243.

7. If either party have a *commission de novo* after he hath examined on a former, he must examine on the *same interrogatories*, as were exhibited by him on the former commission, and no other, without order or consent of parties. P. R. C. 221.

Curs. Canc. 243.

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8. If leave is given to examine a witness after publication and before bearing, a master is commonly ordered to settle the interrogatories, that they may be to such points only as were omitted before, and as are now ordered to be examined to. P. R. C. 221.

Interrogatories for proving particular points needful, upon a reference

ence to a master, shall be directed by the master, and shall be to such points only. P. R. C. 221.—Curs. Canc. 243.

9. Where interrogatories are exhibited in the examiner's office and witnesses examined thereon, either party may, without application to the court, or order for that purpose, exhibit one or more interrogatories, or a new set of interrogatories for further examination of the same, or other witnesses. Ch. Prec. 386. Pasch. 1714. Andrews v. Brown.

But where a commission is taken out for examination of witnesses there no new inter-

rogatory, or set of interrogatories, can be exhibited without motion and order of court; agreed both by court and bar. Ch. Prec. 386. Andrews v. Brown.—Abr. Equ. Cases, 233. S. C.

10. Witnesses were examined, and publication passed, but the depositions were suppressed, because the interrogatories were leading. Afterwards a new set of interrogatories were allowed to be settled before a master, for the witnesses to be re-examined. Trin. 1718. Ch. Prec. 493. Spence v. Allen.

(E) How they must be; and in what Cases set aside, or not read.

1. **THEY** must be drawn, or perused and signed by counsel; else they are to stand suppressed. P. R. C. 220.

Curs. Canc. 242.

2. They must be engrossed on parchment. P. R. C. 220.

Curs. Canc. 242.

3. Interrogatories must be short, pertinent, and to the points necessary. P. R. C. 220.

Curs. Canc. 242.

4. They must be exhibited before any witness be examined on either side. P. R. C. 220.

S. P. for the witnesses are

to be examined thereby. Curs. Canc. 242.—If the witnesses be examined before an examiner of the court, the interrogatories must be produced before, and left with him: if in the country on a commission the interrogatories must be either annexed to the commission at the issuing thereof, or by consent of parties (which now seems, generally to be intended) they may be exhibited before the commissioners on opening the commission. P. R. C. 220.—Curs. Canc. 243.

5. Christian name was mistaken in the title of the interrogatories; per Cur, the depositions cannot be read, nor can the title be amended

though most of the witnesses since their examination were gone to sea. Pasch. 1702. 2 Vern. R. 435. White v. Taylor.

• P. R. C.  
220. cites  
Ord. Ch.  
216. S. P.

6. If an interrogatory is \* *leading* it is good cause to *suppress the deposition*. See 2 Vern. 472. Mich. 1704. in the case of Callow v. Mime.

—So the *tendering a deposition ready drawn* to a witness, or if brought by the witness in writing, and delivered so to the examiner or commissioner, is a sufficient cause to suppress a deposition. 2 Vern. 472. in case of Callow v. Mime.—These are accounted *leading words*, *did you not do, or see*, such or such a thing, &c. and so are all such as are too particular, or seem to point more to one side of the question than the other. P. R. C. 220.—Curs. Canc. 242.

## [ 464 ] (F) Demurrer to Interrogatories, for what Causes.

1. **A** *Witness* demurred to an interrogatory, because he *claimed interest in the land*; but disallowed because he did not swear to the interest, nor what interest he claimed. 2 Chan. Cases, 208. Mich. 27 Car. 2. Jefferson v. Dawson.

2. A witness cannot *demur* because the question asked him is *not pertinent to the matter in issue*; for it did not concern the witness to examine what was the point in issue; per North K. Pasch. 1683. Vern. 165. Ashton v. Ashton.

3. In case of a *prosecution of a contempt for breach of an order of court or otherwise grounded upon an affidavit*, the interrogatories shall not be *extended to any other matter than what is contained in the said affidavit or order*; and if any other be exhibited, the party to be examined, may for that reason *demur* to them, or refuse to answer them. P. R. C. 219.

4. If *impertinent* interrogatories be put to a person who is ordered to answer interrogatories, his way is to demur to them; for there is no way but to answer or demur. And there ought not to be an interrogatory *leading the party to a penalty*. 12 Mod. 499. Pasch. 13 W. 3. the King v. Raw.

## See (D) pl. 4. (G) Punishment for *refusal* to be examined thereon.

So it is if he  
enters his ap-  
pearance  
with a regis-

1. **A**FTER a party is brought in upon a contempt, and is *ordered to be examined* on interrogatories, if he *refuses*, he will be *committed*. P. R. C. 219.

ter, upon a process of contempt, and is ordered to be examined, and departs without being examined, and without licence. P. R. C. 219.—Curs. Canc. 94. cites Ord. Chan. 138.—And if he shall, upon his examinations, or by proofs, be found in contempt, and thereupon committed, he shall clear such his contempt and pay the prosecutor his costs before he be discharged of his imprisonment. Curs. Canc. 95. cites Ord. Chan. 139.—And though he be cleared of his said contempt, yet he shall have no costs in respect of his disobedience, in not submitting to be examined without the prosecutor's trouble and charges in moving the court as aforesaid. Ibid.

## Intestate.

### (A) Intestate. *Who.*

1. **T**H E R E are divers kinds of intestates, one that makes no will, another that makes a will and executors, and the *executors refuse*, in this case the *deceased dies quasi intestatus*; and this is within the statute of W. 2. cap. 19. 2 Inst. 397. Pl. C. 279. a. 282. a. cites S. P. in case of Greysbrooke v.

**Fox.**——And if he, to whom the ordinary grants administration after refusal of the executor, in action against him *pleads that the deceased made executor, who administered absque hoc, that he died intestate*; the plaintiff may *shew the special matter* to maintain his writ. Br. Administrator, pl. 32. cites 4 H. 7. 13.

2. If A. by will appoints that the executors of J. S. shall be his executors, and he dies living J. S. there till the death of J. S. this is a dying intestate of A. for in the mean time A. has no executor. Pl. C. 281. b. by Dyer and Walsh. Pasch. 7 Eliz. in case of Greysbrooke v. Fox. So if A. makes J. S. [to be] his executor a year after his death; for within

\* the year he dies intestate, and therefore for this time the ordinary has power to commit administration, and it shall never be disproved; per Dyer and Walsh. Pl. C. 281. b. in case of Greysbrooke v. Fox. — And if executor proves the testament, and dies intestate, there, from the death of such executor dying intestate, the first testator died intestate, and for that reason the ordinary may grant administration. Per Dyer and Weston. Ibid. 281. b. 282. a. \*[465]

3. Where the strictness of the *civil law* is observed, there a man \* cannot die *partly testate and partly intestate*; though here in England where that ceremonial strictness is not observed, but all immunities enjoyed, being not obliged to any other observance in making testaments than what is *jure gentium*, a man may several ways die partly testate and partly intestate. 1 Godolph. Orp. Leg. cap. 19. f. 4. \* S. P. Ibid. 2d. part. cap. 25. f. 8. near the end.

4. Error was assigned that one pleaded (*cum testamento annexo qui obiit intestatus*;) which is absurd and repugnant; per Cur. it is well, for though one make a will, yet if he make no executor he is intestate. Comb. 20. Pasch. 2 Jac. 2. B. R. Anon.

## Inventory.

### (A) *What it is, and the Original.*

1. **A**N inventory is a *description* or repertory orderly made of the goods and chattels of a person deceased, valued and appraised by four indifferent and credible persons, or more experienced in such affair, and of the neighbourhood to the deceased: which inventory every executor or administrator ought to exhibit to the ordinary at such times as he shall appoint. This inventory proceedeth from the civil law; for whereas by the ancient law of the Romans the heir

was obliged to answer all the testator's debts, whereby inheritances or heritages did often become to many persons rather prejudicial, than profitable or advantageous, the emperor Justinian, the more to encourage persons to assume and take upon them this charitable office, ordained, that if the heir would first make and exhibit a just and true inventory of all the testator's substance coming to his hands, he should then be no further charged, than to the value of the inventory. Godolph. Orph. Leg. 150. f. 1.

(B) *Necessary ; in what Cases ; and the Punishment of not making it.*

A. by will among other legacies gave C. a younger son 2000 l. to be paid at three several payments, and made B. his eldest son executor, leaving a very great personal estate. B.

1. 21 H. 8. *THE* executors, or such persons to whom administration shall be committed, taking to them two at least, to whom the person dying was indebted or made any legacy, and upon their absence two other persons being next of kin to the person dying, and in their absence two other honest persons, shall make a true inventory of all the goods, as well moveable as not moveable, that were of the person deceased; and the same shall cause to be indented, whereof the one part shall be by the executors or administrators, upon oath to be taken before the bishop, &c. delivered into the keeping of the bishop, &c. and the other part to remain with the executors or administrators, and no bishop, &c. shall refuse to take any such \* inventory so tendered to him in court, together with his oath to verify the same.

proved the will, and swore to bring in an inventory, and a time is assigned by the judge for the doing it, but he not doing it, C. cites him before the judge, who is satisfied that there needed not any. The will before the citation was proved per testes, and sentenced to be a good will; the reason why the judge thought the inventory not necessary was, because the two first payments were made and releases given, and as for the last B. offered payment thereof to C. and had allowed him 6 l. per cent. though the will gave only 4 l. Upon appeal to the delegates the whole cause was heard, and sentence given, that there was no need of an inventory at the plaintiff's instance. C. brought a commission of review, and prayed that the sentence be reversed, and that B. may be compelled to bring in an inventory for these reasons: 1. That there may be found another will in which C. may be executor, and then he will be to seek for the estate. 2. There may be specialties taken by A. in the name of C. and no trust being declared, the same will be construed an advancement to C. 3. B. the present executor may die intestate, and then the administration de bonis non will belong to C. 4. This statute says, that the executor shall make a true and perfect inventory. 5. B. had sworn to do so, and no judge can dispense with his oath. Notwithstanding these arguments, sentence was confirmed by Ld. Ch. J. North, and Wyndham and Raymond J. and Dr. Newton, and Dr. Oxendon commissioners of review; and said that, as to the first three arguments, there shall not be presumed another will, or specialties, or dying intestate; and as to the fourth, the intention of the statute was for the benefit of legatees and creditors, and it is found that B. has acknowledged in his hands 23000 l. more than enough to pay the debts and legacies. And by the statute the inventory is to consist only of goods, chattels, wares and merchandizes, and not of things in action, whereas this estate consists most of specialties; and it would be very disadvantageous to debtors, (as this case is) to have their debts discovered, when no necessity requires it; and the ordinary does frequently dispense with a longer time to bring in an inventory, and so he may dispense with the bringing in the inventory upon cause. Raym. 470, 471. July 18, 1682, Boon's case.

\*[466]

S. 8. Provides, that this act shall not prejudice any ordinary, or other person, having or hereafter to have authority for probate of testaments, but that they may convene before them executors to prove or refuse the testament, &c. and to bring in inventories, &c.

If he make no inventory, every legatee

2. The executor had need be cautious that he doth not intermeddle with, or administer, the testator's goods, until he hath made an inventory; for although the act of an executor is said to hold in law

law before the proving of the will, and the making of an inventory; yet for *intermeddling with the testator's goods*, as executor, *before* he hath made an inventory, or caused the same to be made, though not exhibited, he was according to law *punishable*; unless it were for doing such things as could not conveniently be deferred till the inventory were made, as concerning things relating to the *funerals*, or disposing such things as *servando servari non possint*, and such like. Besides, if he make not an inventory, and yet administer, he may be compelled to discharge out of his own purse more debts and legacies than perchance the testator's goods and chattels did amount to. Godolph. Orph. Leg. cap. 20. f. 5.

may recover from him his whole legacy; for in such case the law presumes goods sufficient to pay all the legacies, and that the executor fraudulently substracts

the same; whereas he is not otherwise presumed to have more than described in the inventory, the same being lawfully made. Swinb. 3 part. cap. 17. at the end.—Besides, if an executor refusing to make an inventory administers the goods of the deceased, he may be punished at the discretion of the bishop or ordinary. Swinb. 4 part, cap. 6.—And he shall be obliged to satisfy all the testator's debts and legacies out of his own estate, upon the \* presumption that he had assets of testator's to discharge the whole. Ibid.—\* Ibid. 6 part, cap. 10. S. P.—S. P. Godolph. Orph. Leg. cap. 21. f. 3.

3. Where the defendant *did not exhibit* an inventory, the court charged the whole legacy on him after 20 years, though he pretended he had no assets. Toth. 183. cites 15 Car. Hewet v. Baker.

4. 22 Car. 2. cap. 10. f. 1. enacts, that all ordinaries and ecclesiastical judges, having power to commit administration, shall, upon their granting administration of intestate's goods, take bonds with sureties, two or more in the name of the ordinary, conditioned (among other things therein expressed) to make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said A. B. (the administrator) or into the hands and possession of any other for him; and the same so made to exhibit or cause to be exhibited into the registry of, &c. at or before the day of, &c. next ensuing.

5. The executor had not an inventory; wherefore it was said, they ought to intend assets. 12 Mod. 346. Mich. 11 W. 3. Anon.

### (C) Of what Things; And how.

1. Inventory exhibited by administrator, shall not estop him to plead a deed of gift of the same goods, in a suit against him in the spiritual court by one of the next of kin to account, and prohibition granted accordingly.—But for debts and things in action which cannot pass by the gift, for them he shall account. Roll. R. 123. Hill. 12 Jac. B. R. James v. James.

2. A. makes executor, and devises after debts and legacies paid, *residuum bonorum* to J. S.—The party does not inventory all the goods, or undervalues them which he does put in; before all the debts paid, J. S. may sue the executor in the court of requests, to make him shew the very value of the goods there. Pasch. 1 Car. B. R. Palm. 409. Anon.

3. M. was possessed of divers leases and conveyed them in trust, and after married J. S. and with part of the trust-money bought jewels,

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See Appraisment (B)

2 Bulf. 315. 316. S. C.

Fin. R. 411. Philips v. Philips.

Godolph. Orph. Leg. 153. f. 5.

cites S. C. and says, that things in action shall be put into the inventory.

jewels, and died. J. S. took letters of administration of the goods of the wife; and the ecclesiastical court would make him accountable for the jewels and money and to put them into an inventory; But the court held that he should not put them into the inventory; because the property is absolutely in the husband, and he has them not as administrator; but things in action he shall have as administrator, and shall be accountable for them. Mar. 44. Trin. 15 Car. B. R. Sir John St. John's case.

4. By the stat. of 21 H. 8. cap. 5. the inventory is to consist only of goods and chattles, wares, and merchandizes, and not of things in action. Raym. 471. 18 July 1682. Boon's case.

But where in the inventory it was set down desperate debts, those shall

5. If an inventory be produced where there is one particular of good and bad debts, the defendant shall be charged with the whole, because he doth not distinguish them, unless he can discharge any part of it by special evidence. Per Holt. Cumb. 342. Trin. 7 W. 3. B. R. Anon.

not be assets, unless the plaintiff can prove that the defendant has received them; but such as are not set down desperate, whether arrears of rent or any other, shall be accounted assets, whether paid or not. Per Holt, Ch. J. 21 Mod. 225. Pasch. 1709. Anon.

6. Executor put in a second inventory somewhat different from the former and would offer that, sed non allocatur, no more than one shall produce his own answer in chancery as evidence for himself; but a creditor may charge him with which inventory he pleases. Cumb. 342. Trin. 7 W. 3. Anon.

7. The same shall be indented, whereof one part shall be, by the said executor upon his oath for the truth thereof, left in the registry of the court, the other part to remain with himself. In which inventory, the testator's goods and chattles are particularly to be valued and appraised, at their true and just value. Godolph. Orph. Leg. 151. l. 3.

8. Generally all the goods and chattels, whereof the testator died rightly possessed, (some certain things for special reasons and legal reservations only excepted) ought to be put into the inventory; and therefore leases are not exempted: also corn growing on the ground, is to be put into the inventory, because it belongs to the executor: but not grass or trees so growing, which belong to the heir; nor glass windows, nor wainscot; nor tables dormant, nor mangers, nor any thing affixed any way to the freehold; nor the box or chest containing the evidences of the land; nor doors, locks, or keys, nor fishes in the pond, nor doves in dove houses, situate in lands belonging to the heir, nor bona paraphernalia, that is, the wives convenient apparel, suitable to her degree; for as they are not to be put into the inventory of her husband's goods, so neither are they liable to the payments of his debts, but the wives jewels, chains, and borders, and other rich ornaments of her person, are to be put into the inventory of her deceased husband's goods. Likewise all household stuff is to be put into the inventory; under which word are comprised tables, stools, forms, chairs, carpets, hangings, beds, bedding, linnen, bason with ewers, candlesticks, with all sorts of domestic vessels, whether of earth, wood, glass, brass, or pewter, yea, apparel,



parcel, books, weapons, tools, cattle of all kind, victuals, corn and grain of all sorts, wains, carts, plowgear, coaches, (though not household-stuff,) also plate and jewels; and generally all things not affixed to the freehold, but coming to the executor, and not descending to the heir, are to be inventoried; but such things as are affixed to, and so become part and parcel of the freehold, and all things that descend to the heir, and come not to the executor, are to be exempted out of the inventory. Godolph. Orph. Leg. 152. f. 4.

4. Also debts due to the testator are to be put into the inventory; but monies raised upon lands given by the testator for the payment of debts or legacies are not to be inserted into the inventory. Godolph. Orph. Leg. 152. f. 4.

## (D) Considered How; and the Effect thereof when exhibited.

1. *ALL* such goods and chattles as are contained in the inventory, are presumed to have belonged to the testator, and now to the executor, and no more. Therefore if a creditor or legatary affirm that the testator had at his death more goods than are appraised in the inventory, he must prove the same; for such an inventory by the civil law cannot be disapproved, unless the number of the witnesses be twice as many in the number as they which do prove it; and if the executors or administrators do make a true inventory, they shall not be charged further with any debts than the goods of the testator or intestate will extend. Godolph. Orph. Leg. 151. f. 3.

Swinh. 6  
part. cap.  
10. pag.  
407, 408.  
S. P.

2. The testator's widow exhibited an inventory of his goods in the prerogative court. Legatee complained that several goods, of which the testator died possessed, (naming them) were omitted and demanded an account what became of them. The defendant pleaded, that they were disposed of by the testator in his life-time, and by his leave, and upon this plea the spiritual court gave costs, it being a confession of more assets than in the inventory; defendant moved for a prohibition, suggesting that the court proceeded to falsify an inventory, which they had no power to do; because by exhibiting thereof, their power was determined. And the court were of opinion, that at the suit of the creditor they could not, but at the suit of a legatee they might. 8 Mod. 168, Trin. 9 Geo. 1. Hinton v. Parker.

A note is added in the margin, that by the civil law, if the creditors or legatories, or any other person concerned, should discover any thing omitted, or should mistrust any omission, they

will be admitted to prove the omissions and frauds which they allege. Ibid. cites 1 Dom. 622.

# Joint and Several.

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(A) Joint Acts as Contracts, &c. Where several join, and all are not capable, whose Act it shall be said to be.

See Baron and Feme.

1. *DEBT* against the provost and scholars of a college in Cambridge, because T. M. late provost, predecessor of the defendant, and the scholars, by F. their servant, bought two bells of the plaintiff

plaintiff for 40 l. here at London where the action is brought, which came to the use and profit of the college aforesaid, and after T. M. was removed from the provostship, and the defendant was elected and made provost, and the defendant being often requested did not pay; and by some justices the buying of the provost, and the contract cannot be good, nor by the abbot and covent, dean and chapter, baron and feme; for it is only the buying of the dean, provost, abbot, or baron, and the others shall be only as dead persons in the law; but by some justices the contract is good and shall be intended the bargain only of the provost, and the name of the scholars is only furplufage; for the contract of the provost and the coming to the use of the college is the effect of the matter. Br. Corporations, pl. 53. cites 5 E. 4. 70.

See Actions.—  
Officers.  
—See (C)

## (B) Joint and several. *What Things may be done Jointly and Severally.*

Two justices are appointed to bear and determine a matter; if one dies, all the

1. **JOINT** acts, or joint authorities, as of the justices of assize, or the 4 coroners, or the 2 sheriffs in London, and such like, ought to be executed jointly, and their returns and precepts accordingly, and yet one of them may serve the process. Br. Jointenants, pl. 25. cites 39 H. 6. 40.

power is gone because it was joint. But it is otherwise in B. R. and C. B. and in Ireland and Wales; the power of one judge is not given joint with the others; but the words are *confutantes se unum justiciariorum*, &c. Therefore offices judicial do not determine by the death of one, though there are many judges; nor ministerial ones, pro commodo publico; but otherwise it is of powers concerning private interests. Jenk. 40. pl. 76.

And though the covenants are with them and either of

2. An interest cannot be granted jointly and severally; as if a man grants proximam advocationem, or makes a lease for years, to two jointly, and severally, those words (severally) are void, and they are jointenants. 5 Rep. 19. Mich. 29 & 30 Eliz. Slingsby's case.

them, yet they must join in action. Ibid. 18. b.—S. C. cited Sand. 155. Trin. 20 Car. 2. in case of Eccleston v. Clipsham.—So of a bond to two & cuilibet eorum, they are void words. Jenk. 263. pl. 63.—But grant of advowson to two to present A. is good. Jenk. 263. pl. 63.

Jenk. 262. pl. 63.

3. A power or authority may be joint and several. 5 Rep. 19. Slingsby's case.

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## (C) *What shall be said to be Joint or Several.*

1. **JOINT** words of parties shall, by construction of law, be taken respective and severally. 5 Rep. 7. b. (d) Mich. 31 & 32 Eliz. B. R. Justice Windham's case.

2. When it appears by the count, that the several covenantors have, or are to have, several interests or estates, there when the covenant is made with the covenantees, & cum quolibet eorum, those words make the covenant several, in respect of their several interests. 5 Rep. 19. Mich. 29 & 30 Eliz. Slingsby's case.

3. There is a great difference between a power given to two, and an interest given to two; a lease for years is made to two, & cuilibet eorum,

*eorum*, this is a joint lease, and the words (*cuilibet eorum*) are void; this is to maintain quiet and avoid contention. So of an obligation made to two & *cuilibet eorum*, or a grant of the next avoidance to two & *cuilibet eorum*. But a power to sell, lett, or make livery to two & *cuilibet eorum* is good; for there is no profit. *Cupido divitiarum est causa belli.* Jenk. 262, 263. pl. 63.

4. And a grant of the next avoidance to two & *cuilibet eorum* to present A. to the said church is good. For the contention is avoided by restraining both to present A. Jenk. 263. pl. 63.

## \* Jointenants.

### (A) What Things they may do, the one to the other.

† 1. [ If two jointenants for life are, of whom one is a feme covert, and the baron and feme levy a fine to B. the other jointenant, by which they grant the land & totum & quicquid habent in it, &c. to B. for the life of the feme with warranty, and after B. dies during the life of the wife. There shall be no occupancy, but lessor may enter into the whole, because this fine, though it was intended as a grant, yet it shall enure as a release, because one jointenant cannot enfeoff his companion, and therefore can not grant to his companion. Mich. 22 Ja. B. R. adjudged upon a special verdict between Eustace and Scawen. ]

and from tenants in common, &c. and anciently they were called *participes*, and not *hæredes*. Co. Litt. 181. —† Jo. 56. S. C. —Release (L.) pl. 3. S. C. (Z.) pl. 2. S. C. —2 Roll. R. 398. 444. 472. 485. S. C. —Cro. J. 696. Mich. 22 Jac. B. R. S. C. —If there are three jointenants, and one grants, sells, bargains, assigns, sets over, and confirms, to one of the others, all his right, title, interest, claim, demand, and estate of and to the lands held in jointure, this is sufficient to pass the purparty; and though the jury found quod concessit, yet the court will adjudge quod relaxavit. 2 Saund. 96. Pasch. 22 Car. 2. Chester v. Willan. —Raym. 187. S. C. —Sid. 452. S. C. —Vent. 78. S. C. But it must be pleaded, quod relaxavit.

\* Jointenants are so called, because the lands, or tenements, &c. are conveyed to them jointly, conjunctim seoffati, &c. or qui conjunctim tenent, and are distinguished from sole or several tenants, from parceners,

[ 2. One jointenant cannot enfeoff his companion, because this passes by way of † livery, and every of them is seised per my & per tout. 22 H. 6. 42. b. 43. Perkins, f. 193. 197. ]

Cited per Doderidge, 2 Roll. R.

Co. Litt. 200. b. —But such feoffment will enure by way of confirmation. Br. Confirmation, pl. 11. cites 22 H. 6. 42, 43. —† And one cannot make livery to the other. See Partition (D) pl. 3. —Jointenants can only pass the estate by release, and not by feoffment properly speaking; for they are in by the first feudal contract, and therefore a second feoffment cannot give any other or further title or notoriety. Because every person \* shall be supposed to be in by the elder and most worthy title, which is the prior feoffment, and therefore the second feoffment is impertinent. Treat. of Ten. 68.

445. —

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[ 3. If a grant be to A. and B. and to the heirs of A. — B. who is jointenant with A. cannot surrender his estate to A. because he is seised per my & per tout with A. and A. with him. 22 H. 6. 51. ]

4. If there are two jointenants, and one confirms the estate of the other, he has nothing but a joint estate as he had before. But if there are such words in the deed of confirmation, to have and

and to hold to him and his heirs, all the tenements, whereof mention is made in the confirmation, then he has an estate sole in the tenements. Co. Litt. f. 523.

One jointenant may make a lease at will to 5. One jointenant cannot make a lease to his companion, because they have joint possession. Arg. Ow. 102. cites 10 E. 4. 3. Popham Ch. J. contra, but Fenner J. doubted.

the other; but only saying to the other, that *I will not occupy it*, this is no assent that his companion shall have all, nor is any thing given by this to his companion. Cro. E. 314. Hill. 36 Eliz. B. R. Geanes v. Portman.—Ow. 102. S. C. by the name of James v. Portman.

If one jointenant releases to the other rendering rent it is void. But in case of a coparcener it is good. Arg. Trin. 21 Jac. B. R. 2 Roll. R. 445, 473.

6. *Rent charge* granted by one to his companion, whether it be void, or whether on the death of the grantor, the grantee surviving shall not have, or on the death of the grantee, the heir of the grantee shall not have it of the grantor surviving. Vid. Kelw. 128. b. pl. 95.

7. A. B. and C. 3 jointenants give their lands to D. a stranger in tail, remainder to A. in tail; per Mead J. The remainder is void. 4 Le. 187. 19 & 20 Eliz. Anon.

So if A. and B. are jointenants of a term, and A. 8. If A. and B. are jointenants, and A. makes a lease for life of his moiety to C. and grants the reversion to B. the same is good. 4 Le. 187. 19 & 20 Eliz. B. R. Anon.

grants his moiety to his companion, the same is good without question if it be by deed; but if it be by word quere. 4 Le. 187. 19 & 20 Eliz. B. R. Anon.—But where A. and B. were jointenants for life, and A. granted his moiety to his companion for 60 years to begin after his death, it was adjudged void; because it was a possibility. And so it is of a covenant to stand seised to the use of, &c. as it was judged in BARTON AND HARVEY'S CASE, 37 Eliz. Godb. 146. 3 Jac. Whitlock v. Hartwell.—Mo. 776. S. C.

9. A. and B. jointenants for 100 years, B. takes a lease of A. for 15 years, to begin, &c. the same shall conclude B. to claim the whole term or parcel of it by survivor. 2 Le. 159. 21 Eliz. B. R. in Pleadall's case.

But if there be 2 jointenants of a next avoidance which is since become void; 10. If there be 2 jointenants of a rent, the one may release to the other; but if the rent be behind, now the one cannot release his interest in the arrears to the other; per Walmesly Serjeant. Le. 167. Mich. 30 & 31 Eliz. C. B. in case of Brokesby v. Wickham & al.

after the falling the one cannot release to the other, nor can it be surrendered. D. 283. Marg. pl. 29. cites Brooksby's case.—Because no interest is in him to whom the release is made. D. 283. Marg. pl. 29. cites the case of Lincoln v. Brookesby.—Cro. E. 173. Hill. 32 Eliz. B. R. S. C.—If one jointenant for life, release to the other, the releasee has now only estate for her own life, and yet the other's life has continuance to answer incumbrances, &c. 6 Rep. 78. Pasch. 5 Jac. C. B. Ld. Abergaveny's case.

† A right of survivorship is as good as a right by descent; neither is there any thing unreasonable or unequal in the law of jointenancy, each having an equal chance to survive, and the duration of all lives being uncertain, if either party has an ill opinion of his own life he may sever the jointenancy by

(B) Of what Estates, Things, or Actions, there may be a ‡ Survivor.

[1. TWO jointenants of a rent service or a rent charge are, the survivor shall recover all the arrearages incurred in the life of his companion. † 33 H. 6. 20. b. adjudged. 15 E. 3. Aff. 18.]

\*[472]

by deed; so that survivorship *can be no hardship*, where either side may at pleasure prevent it. 2 Wms's Rep. 529. Trin. 1729. by the Master of the Rolls in case of Cray v. Willis.

† Br. Jointenants. pl. 49. cites S. C. and Fitzh. Affise, 18. and it shall be recovered by assise or avowry.—So if the survivor be disseised, per Choke and Littleton. Ibid. pl. 3. cites S. C.—Br. Affise, pl. 7. cites S. C.—If a *rent* be granted to A. and B. and the rent is behind, the survivor shall now *avow* in his own name for the whole, and yet it was *in arrear* in the life of the other. Arg. Bull. 136. Trin. 9 Jac.

[ 2. If an *office of trust* be granted to two for their lives, no survivor shall be of it, but by the death of the one, the grant is void as to the other. 11 Co. 3. b. Auditor Curle's case. (But quære.) ] e ft

Vid. Survivor.

[ 3. The statute of 32 & 33 H. 8. ordains, that there shall be two auditors in the office in [the court of] wards; and one grant is to two of the office for their lives. By the death of one the grant is void. 11 Co. 3. b. Curle's case. ]

\*Orig. (un.)

[ 4. But if the grant be to two *conjunctim & divisim* and the survivor, the survivor shall have his part. 11 Co. 4. ]

[ 5. If A. and B. recover by assise of mortdancestor land and damages, and before execution of the damages B. dies, A. shall not have execution of all the damages by survivor, but only of a moiety, because the damages are *real*, being in lieu of the profits of the land, and therefore shall not survive. 14 E. 3. Execution, 75. adjudged. ]

Br. Jointenants, pl. 56. cites S. C. and Fitzh. Execution, 255.

[ 6. But if A. and B. recover a debt by judgment, and B. dies, A. shall have execution of all by survivor. 14 E. 3. Execution, 75. for this is *not real* in its original. ]

But where three defendants in quare impedit

barred the plaintiff, and had judgment to recover the advowson, and writ to the bishop, the one died, and the other two brought scire facias, and could not have execution, because three recovered by judgment, and two could not sue execution. Br. Jointenants. pl. 58. cites 11 E. 3. and Fitzh. Quare impedit, 55.

[ 7. If a recognizance or statute be acknowledged to A. and B. and B. dies, A. shall have execution of the whole by survivor. 14 E. 3. Execution, 75. 41 E. 3. Execution, 88. adjudged. 25 E. 3. 38. b. ]

Fol. 87.

[ 8. If A. and B. recover by assise of mortdancestor land and damages, and have execution of the damages by elegit of the moiety of the land, and after B. dies, A. shall have all by survivor, till all the damages levied; for this is by their joint execution one joint term, which shall survive. 14 E. 3. Execution, 75. ]

Br. Jointenant, pl. 56. cites a. C.

9. In quare impedit against baron and feme, the plaintiff recovered by false oath, the baron died, and the feme brought attain for the damages levied of the goods of the baron, and yet the feme by the attain was restored to the damages lost, and to the advowson, and recovered other damages by the attain, because if the first damages had not been levied of the goods of the baron, they should be levied of the goods of the feme who was party to the judgment; and therefore the attain survived as well for damages as for the principal. Br. Jointenants, pl. 46. cites 46 Aff. 8.

10. As the survivorship takes place among jointenants, so it takes place among those who have joint estate, or possession, with another, of a chattle real or personal; as if a lease of lands be made to several for term of years, the survivor of the lessee shall have the tenements to himself intire during the term. Co. Litt. f. 281.

11. If



Hereby it  
is manifest  
that sur-

vivorship holds place regularly as well between jointenants of goods and *chattles* in possession or *in right*, as between jointenants of inheritance or freehold. Co. Litt. 182. a.

[ 473 ]

11. If a horse or other *chattle personal* be given to several, the survivor shall have the horse solely. Co. Litt. f. 281.

13. In the same manner it is of *debts and duties*, as if an *obligation* be made to several for a debt, the survivor shall have the whole debt or duty.—And so it is of other *covenants and contracts*, &c. Co. Litt. f. 282.

14. The wares, merchandize, debts, or duties which *joint merchants* have as joint-merchants or partners shall not survive, but shall go to the executors of the deceased, and this is *per legem mercatoriam*, which is part of the laws of this realm for the advancement or continuance of commerce and trade, which is *pro bono publico*; for the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. Co. Litt. 182. a.

So it is  
when tene-  
ments are  
given to two  
and the  
heirs of the  
body of one

15. If lands be given to *two*, and the heirs of *one* of them, this is good jointure, and the one hath franktenement, and the other hath fee simple, and if he who hath the fee die, he that has the franktenement shall have the entiertie by the survivorship for his life. Co. Litt. f. 285.

of them begotten; the one hath frank-tenement, and the other fee-tail, &c. So that they are jointenants for life, and the fee simple or estate tail is in one of them; and because it is by *one and the same conveyance* they are jointenants, and the fee-simple is *not executed to all purposes*. Co. Litt. 184. a.

16. If lands are *let to two* for their lives *et eorum alterius diutius viventi*, and *one* of them grants his part to a stranger, whereby the jointure is severed and dies; here shall be no survivor, but the lessor shall enter into the moiety and the survivor shall have no advantage of these words, (*et eorum alterius diutius viventi*) for two causes; for that the jointure is severed, and because those words are no more than the common law would have implied without them. Co. Litt. 191. a.

17. As there are also jointenants by other conveyances than Littleton here mentions, as by *fine, recovery, bargain and sale, release, confirmation*, &c. so there are divers other limitations than Littleton here speaks of; as if a rent-charge of 10 l. be granted to A. and B. to have and to hold to them two, viz. to A. until he be married and to B. until he be advanced to a benefice, they are jointenants in the mean time notwithstanding the several limitations; and if A. die before marriage the rent shall survive, but if A. had married the rent should have ceased for a moiety & sic e converso, on the other side. Co. Litt. 180. b.

18. If two jointenants be in fee, and the one lets his part to another for the life of the lessor, and the lessor dies; some say, that his part shall survive to his companion, for by his death the lease was determined, and others hold the contrary, and their reason is first, that at the time of his death the jointure was severed; for so long as he lived the lease continued; secondly, that notwithstanding the act of any one of the jointenants there must be equal benefit of survivor as to the freehold; but if the other jointenant had first died there,



there had been no benefit of survivor to the lessor without question. Co. Litt. 193. a.

19. Lands were given to A. in tail, *remainder to the right heirs of B. who had issue two daughters M. and N.* and died; A. died without issue, M. and N. died; a formedon must not be brought by the heirs of both, but by the heir of the survivor; because they have that remainder as purchasers. 3 Le. 14. Mich. 8 Eliz. C. B. Stowell v. the Earl of Hartford.

20. Two jointenants, *one makes feoffment in fee on condition* and dies, the other shall not take benefit of the condition; per Wray Ch. J. 2 Le. 218. Pasch. 16 Eliz. B. R. in Humphreston's case.

21. A. and B. jointenants; *A. bargains and sells the land and dies before enrolment of the deed*; the land shall not survive to B. because the after enrolment makes the use to pass from the sealing and delivery of the indenture. Arg. 2 And. 161.

22. A. brought trespass against B. *for taking his cattle*. B. pleaded that A. was *possessed of the cattle jointly with another* not named in the writ, and demanded judgment of the writ; A. replies that the other was *dead* at the time of the action brought, B. demurs; court ruled a respondeas ouster. Sti. 102. Pasch. 24 Car. B. R. Scoble v. Tolye.

23. Two jointenants of a *copyhold, one surrendered and dies before administration*, survivor shall be prevented by admittance afterwards. 3 Lev. 386. Hill. 5 W. & M. C. B. in case of Benson v. Scott. —cites Co. Litt. 59. b.

24. A. and B. are jointenants *of the trust of a term*; A. dies, the executor of A. got an assigment from the surviving trustee; yet B. shall have the whole by survivorship; for per Ld. Cowper a trust of a term must go as the term at law would have gone by the like limitations. Pasch. 1706. 2 Vern. R. 556. Aston & al. v. Smallman & al.

S. C. cited by the Master of the Rolls. Trin. 1729. 2 Wms's Rep. 230. in case of Cray v. Willis.

### (C) What Things may survive [Charge.]

[ 1. ] *F baron and feme alien by fine with warranty and the feme dies, the warranty survives upon the baron during his life.* 22 E. 3. 1. Curia. ]

land of the baron only may be put in execution; because there are no moieties between the baron and feme. —So the case is reported. 3 Rep. 14. a. b.

[ 2. If two make a *joint warranty* and one dies, the survivor shall not be charged of all, but *the heir and the other shall be charged jointly*; because this is a *real charge* and no survivor. 3 Rep. 14. Sir Wm. Herbert's case. 17 E. 3. 41. b. adjudged 21 E. 3. 50. Contra 17 E. 3. 8. b. ]

See (F) — Devise (D. c) (E. c) — Executor (U. b. 2) — Survivor (G) The

But if the one has nothing to render in value, the other shall account for

the whole. Br. Jointenants, pl. 5. cites 41 E. 3. 3.

[ 3. So if two bind themselves in a *recognizance*, there shall not be

S. C. cited 3 Mod. 315.

be any survivor of it; because this *charges the lands*. 3 Rep. 14. Sir Wm. Herbert's case. 29 E. 3. 39. 29 Aff. 37. adjudged.]

See pl. 16.

[ 4. So it seems if a *joint judgment* be against two upon a *joint obligation* there shall not be any survivor. But Quære. ]

[ 5. If two are bound in a *recognizance*, and one dies, and the *other has nothing whereof to levy* the debt, the execution may be sued against the *heir* of him that is dead to have execution of the land to him descended in fee. 5 E. 3. 35. Execution 100. ]

S. P. Br.

Jointe-

nants, pl. 4.

cites 40 E.

[ 6. If two bind themselves in an *obligation* \* *jointly*, of this there shall be a survivor; for survivor shall be charged of all, because it is *personal*. 3 Rep. 14. b. Sir Wm. Herbert's case. ]

3. 27—So if the one be outlawed the other shall answer for the whole. Ibid.—S. P. but the obligee may bring an action against the survivor and the executor of the other if he will, and if both die he shall have an action against the executors of both. Ibid. pl. 55. cites 31 E. 3. and Fitzh. Exec. 82. —Ibid. pl. 16. says that it seems the obligee of necessity, shall have the action against the survivor, and the executor of the other; for the charge cannot survive, for the one who survived was never bound alone in the whole, therefore he and the executor of the other shall answer it, as it seems; nevertheless non arguitur.—And, if they were bound *jointly and severally*, yet per Markham he may have debt against the one and the executor of the other if he will. Ibid. cites 19 H. 6. 55. —\* If one dies before judgment the survivor shall be charged alone. 4 Mod. 315, 316; in case of Lampton v. Collingwood.—Sid. 238. in case of Osborn v. Crof-bern.

[ 7. If A. *recovers damages in an assise against B. and C.* and after B. dies; A. shall not have execution against C. only, but against C. and the *heir*, and terr-tenants of B. 19 E. 3. Execution 81. B. being returned dead in a sci. fa. was not compelled to answer till the heir and terr-tenants of B. were warned. ]

\* Ibid. pl. 4. cites S.

C. so if the one is out-  
lawed; and  
to see that

charge may survive, as well as profit.

8. If a man makes *two* his *bailiffs* and the one dies, the other shall answer the whole account clearly; per Thorp and Finch. justices, quod nemo negavit. Br. Jointenants, pl. 50. cites \* 41 E. 3. 3. —Ibid. cites 13 E. 3. Fitzh. Brief 672. agreeing herewith.

[ 475 ]  
Br. Charge,  
pl. 41. cites  
S. C.

9. If there be *two jointenants of a term* and one is *condemned in debt*, or damages, and dies, and the other survives, the term is discharged of the execution; per Chaunterell. Br. Charge, pl. 12. cites 7 H. 6. 1.

10. Debt upon a contract against B. who abated the writ, because the *contract* was made by B. and C. who was alive, not named, &c. and after C. died, and another *action* was brought against B. only; so see that charge may survive. Br. Jointenants, pl. 21. cites 9 E. 4. 24.

11. If a *lease* be made to two rendering rent with words that *if it be in arrear, and demanded of them both, &c.* And the one dies, and it is demanded of the other who survives, and he does not pay it, this is a good demand, and he may re-enter. Br. Jointenants, pl. 62. cites P. 33. H. 8.

12. If two jointenants are seised of an estate in fee simple, and the one grants a *rent-charge* by deed to another out of that which to him belongeth; in this case during the life of the grantor the rent-charge is effectual; but after his decease the grant of the rent-charge

is void as to \* charging the land ; for he who hath the land by survivorship shall hold all the land discharged, and the reason is because the survivor claims and † hath the land by the survivorship ; and hath not, nor can claim any thing by descent from his companion, &c. But otherwise it is of parceners. Co Litt. f. 286.

\* And it is no interest in the land itself. Fin. Law, 8vo. 98.—Arg. Bridgm.

43. S. P.—† He has it by title paramount and from the grantor. Arg. 2 Roll. R. 286.—But if the one jointenant grants a rent-charge out of his part, and *after releases to his companion* and dies, he shall hold the land charged ; for that he is out of the reason and cause set down by Littleton ; because he claims not by survivor in as much as the release prevented the same. Co. Litt. 185. a. —6 Rep. 78. Lord Aberganey's case. —Show. 377. Pasch. 4 W & M. cites S. C. that he shall never avoid the grant, because he comes to the estate by his own act, viz. *acceptance of the release*, and not per jus accrescendi. —So if *A. B. and C.* be jointenants in fee ; and *A.* charges his part and then releases to *B.* and his heirs and dies ; it is agreed by all that the charge is good for ever ; because in that case *B.* cannot be said to be in from the first feoffor, for he has a joint companion at the time of the release made, and several writs of præcipe must be brought against them ; and albeit the *release* of one jointenant to the residue of the jointenants makes no degree in supposition of law, neither is there any several estate between them, but the estate of him that releases is as it were extinguished and drowned in their estate and possession so as one præcipe lies against them, yet shall they hold the land charged. Co. Litt. 185. a. (w) —Show. 377. 4 Le. 153. cites 33 H. 6. 4 & 5.

13. If two jointenants be of a term and the one of them grants to *J. S.* that if he pay to him 10 l. before Michaelmas, then he shall have his term ; and if the grantor dies before the day, *J. S.* pays the sum to his executors at the day, yet he shall not have the term, but the survivor shall hold place ; for it was but in the nature of a communication. Co Litt. 184. b. 185. a.

Fin, Law. 8vo. 98.—But if jointenant of a term had made a lease for years to begin at

*Mich.* it should have bound the survivor. Co. Litt. 185. a.—S. P. Arg. Bridgm. 43.

14. If there are two jointenants infants, and one makes a lease for years and dies, the other shall avoid it ; for the lease is utterly void, of which every stranger may take advantage ; but of acts voidable it is otherwise ; per Wray Ch. J. 2 Le. 218. Pasch. 16 Eliz. B. R. in Humphreston's case.

But if one leases for life and makes a conveyance in person and dies, the

other shall not avoid it because it is a voidable act only ; per Wray Ch. J. 2 Le. 218. in Humphreston's case.

15. Where the lands of several are charged with a debt, it shall not lie wholly on the survivor ; as if a recognizance is acknowledged by several, the lands of all are thereby become chargeable and execution shall be equally made, and if one die, a sci fa. must be brought against his heir and tertenants ; for they being all in æquali jure the charge survives. 4 Mod. 315.

If judgment in debt be against two, and after one dies, execution in the per-

sonalty may be against the survivor ; but if he takes execution in the realty it shall not be against the survivor only, but against him and the heir of the other. Lev. 30. Pasch. 13 Car. 2. Smart v. Edson. —Raym. 26. Edsar v. Smart. S. C.

## (D) Of what Things there shall be a Survivor [to [ 476 ] his Advantage.]

[ 1. ] If two jointenants are disseised, and after one dies, the survivor shall have all. For the right continues joint. 21 E. 3. 50. b. ]

[ 2. If two infants [jointenants] alien in fee, and after one dies, the survivor shall have the whole ; for notwithstanding the feoffment,

But if one only alien in fee and

dies, the  
survivor  
cannot en-  
ter, by reason of the infancy of his companion; for by his feoffment the jointure was severed so long as the feoffment continues in force, so the heir of feoffor shall have *dum fuit infra ætatem*, or shall enter into the moiety. 8 Rep. 43. Hill. 45 Eliz. Whittingham's case.

3 Bulst.  
274. S. P.  
by Coke  
Ch. J. in  
case of  
Smalman v.  
Agburrow.  
—Co. Litt.  
[ 3. If baron and feme and a third person purchase land in fee, and baron aliens all and dies, and then the feme dies, all shall survive to the third person; for the jointenancy was not severed by the alienation of the baron; for the feme and third person might join in a writ of right after the death of the baron. 35 Ass. 15. adjudged. 31 H. 6. Entre Congeable, 54. ]

187. b. 188. a. S. P. and the discontinuance should not have barred the entry of the survivor; for that he claimed not under the discontinuance, but by title paramount above the same by the first feoffment, which is worthy observation. Co Litt. 187. b. 188. a. — But if the husband had made a feoffment in fee *but of the moiety*, and he and his wife had died, their moiety should not have survived to the other. Co. Litt. 188. a.

So where a  
man leased  
his manor  
for 10 years  
4. If a lease be made \* to two during their lives, and one dies, his estate survives. 5 Rep. 9. per Popham, Ch. J. & tot Cur. Trin. 34 Eliz. B. R. in Brudenell's case.

to two, and they made a bailiff, and after the one made his executors and died, the other brought writ of account by the survivor, and well as it seems; for as the term shall survive, so the action and arrears shall survive. Br. Jointenants, pl. 22. cites 39 E. 3. 19. — \* S. P. by the Master of the Rolls. 2 Wms's Rep. 529. Trin. 1729. in case of Cray v. Willis. — But if a lease be made *as A. during the life of two*, without saying, and during the life of the longest liver, the estate determines not on the death of one. 5 Rep. 9. Per Popham Ch. J. and tot. Cur. in the case supra. — S. C. cited by Coke Ch. J. 3 Bulst. 131. and says that there is a difference between a *mere collateral limitation*, and where the same is *mixed with an interest*.

5. But if a bond be to pay during the life of two strangers, the payment ceases on death of one; per tot. Cur. and grounded themselves upon the distinction in BRUDENELL's case, between where the cestuy que vies have an interest, and the cases of collateral limitations. 1 Mod. 187. Slater v. Carew.

11 Rep.  
4. b. re-  
solved. Au-  
ditor  
Curle's case.  
6. But in some cases an interest will not survive, as if an office were granted to two and one dies, unless there are words of survivorship in the grant. 1 Mod. 187. 26 Car. 2. C. B. in case of Slater v. Carew.

(E) What shall be said, a Severance of the Jointure.

⏟ [ 1. ] If a feme covert and J. S. are jointenants for life of a copyhold,  
\* Fol. 88. and J. S. surrenders his moiety to the baron and feme, this is  
⏟ a \* severance of the jointure; so that he is tenant in common with his  
Roll. R. wife. Adjudged, my Reports. 14 Ja. Lane v. Pannel. ]  
238. 3. 7.  
438. S. C. adjudged.

[ 477 ] [ 2. If two jointenants in fee of a copyhold are, and one surrenders  
N. B. All in his moiety into the hands of the lord to the use of his last will, and by  
Co. Litt. his last will devises it to \* the other, this is a good devise; because  
by

by the surrender the jointure was severed between them. Co. Litt. 59. b. to this purpose, is 59. b. ]

only the following Pl. — \* Orig. (al'auter)—Brownl. 127. Hill. 5 Jac. Allen v. Nash.

[ 3. So if two jointenants in fee of a copyhold are, and one surrenders his part out of court into the hands of the lord, to the use of his last will, and after by his last will devises it to a stranger in fee and dies, and after at the next court the surrender is presented; by the surrender and presentment the jointure was severed, and the devisee ought to be admitted to the moiety of the land; for now by relation the state of the land was bound by the surrender. Mich. 2 & 3 Ph. & Ma. 6. Constable's case, cites Co. Litt. 59. b. ]

Noy. 152. Coke Ch. J. cites it as adjudged, in case Allen v. Nash.—S. P. Adjudged. Cro. J. 100. Mich. 3

Jac. B. R. Porter v. Porter——S. P. per Cur. cited 4 Mod. 254. Hill. 5 W & M. B. R. in case of Benson v. Scott.

[ 4. If A. and B. are jointenants in fee of land held of a common person, and A. is attaint of felony and executed, yet this is not any severance of the jointure; but this notwithstanding, the land shall go by survivor to B. till the lord enters for the forfeiture. Mich. 11 Car. B. R. per Curiam, between Harris and Wardell, upon the attainder of the Lord Castlehaven. ]

[ 5. But in the said case, though the lord does not enter in the life of A: who was attaint, by which the land comes by survivor to B. yet the lord may enter after for a forfeiture into the moiety of A. for this was bound by the attainder, and the forfeiture relates to the felony committed, which by relation, when the lord enters, comes in paramount the title of B. and so prevents the survivor, and [makes] an alteration of the estate before the death of A. by way of relation. Mich. 11 Car. B. R. adjudged upon a special verdict between Harris and Wardell. Intratur Hill. 10 Car. Rot. 542. The lord Castlehaven was the person attainted, who was attainted of a rape. ]

Jo. 387. Ld. Audley's case S. C. adjudged, by Croke, Jones and Berkley, absente Brampston.

[ 6. If one jointenant in fee be attaint of felony, and after the other dies in the life of him who is attaint, his part shall survive to him who is attaint; held per Brampston in the said case of Harris and Wardell. But he held, that the lord shall not have this part by his attainder if he be pardoned afterward. But Barkley seemed, that he shall forfeit by his attainder all the land which shall come to him during his attainder, and therefore that the lord shall have this moiety also. ]

[ 7. If two jointenants of a reversion in fee are, and one grants his reversion, and before attornment, the other dies, his part shall survive to him who made the grant; because the jointure was not severed till attornment had; per Brampston in the said case. And though an attornment comes after, yet he shall have it by survivor, and it shall not be devested after by attornment. ]

8. In assise; land was demised to two for life, and to the longest liver of them; they made partition, and one died; the lessor entered; the lessee ousted him, thinking by these words (the longest liver of them) that the survivor should have the whole; and the lessor brought assise and recovered; for these words (the longest liver, &c.) is the com-

mon



mon law, and by the partition the jointure is severed for ever. Quod nota. Br. Jointenants, pl. 28. cites 30 E. 3. 8.

9. If a man leases land to two for 20 years, and confirms the estate of one for life; quære if by this the jointure be severed. Br. Jointenants, pl. 57. cites 32 E. 3. and Fitzh. Quid Juris clamat, 5.

[ 478 ]

Br. Parti-  
tion, pl. 4.  
cites S. C.  
—\* Orig. is  
(Dolet).

10. In assise, it was found by verdict, that two brothers purchased a mill jointly to them and their heirs, and there was a post in the mill, and it was agreed for reparation of it that \* a mark should be made in the post, and that one repair the one part to the post, and the other repair the other part to the post for ever, and that their intent was, that this should be a severance between them and their heirs, and one died, and the survivor ousted his heir, and he brought assise and recovered by award; for this is a good severance of the jointure. Br. Jointenants, pl. 37. cites 47 E. 3. 22.

11. Where a man and a villein purchase jointly, and the lord of the villein enters into the moiety of his villein, or if this moiety be recovered, the jointure is severed and the warranty also. Br. Jointenants, pl. 9. cites 48 E. 3. 17.

12. If a disseisor infeoffs baron and feme, and the disseisee re-enters, and the baron enters claiming to him and his fem., the feme by this is not made tenant, by reason that the jointure before was defeated by the entry of the disseisee, and the entry of the baron again is not lawful, and so nothing vests again in the feme. Br. Jointenancy, pl. 28. cites 14 H. 6. 26.

S. C. cited  
6 Rep. 13.  
a. Pasch.  
27 Eliz. C.  
B. in Mor-  
rice's  
case;  
where  
Coke says  
nota, that  
though

13. If two femes are jointenants and take barons, and the barons alien all and die, and one feme recovers one moiety by cui in vita, and the other feme recovers the other moiety, they shall hold severally; per Paston, Newton, and Ascue justices. Quære; for by the reporter, where land is given to two and the heirs of one who lose by default, and one recovers the one moiety by writ of error, and the other recovers the other moiety, by quod ei deforceat, they shall hold jointly sicut prius. Br. Jointenants, pl. 43. cites 19 H. 6. 45.

some books are, that judgment shall be given to hold in severalty in the case of jointenants, as 10 E. 3. 40. & 10 Ass. pl. 17. yet it seems to him that it will be hard in law to maintain the judgment; for 1. The plaintiff in assise ought to recover according to his plaint, and this is of nothing in severalty. 2. He ought to recover in the assise by view of the recognitors, and they had not view of any thing in severalty. 3. This will be to the prejudice, of the plaintiff as well for the survivor as for warranty, &c. and with this agrees 28 Ass. 35. where the case was adjudged, not upon any opinion at the assises, but upon adjournment in bank, and there adjudged that the plaintiff recover generally, though the plaintiff himself prayed that the judgment should be, that he hold in severalty; for the prayer of the party does not alter the judgment of the law in such case.

But if the  
one releases  
to all the  
others they  
are in by  
the first

14. If three jointenants are, and the one releases to one of the others in fee, he is in as purchaser of this part by the release, and of this the jointure is determined, and the survivorship is gone. Per Littleton. and Waingf. Br. Jointenants, pl. 2. cites 33 H. 6. 4, 5.

teoffor, and not by him who released, and the survivor shall hold; per Littleton and Waingf. Note the diversity, for it was not denied; and per Littleton, where the one charges, and after releases to all the others, they shall hold charged imperpetuum. But per Joce, they shall not hold charged imperpetuum, unless he who releases survives. Br. Jointenants, pl. 2 cites 33 H. 6. 4, 5.

So if the  
lessor had  
reserved to

15. If there be two jointenants in fee, and the one of them let-  
teth that which to him belongeth for his life, by such lease the frank-  
tenement



tenement is severed from the jointure; and by the same reason the reversion which is depending upon the same franktenement is severed from the jointure. Co. Litt. f. 302.

him an annual rent upon the lease, the lessor

only should have had the rent, &c. the which is a proof that the reversion is only in him, and that the other hath nothing in the reversion, &c. Co. Litt. f. 302.——Also if the tenant for life was impleaded, and maketh default after default, the lessor only shall be received for this to defend his right, and his companion in this case in no manner shall be received, the which proveth the reversion of the moiety to be only in the lessor: and so by consequence if the lessor dies living the lessee for life, the reversion shall descend to the heir of the lessor, and shall not come to the other jointenant by the survivor. But in this case, if the jointenant who hath the franktenement hath issue and dies, living the lessor and lessee, then it seemeth that the same issue shall have this moiety in demesne, and in fee by descent; because a franktenement cannot by nature of jointure be annexed to a reversion, &c. and it is certain, that he that leased was seised of the moiety in his demesne as of fee, and none shall have any jointure in his franktenement, therefore this shall descend to his issue, &c. Sed quære. Co. Litt. f. 302.

16. If two jointenants are of a lease for 21 years, and the one of them lets his part for part of the term, the jointure is severed, and survivor holds no place; for a term for a small number of years is as high an interest as for many more years, and so it was resolved. Hill. 18 Eliz. R. C. B. Co. Litt. 192. a. [ 479 ]

17. If two jointenants be and one makes a lease for life, this is a severance of the jointure, and several avowries shall be made upon them; otherwife of coparceners. Co. Litt. 192. a. So, if one makes a lease for years of her

moiety to a stranger to commence after her death; this is a severance of the jointenancy, and the lease of her moiety will be good against the survivor. 2 Vern. 323. Mich. 1694. Clerk v. Clerk and Lady Turner.

18. Marriage does not sever a jointenancy of the feme with another person. Pl. C. 418. b. Trin. 14 Eliz. Bracebridge v. Cooke.

19. Bargain and sale by one jointenant, who dies before enrolment, will sever the jointure by relation. Arg. Mo. 132. Trin. 25 Eliz. cites 6 E. 6.

20. Four jointenants of an advowson; if one grants over his interest it is good, and the survivor shall not hold place; per Anderson Ch. J. and Windham; and Rodes J. did not gainsay it, and Periam was absent; but Fenner spake against it, because it is an entire thing, but Anderson clearly to the contrary. Hill. 30 Eliz. Goldsb. 81. Kemp v. Bishop of Winchester.

21. When the reversion comes to the freehold the jointure is destroyed; but where the freehold comes to him in reversion and to another it is otherwise. Cro. E. 470. (bis) Pasch. 38 Eliz. B. R. Child v. Westcot.

For in the first case the freehold is merged. S. C. cited 2 Saund.

387. per Hale Ch. J. in case of Purefoy v. Rogers.——But there is no merger where the fee and franktenement are granted and created by one and the same conveyance and at one and the same time. Ibid.

22. If the reversion descends to one jointenant for life, or one jointenant for life purchases the reversion, the jointure is severed and the estate for life is drowned, Cro. E. 743. Hill. 42 Eliz. C. B. Taylor v. Seyer.

S. P. per two judges, and so it was ruled. 2 And. 202. Morgan's case.

23. If one jointenant makes feoffment to the use of his will, though the use results and reverts yet the jointure is severed. Arg. 2 Roll. R. 383. Mich. 21 Jac. C. B. in case of Royden v. Malster.

24. If one jointenant *bargains and sells to his companion*, this is a severance of the jointenancy. Arg. 2 Roll. R. 473. Mich. 22 Jac. B. R. in case of Eustace v. Scoyen.

Mod. 117.  
Green v.  
Proud. S. C.

25. Two jointenants in fee accept a fine to the heirs of one of them; yet they continue jointenants in fee as they were before. Vent. 257. Pasch. 26 Car. 2. B. R. Anon.

26. Holt Ch. J. said he did not know why a (*viz.*) should not make a severance as well as an habendum; and judgment accordingly. Cumb. 330. Trin. 7 W. 3. B. R. Ward v. Everard.

27. Two jointenants of an *advowson* agree *averunt inter se* thenceforth to be seised in common and not jointly, and that one should have one moiety and the other the other, and should present by turns, first A. and then B. which they afterwards did accordingly; per Cur. this (though by *deed of covenant*) is a good partition of the inheritance of this advowson; for by this agreement a separate interest is vested in A. and B. to present by turns, and, being *executed on both sides*, the inheritance is thereby severed. Carth. 505. Mich. 11 W. 3. B. R. Bishop of Salisbury v. Philips.

1 Salk. 286.  
Ford v.  
Grey.

28. If one jointenant levies a *fine of the whole*, this amounts to no ouster of his companion but it is a severance of the jointure, though he be in of the old use again, and though after the fine he has the same old estate, yet he has it in another manner; for the fine being for cognizance de droit come ceo, &c. presupposes a feoffment. 6 Mod. 45. Mich. 2 Annæ, B. R. Ford v. Lord Grey.

29. A mortgage severs the jointenancy of the trust of a term, 1 Salk. 158. Mich. 8 Annæ, York v. Stone in Canc.

### [ 480 ] (F) What Things or Acts shall bind the Survivor.

See (C)

Co. Litt.  
184. b.

[ 1. ] If two jointenants are, and one acknowledges a statute, or recognizance or judgment, and dies before execution the survivor shall hold it discharged. 6 Rep. 79. Lord Aberganey's case. ]

S. P. Co. .  
Litt. 184.  
b. and both  
in the case  
of the  
charge and  
of the recognizance,

[ 2. But if the statute recognizance or judgment be extended, or executed in the life of him who acknowledged it, and after he dies, the survivor shall hold it charged; for this is in nature of a lease. 6 Rep. Lord Aburg. implied. ]

statute, and judgment, if he, that charges, survives, it is good for ever.

Fol. 89.

See (U) —  
In such

[ 3. If two jointenants for life are, and one leases his moiety for years and dies, the survivor shall hold this charged with the lease. H. 13 Ja. B. R. adjudged without question, between \* Daniel and Waddington. ]

case the lessor reserved a rent to him and his heirs; and the court thought the term continued, and that lessee should hold discharged of the rent. D. 187. pl. 5. Mich. 2 & 3 Eliz. Anon. But there is added, *Quere bien*, — \* The lease was for 60 years if he and his companions so long live and held that the lease determined by the death of either of them. Cro. J. 377. Mich. 13 Jac. B. R. S. C.

[ 4. If two jointenants for life are, and one leases his moiety to another for certain years to commence after his death, this is a good lease

lease to charge his companion after his death; for this is a *present interest* in the lessee, though it be to commence in estate in futuro \* 2 And. 16 pl. 9. Anon. seems to be S. C. and there all the judges  
 \* Harben v. Barton. 3 Ja. B. R.  
 agreed between Whitlock and Huntwell. ]

except Popham, Anderson and Periam held, that this lease shall bind his companion as well as a lease made to commence immediately, or at a day after, if it takes effect in possession in the life of the lessor; but the other three held otherwise, and the cases are not like; for in the commencement it appears that it is not possible for this lease to take effect in the life of the lessor, nor can it by any means unless the lessor survives; and therefore the lease shall be void; and it was said, that the reason why a lease in possession by one jointenant shall bind his companion if he survives is, because as to the possession the jointure is severed, though as to the franktenement it is not, &c.—D. 187. Marg. pl. 5. [but misplaced against pl. 6.] cites Trin. 37 Eliz. HARDING v. CHARDE, [but seems to be S. C.] S. P. adjudged before all the judges of Serjeant's Inn to be good, but the opinion of 7 judges against 4.—Mo. 395. S. C. but states it as of jointenants in fee, and that it was adjudged a good lease to bind the survivor.—And ibid. says the like point was resolved in the Dutchy Chamber, and decreed there by the advice of Clench and Walmley J. and Brograve attorney of the dutchy in the case of Sharpner v. Hardenham.—S. P. resolved and agreed per tot. Cur. Cro. J. 91. Mich. 3 Jac. B. R. in case of Whitlock v. Horton.—And. Ibid. cites it as resolved before in case of Harby v. Barton.

[ 5. If two jointenants for life are, and one grants his moiety to J. S. to have for certain years to commence after the death of his companion, and the other moiety to the said J. S. by the same deed to have from the death of the lessor for certain years and dies; the survivor shall hold the land discharged of any lease, notwithstanding this grant; for the lease of his own moiety (which he might have leased) is not to commence till after the death of his companion, and he had not any power to lease the other moiety, which was the moiety of the companion, and so all void. M. 3 Jac. B. R. adjudged between Whitlock and Huntwell. ]

S. P. and the moiety of the companion is only a possibility and not grantable and it was agreed that if one jointenant covenants to stand seized of the moiety of his

companion, the covenant is void, though he should survive. Mo. 776. Trin. 2 Jac. Whitlock v. Hartwell.—Cro. J. 91. Mich. 3 Jac. B. R. by the name of WHITLOCK v. HORTON, and states it, that the other jointenant survived the lessor, and that it was resolved that the lease was not good for any part; but that by the first words it was a good lease by the lessor of her own part, had she happened to have survived her companion, which she did not, and therefore adjudged for the plaintiff.

[ 6. If a feme covert and J. S. are jointenants for life, and baron and feme by indenture lease the moiety of the feme for certain years rendering rent, and after the feme dies, the survivor shall not avoid this lease; because it was and is the lease of the feme prima facie, till she has disagreed to it, and only avoidable, and the survivor is not privy to her to avoid it; for the lease was an actual severance during the years. Adjudged. 14 Ja. my Reports Smallman v. Agborrow. ]

[ 481 ]  
 S. C. adjudged Roll. R. 442.—Bridgm. 42. S. C. adjudged.—3 Bulst. 272. S. C. adjudged.—

S. C. adjudged, and that it is as a lease made by her until she after the coverture, or one who claims in privity by her, avoids it by entry, whereas the jointenant is paramount the feme, by surviving her, and not under her. Cro. J. 417. B. R. S. C.

7. Where a man and his lands are chargeable to execution by any way, yet if he and another are jointenants, and the party who is charged dies before execution made of the moiety of his lands, and the other survives, the survivor shall hold it discharged. Br. Charge, pl. 61.

Br. Executions, pl. 148. cites 50 Aff. 5. that where the receiver of money

due to the king, and A. purchase jointly, the receiver dies, and A. survives, he shall not be charged; but where the baron and feme purchased a lease for 40 years, and the baron received ut supra, and died, the feme was charged by it; for it is a chattel; contra of franktenement; but Brook says quare inde.—Br. Charge, pl. 34. cites S. C. acc.—Br. Jointenants, pl. 30. cites S. C. acc.—Co.

———Co. Litt. 185. a. says, that if a recovery be had against one jointenant, who dies before execution, the survivor shall not avoid this recovery; because the *rights of the moiety is bound by it.*

This difference was agreed by Doderidge and Haughton J. Roll. R. 442. in case of Smallman v. Agburorow.

8. If two jointenants in fee are, and one of them within age makes a feoffment in fee of his moiety, and dies, the survivor shall not enter for the infancy of his companion; for by his feoffment the jointure was severed so long as the feoffment remained in force; but if both are within age and make a feoffment in fee, one joint right remains in them, and therefore if one dies the right will survive as from the first feoffor, and the survivor may enter into all. 8 Rep. 43. a. Hill. 45 Eliz. in the Star Chamber in Whittingham's case.

So it is if two jointenants be of a water, and the

one grants the several piscary. Co. Litt. 186. b. — But if one grants a common of pasture, or of turbarry, or of estovers, or a corodie, &c. out of his part, or a way over the land, this shall not bind the survivor; for it is a maxim in law that *jus accrescendi præfertur amicis*, and there is another maxim, that *alienatio rei præfertur juri accrescendi.* Co. Litt. 185. a.

See (K) — Presentment (G)

### (G) Tenants in Common. In what Cases.

5 Rep. 8. a. S. P. in justice Windham's case. cites 24 E. 3. 29. a.

[ 1. ] If a man leases for life the remainder to the right heirs of J. S. and J. D. who are alive at the time, their heirs shall take the remainder in common; because this may vest in one before [it vests] in the other, and cannot vest in both at one time. 18 E. 3. 28. ]

Devise to 2 equaliter and to their heirs is a jointenancy. 2 And. 17. Lowen v. Bedd.

[ 2. If a man seised in fee of a house, devises it to his wife for life, the reversion to his two sons equally and to their heirs and dies, the two sons shall have it in common. Tr. 41 Eliz. B. R. adjudged. See 30 H. 8. f. 133. See 28 H. 8. 28. f. 158. ]

Het. 55. NOKBURY v. WATKINS Mich. 3 Car. C. B. For should the survivor hold place it would be

[ 3. So if he devises to his two daughters and to the heirs of their two bodies begotten by equal portions equally to be divided and dies; those words (equally to be divided) makes them tenants in common, though they never make partition in fact; for his intent appears that it shall be divided, and by consequence that there shall be no survivor. Resolved. 3 Rep. 39. b. Ratcliff's case, and said that it had been so adjudged several times before. ]

against the will of the devisor; per Harvey. — But it was said that if the words had been (equally to be divided by J. S.) it had been clearly a jointenancy. — See pl. 5.

\*[482]

4 Le. 19. pl. 45. Pasch. 14 Eliz. C. B. in WEBSTER'S case it was held by Dyer and Weston that where such devise

[ 4. If A. devise certain lands to his three sons, infants, T. W. and R. and their heirs for ever, and there further follows this clause, and my will is that the said lands be equally unto my said three sons by the oversight, order, and discretion of C. D. and E. or any two of them so as that part to be assigned and appointed to T. my son shall be of those lands which lieth most fit to be occupied and nearest adjoining to the messuage wherein I now dwell; this is an estate in common and not a joint estate, though the actual division thereof by metres and

and bounds be left \* to the said three persons named to this purpose. H. 17 Car. B. R. adjudged upon a special verdict, between Dearsley and Abbot. Rot. ]

\* Fol. 90.  
is made

(between them to be divided by my executors, &c.) that they are jointenants until the division be made.

[ 5. A man seised in fee of land, and having two daughters A. and B. and C. his son, devised it to the said two daughters equally to be divided between them, to have and to hold to them and to the survivor of them, and to the heirs of the body of the survivor of them, for and until there shall be paid unto each of my said daughters the full and whole sum of 150 l. at one intire payment; and upon this condition, that upon the payment of the said money, this my will and devise of my said lands unto my said daughters, and to either of them, and the heirs of the body of the survivor of them as aforesaid, shall be utterly void, and of none effect. Upon this devise the said daughters are jointenants, and not tenants in common; for though if a devise be made to two, equally to be divided between them, they shall be jointenants, because in a will the intent of the deviser shall be interpreted to be so, yet it is not so in case of a grant or feoffment, but in a will this is a tenancy in common by construction, and not by express words, but only by collection of the intent of the deviser. But if the other words of the will shew his intent more strong to be, that he intended a jointenancy, this shall be so interpreted; for the other words are habendum to them and the survivor of them and to the heirs of the body of the survivor of them, which implies strongly that he intended a jointenancy, or otherwise the survivor cannot have it, and † [so also do] the other words, that they and the survivor shall have it until the several portions shall be paid; but if they are tenants in common, then they are but tenants for life, and the survivor is to have the estate tail, and then by the death of one, her estate is determined before her portion paid, and no remedy for it; but if it be a joint estate, then they are jointenants for life, and the survivor shall have the estate tail in the whole, in trust for the portion of the daughter, who is dead; and it appears by the last words, viz. the condition, that it is not intended that the estate shall end till the portions paid. P. 1650. adjudged upon a special verdict upon master Ford's will of Devon a reader of the Middle Temple, between † Furse and Weekes. Intratur. Tr. 1649. ]

Sti. 211. seems to be same case by name of Hurd v. Lenthall.—† S. C. cited per Holt Ch. J. who said that the true reason of this case is, that the first words did not make a tenancy in common by express limitation, but by implication or construction. Wms's Rep. 20, 21. in case of Fisher v. Wigg.—And. 12 Mod. 303. in S. C. and there he says it was adjudged a jointenancy, because of the subsequent words, which do not contradict the words (equally to be divided) and if they had they,

would be rejected; for if they had made an express tenancy in common, the subsequent words would be void.—And in 1 Salk. 227. in the case of BLISSET v. CRANWELL, Holt said, that in this case of Roll. the inheritance was fixed and settled in the survivor, which shewed plainly testator's intent, that they should be jointenants.—Devise was to A. and B. and their heirs, and the longer liver of them equally to be divided between them † and their heirs after his wife's death; this per 3 Just. against Powel, makes a tenancy in common; Powel urged, that the word survivor made a jointenancy by express words, and that no construction is to be received against express words; but judgment by the three. 1 Salk. 227. Blisset v. Cranwell & al.—Though the word (survivor) regularly makes a jointenancy, yet the subsequent words do explain and alter the sense of the precedent; per 3 J. against one. Cumb. 256. S. C.—† 3 Lev. 373. Mich. 5 W. & M. C. B. S. C.—[But those words, viz. (and their heirs) are not there.]—\* Contra 9 Mod. 160. Trin. 12 Geo. Barker v. Eyles and Smith.—S. P. MS. Tab. cites Sept. 1727. Earl of Anglesey v. Ram.—† The original seems to be imperfect without something to that or the like purpose.

\* [483]



6. Where a gift is made to N. in tail the remainder to the right heirs of P. and Q. who are dead at the time of the gift made, there the remainder is in jointure, and survivor shall hold place. Br. Jointenants, pl. 12. cites 38 E. 3. 26.

7. If two have goods jointly, and the one is condemned in debt or damages, and dies, yet the other shall have all by the survivor, and execution shall be made of the moiety; per Chaunter. Br. Jointenants, pl. 38. cites 7 H. 6. 2.

8. By grant of the tenant for life to him in reversion and to two others, there the jointure shall not hold place for the third part, because this enures by way of surrender of his part. Br. Jointenants, pl. 14. cites 7 H. 6. 2. & 4.

9. If three coparceners are, and they make partition, and the one grants 20 s. rent to the other two for equality of partition, this rent shall be of the nature of coparcenary, so that if one of the grantees dies, the others shall not have the whole rent by the survivor, but the moiety of the rent shall descend to the heir; per Frowick and Vavisor. Br. Jointenants, pl. 69. cites 15 H. 7. 14.

10. Devise of gavelkind to all his sons. They are now jointenants, and survivor takes all. For they are in by the devise. Le. 113. Pasch. 30 Eliz. C. B. Bear's case.

11. A. seised in fee had issue two daughters B. and C.—B. had issue D. E. and F. A. devised to D. E. and F. and to C. the rents of, &c. to hold by equal parts to D. E. and F. one moiety, and to C. the other. And if either die during the term, then for the benefit of the survivor, &c. Adjudged a tenancy in common. 3 Mod. 209. Pasch. 4 Jac. 2. B. R. Anon.

So in the  
case of  
BLISSET  
AND CRAN-  
WELL. 3  
Lev. 373.  
where the

12. Devise of lands to three sons severally, of several parcels. And if they live to 21, to them and their heirs. They are several tenants till 21, and then jointenants. 3 Lev. 373. Mich. 5 W. & M. C. B. in case of Blisset v. Cranwel, & al.—Cites 2 Le. 68, 69. Brian v. Cofins.

devise was to A. and B. and their heirs for ever, and the longer liver of them, to be equally divided between them after his wife's death, it was said, that all the words may be taken to stand together, viz. that they should be jointenants during the life of the same, and tenants in common after her death.

But devise to three sons and their heirs respectively, is a tenancy in common. 3 Lev. 373. in case of Blisset v. Cranwell.—Cites Cro. E. 443. LEWEN v. DODD, and Sty. 434. Tortel v. Frampton.—but the word in Cro. E. 443. is (equally) and not (respectively.)

## (G. 2) Who shall be said Tenants in Common or Several Tenants.

1. IF a feme be endowed of the third part of a mill, there the heir and the feme are several tenants, and not tenants in common; for she shall have each third toll dish put in certain. Br. Several Tenancy, pl. 28. cites 23 H. 3. Fitzh. Assise, 435.

2. Land is given to two barons and their femes in tail by fine in reversion, who have issue and die, and after the tenant for life dies, and the one issue, and a stranger enter, and the other issue brought sci. fa. against the stranger of the moiety, and well; for the other issue is in



In by title, and so the stranger is a several tenant in law of the moiety; quod nota, by abatement. Br. Several Tenancy, pl. 21. cites 24 E. 3. 29. 60.

3. In sci. fa. if the land descends to two daughters, and the one takes baron and has issue, the feme dies, the baron is tenant by the curtesy of the moiety, and grants his estate to W. N. Wilby and Cur. said that these are not several tenants, but tenants in common, and therefore the writ brought as against several tenants shall abate. Quære, for it is said there, that it is dubious; for, per Skipw. the tenant by the curtesy, and he who has his estate, is in as the coparcener was, and against two coparceners lies one writ only. Br. Several Tenancy, pl. 22. cites 24 E. 3. 29.

[ 484 ]

4. Where a fine was levied of a manor by four, and the consuee rendered the fourth part against the east to one, and another fourth part to another, and so of the other two parts; by this they are several tenants of the franktenement, and yet the possession is in common. Br. Several Tenancy, pl. 27. cites 44 Aff. 11. and 45 E. 3. 12. acc.

## (H) Tenants in Common. Survivor of Action.

[ 1. ] **I**F one tenant in common grants to a stranger to cut wood or to agist beasts in the land, who does it accordingly, the other tenant in common after his death, shall have trespass for this against the stranger, notwithstanding the warranty. 45 E. 3. 13. b. ]

Tenants in common being plaintiffs, may join in personal actions, and the survivor of them shall have the action in trespass de clauso fracto; in this case the action survives. But not so of goods, for they go severally; neither the goods survive nor the action for them. Jenk. 35. pl. 68,

2. Where baron and feme lost in quare impedit, and the baron died, the feme had the attain, and not the executors of the baron, notwithstanding that it was averred, that the damages were paid of the goods of the first baron; quod nota. Br. Jointenants, pl. 7. cites 46 E. 3. fol. 23.

3. If a rent be granted to two, and the rent is arrear, the survivor shall now avow in his own name for the whole, and yet it was arrear in the life of the other. Arg. Bull. 136.

## (I) Tenant by the Curtesy of what Estate.

See Curtesy.

[ 1. ] **I**F land be given to two sisters and the heirs of their bodies, by which they have a joint estate for life, with several tails, and one takes baron, who has issue by her, and after she dies. The baron shall not be tenant by the curtesy; for the jointure was not severed by the having of issue. Contra 17 E. 3. 51. ]

2. A. has issue a daughter, and devised his lands to executors for payment of his debts, and till his debts are paid, and makes his executors and dies. The daughter marries and dies; the debts are paid by executors, the husband shall be tenant by the curtesy. 8 Rep. 96. Trin. 7 Jac. in Manningham's case.

(K) Jointenants

See (G) —  
Devise at  
the division  
of [Devise  
to the heir  
at law.]

Fol. 91.

[485]

## (K) Jointenants or Tenants in Common. By what Words. [By Devise.]

[ 1. ] If a man by his will *devises his land in E. which he values at 100l. per ann. to his executors and their heirs in fee, upon confidence and trust, and to the intent that they and the survivor of them and their heirs stand seised of 100 marks of it, to the use of R. &c. and of 20l. per ann. to the use of T. and of 20 marks of it to the use of J. and in the end of the will is a clause that the executors shall be seised to the uses aforesaid, and shall make partition and division of the land according to the manner aforesaid.* The said R. T. and J. are immediately tenants in common of the land before any division by the executors, in as much as there was a *certain valuation* made. Mich. 37 & 38 Eliz. B. R. adjudged between Gibbon and Warner.]

S. P. per  
Haughton  
J. 3 Bulf.  
105.—Cro.  
E. 9. Mich.  
24 & 25

2. If A. in one part of his will *devises his lands to B. in fee, and in another part of his will devises the same to C. in fee.* They are jointenants. 3 Le. 11. pl. 27. Mich. 8 Eliz. Per Dyer and Brown J. Anon.

Eliz. C. B. per Anderson. S. P. Anon.—S. P. by Tanfield Ch. B. Lane 117. Pasch. 9 Jac.—Arg. Cro. J. 49. Roll. Rep. 320. and 10 Mod. 521.

The devise  
was to A. B.  
and C. in  
tail, and  
then fol-  
lowed these  
words, viz.  
*I will that  
every of  
them be the  
other's heir,  
by equal por-  
tions.* The  
whole  
court a-

3. Devise to his younger sons. *A. B. and C. in tail equally to be divided by even portions; and if one of them die, then the two that survive shall be next heirs;* per Dyer and Weston J. They are tenants in common; and they held, that the words (equally to be divided) is not intended of a division in fact and possession, but of the interest and title; for if a man brings a *præcipe quod reddat de una parte manerii de D. in seven parts to be divided*, it is not intended divided in possession, but divided in interest and title. But if one of the brothers dies without issue, the two survivors have his part by purchase, and are jointenants. 3 Le. 19. Pasch. 14 Eliz. Webster's case.

greed this to be a tenancy in common, the testator's intent appearing to be so, by his saying that each shall be the other's heir by equal portions, which cannot be if there shall be a survivor: But had the words been, *if one of them die, then every of them shall be the other's heir*, without those words, (by equal portions) then they doubted what the sense of them would be; and some of the court held, that they would be vain words, and senseless, and others doubted. But yet it was afterwards, upon good consideration, adjudged to be jointenancy; for so it is implied, and it was as much as to say, that *each survivor shall be the other's heir.* And. 194. Mich. 31 Eliz. Fowler v. Ougley.

4. A devise to two equally, and to the heirs of their bodies, makes a tenancy in common. Cro. E. 696. cites 18 Eliz. Shepherd's case.

Land de-  
vised to  
two to be  
equally di-  
vided between  
v. Lowen.

5. So devise to two and their heirs equally, is a tenancy in common; but a devise of land to two equally and to their heirs, is a jointenancy. Cro. E. 696. Mich. 41 Eliz. B. R. Lewen v. Cox.

them and to their heirs, makes a tenancy in common. Toth. 143. cites 41 Eliz. Lowen v. Lowen.

6. Lands are devised to two men, and to a child *en ventre sa mere*; the child shall take by the devise, but whether in common, or in jointure, Dyer Ch. J. doubted. Mo. 177. pl. 312. Mich. 24 Eliz. Anon.

7. A. having two daughters, (his heirs) devises his land to them in fee. per Cur. they shall hold by the devise, because he gives *another estate to them than descended*; for by the descent each of them had a distinct moiety, but by the devise they are both jointenants, and the survivor shall have all. Owen 65. Hill. 37 Eliz. Anon.

8. If a man had *land in borough english, and guildable lands*, and devised all his lands to his two sons, and dies, both of them shall take jointly, and the younger shall not have a distinct moiety in the borough-english, nor the elder in the guildable land, but they are both jointenants; per Fenner. Owen 65. Anon.

9. A. devises *all his lands to B.* and after, in the same will, devises *Black Acre to C.* They are tenants in common; but if he devises *all his lands to B.* and after, in the same will, devises *all his lands to C.* By this they are jointenants by intention of devisor. Yelv. 209. Mich. 9 Jac. B. R. Wallop v. Derby.

10. Devise to five, their heirs and assigns, *all of them to have part and part alike, and the one to have as much as the other.* Adjudged that it is a tenancy in common. Het. 29. Trin. 3. Car. C. B. James and Thoroughgood v. Collins. [ 486 ]

S. P. Arg. Cro. E. 696. in case of Lewen v. Cox.—cites 2 & 3 Ph. & M. Bendl.

11. A devise to two *equally to be divided between them, and to the survivor of them*, makes a jointenancy, on the express import of the last words. Per Hale. Vent. 216. Trin. 24 Car. 2. B. R. in case of King v. Melling. But equally divided between them, without adding more,

makes a tenancy in common. Vern. 32 Hill. 1681. Thickness v. Vernon.—Though the words (equally to be divided betwixt them) sometimes in a will may make a tenancy in common, only by way of construction, and that it was the intent of the testator, that there should be a division or partition, yet if afterwards, in the will, it is declared it should go to the survivor, that would oust such construction, and it would be a joint-estate, even in the case of a devise by will. 2 Vern. 323. Mich. 1694. Clerk v. Clerk and Lady Turner.—S. P. Sti. 211. Hurd v. Lenchall.

12. A. devise to A. and B. *paying 25 l. per ann. out of the rents to C. during his life, viz. 12 l. 10 s. by each of them*, is a tenancy in common; per Jefferies C. Vern. 353. Mich. 1685. Kew v. Rouse.

13. A. devised to B. his daughter, and to C. D. and E. his granddaughters by another daughter deceased the rents of S. *for 30 years, to hold by equal parts, viz. B. to have the moiety, and the three granddaughters the other moiety, and if either die before the 30 years expired, then the said term to be for the benefit of the survivor, and if they all die, then the same was devised over to others.* The words of the will shew them to be tenants in common; for equally to be divided runs to the moieties. Adjudged and affirmed in error. 3 Mod. 209. Pasch. 4 Jac. B. R. Anon.

14. A trust by devise was that the *profits should be equally divided between M. his wife, and B. his daughter during the life of M. and after* S. C. Wms's Rep. 34. to

41. Pasch. 1701. states it that B. was heir at law of testator, and thereupon it was insisted, that thence arose a plain and necessary implication that M. should have it for her life. And the reporter notes the different opinions on this case, viz. The Master of the Rolls held, that M. and B. were jointenants, and that all survived to M. Afterwards on appeal, Lord Somers held, that M. and B. were tenants in common, and that B.'s estate determining by her death, the remainderman or reversioner had a right to that moiety. Afterwards Lord Wright was of opinion, that an estate by implication arose to M. in B.'s moiety after B.'s death. But upon referring it to the court of C. B. they conceived that B. and M. were tenants in common, and that M. had an estate per autre vie, which, upon the statute of frauds (that takes away occupancy) ought to go to B.'s administratrix, viz. M. the mother, and that B. had not an estate tail in the trust; for that mergers are odious in equity, and never allowed unless for special reasons.

after M.'s death to the use of B. in tail, remainder over; B. died without issue, living M. This, by the opinion of the judges of C. B. to whom it was referred, is a tenancy in common between M. and B. So that M. has no title to B.'s moiety, either by survivorship or implication; nor does that moiety either descend or result to the heir; but as to that moiety during M.'s life, it was an interest undisposed of, and in nature of a tendency per autre vie, and consequently belonged to the administrator of B. and decreed accordingly. 2 Vern. 430. Hill. 1701. Philips v. Philips.

S. C. 11 Mod. 108. 109. and Holt Ch. J. delivered the opinion of the court, that this was a jointtenancy, because the remainder quoad the moiety is contingent. — S. C. cited Tr. 11 Geo. Arg. 9 Mod. 158. in case of Barker v. Eyles.

[487] 16. A. debt of 20,000 l. was bequeathed to five, share and share alike, equally to be divided between them, and if any of them die, then his share to go to the survivors or survivor of them. Ld. C. Cowper held this to be plainly a tenancy in common, from the words (share and share alike;) and by the subsequent words (if any of them die, his share shall go to the survivors, &c.) they must be intended, if any of them die in the life of the testator, and so every word of the will will have its operation. And without that clause, if any had died in testator's life, such child's part would have been a lapsed legacy, and have gone to the executor as undisposed of by the will. And that to understand it thus, viz. if any of them should die before the receipt of the money, it would be intirely de hors, there being nothing in the will to justify such construction. Wms's Rep. 96. Trin. 1707. Ld. Bindon v. Ld. Suffolk.

Rolls, Mich. 1730, Lord Cowper's opinion be not adhered to? Wms's Rep. 97 — The word (survivor) must signify something, and therefore it shall be construed, if any of them die before the money received. MS. Tab. cites S. C. 16 Jan. 1707. and states the debt bequeathed to have been a desperate debt.

G. Equ. R. 146. S. C. 17. A. devised several leasehold houses to B. for life, and after B.'s death to M. and her 3 children equally amongst them. Decreed to be a tenancy in common, though no mention of any division to be made. Ch. Prec. 491. Pasch. 1718. Warner v. Hone.

18. A.

18. A. devised land to be sold for payment of debts, and the surplus to be vested in land and settled on B. and C. and the survivor of them, and their heirs, equally to be divided between them share and share alike. B. died in A.'s life-time; then A. died leaving J. S. his heir at law. The question was, if this was a lapsed devise, and should go to the heir at law, or to C. the surviving devisee. This case, coming before Ld. Commissioners Raymond and Gilbert, was put off for difficulty, and afterwards Ld. C. King held, that by the first part of the will, they were plainly jointenants for life, and the after words importing a tenancy in common, they are tenants in common of the inheritance, and so every word of the will takes effect, and B. dying in the life of A. thereby C. became intitled to the whole for life, and the inheritance being devised in common, the one moiety having lapsed by the death of B. in A.'s life, therefore C. shall take all for life, and a moiety of the inheritance shall descend to A.'s heir at law, expectant on C.'s death, and the other moiety of the fee to C.'s heir. 2 Wms's Rep. 283. Pasch. 1725. Barker v. Giles.

This decree was affirmed on appeal to the House of Lords. Ibid. 283.—9 Mod. 157. 160. S.C.

19. Devise to trustees and their heirs in trust for B. for life, remainder to the children of B. by her then husband, in trust, that they shall have the profits thereof when they come of age. The children will take a fee as tenants in common. Mich. 11 Geo. 1. 9 Mod. 104. Bateman v. Roach.

(L) Tenants in Common. In what Cases they shall be Jointenants, or Tenants in Common. [By Deed, &c.]

See Grant (I. 2. 3)

[ 1. ] If a man leases for life, the remainder to the right heirs of J. S. and J. D. who are alive, their heirs shall take this remainder in common and not jointly; because they cannot take it at one time. For both by intendment will not die at one time.]

(G) pl. 1. S. C. cites 18 E. 3. 28.

[ 2. If a man gives to baron and feme, and J. and to the heirs of the lady of J. the remainder to him, and to the right heirs of the baron and feme, their heirs shall take in common for the cause aforesaid. Dubitatur. 38 E. 3. 26. ]

[ 3. So if a man lease to A. the remainder to him and to the right heirs of B. who is alive, they shall take the remainder in common; because they take the estate at several times. 38 E. 3. 26. b. ]

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[ 4. If M. by his obligation acknowledges himself teneri & obligari decano & capitulo Eborum & A. B. and C. D. in 2000 marks solvendis eisdem decano & capitulo, in this case the dean and chapter are tenants in common with A. B. and C. D. Because the body politic, having a several capacity from the body natural, cannot take jointly with them, and the solvendis to the dean and chapter does not alter the case, but is void, being contrary to the premisses, which is a perfect \* lien of itself, and therefore after the death of A. B. and C. D. the dean and chapter cannot bring action of debt upon this obligation solely, but must join with the executor of the survivor of the said A. B. and C. D. For this is joint between them. Mich. 9 Car.

If a man is bound in 100 l. to an abbot and secular, and the one dies, this shall not survive, but the survivor, and the executor or successor of the other shall join



In an action of it, quod nota, sci- licet in an action of debt. Br. Jointenants, pl. 54.—\* Orig. (Lier.)

B. R. between the dean and chapter of St. Peter's of York, and G. Power defendant, adjudged upon a demurrer, that such action, brought by the dean and chapter only, is not well brought; but judgment against him, I being of the defendant's counsel. *Intratur* Tr. 3 Car. Rot. 350.]

Jenk. 330. [ 5. If a man *enfeoffs* A. to the use of him and B. they shall not be tenants in common but jointenants; for *both shall come in by the statute*. Tr. 7 Ja. Curia Wardorum Some's case in Curia Wardorum dubitatur. But \* Mich. 7 Jac. this was resolved by the 3 judges, and the attorney of the wards accordingly. M. 5 Ja. B. R. adjudged per Curiam, between Loe and Lee.]

ed, that A. being enfeoffed to the only use of him, and B. and their heirs, that A. is in by the common law in the per, and then the limitation of the use to him and B. and their heirs cannot *divest the estate which was vested in A. by the common law and vest it in him in the post* by force of the statute, according to the limitation of the use, and so as to one moiety A. should be in by the feoffment in the per, and B. as to the other moiety, should be in by the statute according to the limitation of the use in the post, and consequently tenants in common. 13 Rep. 55. Same's case.

6. Jointenants are, as if a man be seised of certain lands or tenements, &c. and *enfeoffeth* two, three, four, or more, to have and to hold to them for term of their lives, or for term of another's life, by force of which feoffment or lease they are seised, these are jointenants. Co. Litt. 180. a. f. 277.

7. Also if two or three, &c. *disseise* another of any lands or tenements to their own use, then the disseisors are jointenants. But if they disseise another to the use of one of them, then they are not jointenants, but he to whose use the disseisin is made, is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin, &c. Co. Litt. 180. b. f. 278.

As if a man enfeoff two jointenants in fee, and the 1 of them *alien* that, which

8. Tenants in common, are they which *have* lands or tenements in fee-simple, fee tail, or for life, &c. by several titles, and none of them know of this his several, but ought by the law to occupy these lands or tenements in common, and pro indiviso to take the profits in common. Co. Litt. f. 292.

to him belongeth, to another in fee, now the alienee and other jointenant are tenants in common; because they are in such tenements by several titles; for the alienee cometh to the moiety by the feoffment of one of the jointenants, and the other jointenant hath the other moiety by force of the first feoffment made to him and to his companion, &c. and so they are in by several titles, that is to say by several feoffments. Co. Litt. f. 292.

So if two par- ceners are, and the one *alien* her part, the other par- cener, and the alienee are tenants in common. Co. Litt. 195. a. f. 309.

9. Also if three jointenants be, and one of them *alien* that, which to him belongeth, to another man in fee, the alienee is tenant in common with the other two jointenants; but yet the other two jointenants are seised of \* the two parts, which remain, jointly, and of these two parts, the survivor between them two holdeth place. Co. Litt. f. 294.

\*[489]

So it is when a lease for life, or pur autre vie is made; for in that case also the lessees are tenants in common. Co. Litt. 189. b.

10. Also if there be 2 jointenants in fee, and the one *giveth* his part to another in tail, and the other *giveth* his part to another in tail, the donees are tenants in common, &c. Co. Litt. f. 295.

11. If



11. If a *feme* be endowed of the third part of a mill, the heir and the feme are not tenants in common, but several tenants for the heir shall have two toll dishes, and the feme the third toll dish in a place by itself; the reason seems to be, because *dower shall be assigned by metes and bounds*. Br. tenants in common, &c. pl. 26. cites 23 H. 3. and Fitzh. Affise 435.

12. Fine of render levied to him that is seised, and to another that is not seised makes the stranger to be jointenant. Br. Fines, pl. 77. cites 22 Aff. 54.

13. Note a diversity, when the estate of inheritance is limited by one conveyance, there are no several estates to drown in one another. But when the estates are divided into several conveyances, their particular estates are distinct and divided, and consequently the one drowns the other. Co. Litt. 182. a. b.

As if a lease be made to two men, for their lives, and after the lessor grants the reversion to them two and their heirs of the two bodies. The jointure is severed, and they are tenants in common of the possession. Co. Litt. 182. b.

14. If two jointenants in fee be, and they both join in a lease to an abbot and a secular man for term of their lives, here the reversion, that is dependant upon several freeholds, is severed. Co. Litt. 191. b.

So it is if they join in a lease to two secular men, to have and hold the one moiety to one for life, and the other moiety to the other for life. Co. Litt. 191. b. 192. a.

15. If lands are given to two, to hold the one moiety to the one and his heirs, and the other moiety to the other and his heirs; they are tenants in common. Co. Litt. f. 298.—Because they have several freeholds, and an occupation pro indiviso. Co. Litt. 190. b.

Brownl. 32. S. P. Anon.—Though it be really one deed, yet they are distinct conveyances, and livery to the one, secundum formam chartæ will not avail the other; per Holt Ch. J. 12 Mod. 301. Mich. 11 W. 3. in case of Fisher v. Wigg.

Nota. The habendum severs the premisses, that prima facie seemed to be joint; for an express estate controuls an implied estate. Co. Litt. 19. a. b.

Equally to be divided, or equally divided makes no distribution, and is repugnant to tenancy in common. But one moiety to the one and the other moiety to the other, is of a moiety undivided, and therefore a tenancy in common. But if twenty acres be given \*habend' 10 acres to one and 10 acres to the other, the habend' is void, because the distribution would be repugnant to the nature of tenancy in common; which must only be of a moiety, &c. undivided; and if these words would signify any thing, the parties could not take 'till division. 12 Mod. 302. In case of Fisher v. Wiggs.—\* The habendum is void, and they are jointenants, per Holt Ch. J. 1 Salk. 391. Hill. 10 W. 3. in case of Ward v. Everard.

If a manor is granted to two in the premisses habend' the one moiety to one, and the other moiety to the other, those words cannot make a tenancy in common, it being the nature of that estate for the tenants to be seised pro indiviso. per Holt Ch. J. Wms's Rep. 19 Hill. 1700. in case of Fisher v. Wigg.

16. If a man seised of land enfeoffs another of the moiety, without saying any thing of assignment or limitation thereof in severalty, at the time of the feoffment, the feoffee and feoffor shall hold their parts in common. Co. Litt. f. 299.

So of a third or fourth part, &c. and if there is an advowson appendant, they are also tenants in common of the advowson. Co. Litt. 190. b.

17. Two jointenants in fee; one leases his part to another for his life. The tenant for life and the other jointenant are only tenants in common during the life of the lessor. Co. Litt. 191. b. f. 302. [ 490 ] 2 Mod. 228. S. C. 18. If

18. If an *alien and a subject* purchase lands in fee, they are jointenants, and the survivorship shall hold place, & nullum tempus occurrit regi upon an office found. Co. Litt. 180. b.

19. As there are jointenants by *disseisin*, so are there jointenants by *abatement, intrusion, and usurpation*. Co. Litt. 181.

20. If I give a horse to two habend' the one part to the one, and the other part to the other, yet they are jointenants of the horse. Mo. 64. Trin. 6 Eliz.—So of a wood; the division will not alter the joint interest. Ut ante.

21. *A. tenant for life, B. lessee for years to begin after the death of A.—B. dies. A. and the administrator of B. joined in the purchase of the fee simple of the land demised; per Dyer, the tenant for life and the administrator are tenants in common of the fee.* 4 Le. 37, 38. 6 Eliz. C. B.

22. *Fine was levied to A. and B. to the use of A. B. and C. They are all jointenants, though A. and B. was in by the fine at common law.* Noy. 124. Watts v. Lee, says, it was adjudged accordingly in the case of a *feoffment* in 21 Eliz. ut ante. cites D. 20.

23. If two tenants in common *enfeoff B. to their use*, they are tenants in common of this use. But if they *levy a fine to B. to their use*, they are then jointenants. Arg. Goldsb. 68. Mich. 29 & 30 Eliz.

24. *A. leased land to B. his son and M. his wife, & eorum primogenito proli successive.* By this grant the issue is to take jointly with B. and M. so that if they have no issue at the time, an after born issue shall take nothing by the grant, Cro. E. 121. Mich. 30 & 31 Eliz. B. R. Stevens v. Lawton.

25. A. seised of land in fee, has issue two sons, B. the eldest and C. the youngest, and makes feoffment to the use of *himself for life, remainder to B. in tail, remainder to C. & primogenito filio prædicti C. & hæred' masculis primogeniti filii of the said C. and for default of such issue, remainder thereof to the heirs males of C. and of A. remainder over.* By this remainder limited to the heirs males of the body of C. and of A. they have several estates tail. Cro. E. 219. Hill 33 Eliz. B. R. Smy v. Chown.

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26. *Feoffment to his daughter and two others to the use of her and the heirs of her body*, adjudged that she has fee, and that she and the others are tenants in common. For *feoffee to the use of himself takes by the livery and not by limitation of the use.* D. 200. Marg. pl. 60. cites Hill. 43 Eliz. C. B. between Reading and Norris.

was afterward reversed and adjudged fee in B. R. *ibid.*—And this case of READING AND NORRIS, being reported at reading in Lincoln's Inn, Lent, 1632. Harrison lecturer took a diversity between this case and Samin's case. For there all the fee passed to the same parties, and therefore jointenants, but otherwise here for the benefit of the remainder. *Ibid.*

28. Lord of a manor in consideration of 100*l.* paid by J. S. his copyholder of inheritance by indenture between him of the one part and J. S. and R. S. son of J. S. of the other part infeoffs, *releases and confirms to J. S. habendum to J. S. and R. S. and their heirs*, and covenanted that all assurances should be to those uses, and livery was made secundum formam chartæ. Resolved, that though this conveyance shall enure by way of feoffment, and that J. S. only shall take by

by the livery, yet either by feoffment, or by release, or confirmation which may enure to an use as well as a feoffment, R. S. shall take together with J. S. by the limitation of the use in the *habendum* as jointenant of the use, which being executed by the statute of 27 H. 8. of uses made them jointly seised of the interest and possession. Ley. 13 Trin. 7 Jac. Samme's case.

29. If a \* disseisin be had to the use of two, and one agrees at one time, [ 491 ] and the other at another time, they shall be jointenants. 13 Rep. 56 Mich. 7 Jac. in Samme's case.

*But otherwise it is of estates which pass by the common law; and therefore if a grant be made by deed to A. for life, the remainder to the right heirs of B. and C. in fee, and B. has issue and dies, and afterwards C. has issue and dies, and then A. dies; in this case the heirs of B. and C. are not jointenants, because though the remainder be limited by one grant or fine and by joint words, yet because by B.'s death the remainder as to one moiety vested in his heir and by the death of C. the other moiety vested in his heir at several times, they cannot be jointenants. 13 Rep. 57. cites 24 E. 3. Joinder in action 10. Co. Litt. 188. a.*

30. If a tree grows in an hedge which divides the lands of A. and B. and by the roots takes nourishment in the land of A. and also of B. they are tenants in common of this tree, and so adjudged. 2 Roll. R. 255. Mich. 20 Jac. B. R. Anon.

31. A deed of trusts to pay the profits to three in equal manner till such an age, and then to convey the inheritance to them in like manner, this makes tenancy in common, as well as if it was in a will. 1. Lev. 232. Hill. 18 & 19 Car. 2. in Canc. Bois v. Rowell.

32. A feoffment was made to two and their heirs equally to be divided; Scrogs and Dolben were of opinion that the feoffees were tenants in common, and not jointenants, but Jones differed; cited per Gold. J. Wms's Rep. 16. as Pasch. 32 Car. 2. B. R. Smith v. Johnson.

Holt Ch. J. said that when this judgment was given no body was satis-

fied with it, and that afterwards the rule for judgment was discharged, and an ulterius concilium awarded and then the party died; so no judgment was given. Wms's Rep. 22 in case of Fisher v. Wigg.

33. In a covenant to stand seised to the use of A. for life, and after to two to be equally divided, and to their heirs and assigns for ever. Per Lord Keeper, the inheritance is in common as well as the estate for life; he said it had been held, that where the words were (to two equally divided) that should be in common, otherwise if the words were (equally to be divided) but are since taken to be all one; nay, a devise to two equally will be in common; here there shall not be such a construction as to make one kind of estate for life, and another of the inheritance, and survivorship is not favoured in prejudice of the heir. Pasch. 36 Car. 2. 2 Vent. 365. Anon.

D. 25. pl. 158. Lowen v. Cock. — This distinction is now exploded and either words make a jointenancy unless in a will. Show.

Parl. Cases 210. — Abr. Equ. Cases 291. — Equally to be divided makes tenants in common in a will, not in a deed. 1 Salk. 39. per Holt Ch. J. in case of Ward v. Everard. — Ibid. 391. S. P. per Holt Ch. J. in case of surrender of a copyhold, but adjudged e contra, according to the opinion of two other justices, Fisher v. Wigg. — A. surrendered a copyhold to his five children, equally to be divided between them and their respective heirs for ever; adjudged per two justices against Holt Ch. J. a tenancy in common. 12 Mod. 296. Fisher v. Wigg. — Wms's Rep. 15 to 22. Hill. 1700. S. C. — Abr. Equ. Cases 291. in the margin of pl. 4. says that the same case being cited Mich. 1730. in the case of STRINGER AND PHILLIPS it was said by counsel to be reversed according to my Lord Holt's opinion; in which case it was held by the Master of the Rolls, that there was a difference between words which create a tenancy in common in a will, and in a conveyance; for that though the words (equally to be divided) in a will create a tenancy in common; yet

yet it is not by force of the words themselves ; but by the intent of the testator, that there shall be no survivorship.

Trin. 1729.  
contra per  
the Master  
of the  
Rolls, but  
that paying

34. If two joint purchasers pay an equal share of the purchase money, this makes them tenants in common in equity. Arg. Hill. 1685. Vern. R. 361. in the case of Usher and Pryme v. Aleworth, &c.

an unequal share makes them partners, if the share appears in the deed itself and the survivor shall be considered in equity as a trustee. Abr. Equ. Cases 290. Lake v. Gibson.

5 Mod. 15.  
S. C.—12  
Mod. 217.  
S. C.—So  
not granted  
to the wife  
held by a

35. Grant of 100 l. rent to five-equally to be divided, to hold to them and their assigns, viz. 20 l. to each for life and the life of the survivor, and if any died his share to be divided equally among the survivors. The grantees are jointenants. 1 Salk. 390. Hill. 10 W. 3. Ward v. Everard.

if of 20 l. viz. 10 l. to the one and 10 l. to the other, makes it not a tenancy in common. 12 Mod. 228. Mich. 10 W. 3. in case of Ward v. Everard.

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36. There is diversity between a grant to two and their heirs, and to two and their respective heirs, and a grant to two and their heirs respectively, since the limitation must be to both their heirs, or they cannot both take a fee simple, and if the fee enures to both their heirs, it must be to both their heirs respectively; per Holt Ch. J. which Turton and Gould J. agreed. Wms's Rep. 18. Hill. 1700. in case of Fisher v. Wigg.

37. A. conveys a term to trustees in trust to permit him to take the profits for his life, and after his death to permit B. and C. two of his daughters their executors and administrators to take the profits during the residue of the term equally to be divided between them, they paying 100 l. within two years to each of his two other daughters; per Master of the Rolls, this being a trust of a personal thing they are tenants in common, and it appears that the father's intention was so, to make them distinct provisions, and the payment of the 100 l. to each of the other daughters makes B. and C. purchasers, Pasch. 1701. Ch. Prec. 163. Hamel v. Hunt.

Ch. Prec.  
332. S. C.

38. Two mortgagees tenants in common purchase the equity of redemption to them and their heirs, they are tenants in common of the inheritance, the purchase being founded on the mortgage. Abr. Equ. Cases 292. 11 Annæ, Edwards v. Fashion.

39. There are but two ways of creating a tenancy in common by conveyance, viz. either by limiting it to them expressly as tenants in common, or else by limiting a moiety, or a third, or other undivided part to one, and the other moiety, &c. to another, &c. for if it be otherwise, though the words (equally divided) be used, yet they signify only an equal division, and proportion of the profits; per the Master of the Rolls. Mich. 1730. Abr. Equ. Cases 291. in a note upon pl. 4.

40. A. had 3 sons and 2 daughters J. and M. and devised three fourths of his personal estate to his three sons equally, &c. and as to other fourth he devised it to the sons, in trust only for his two daughters, and by their approbation to be put out at interest in name of his three sons, and the interest to be paid to his two daughters respectively, during

ing their natural lives, and afterwards to their, or either of their child or children, and for default of such issue, he devised it to his three sons equally, &c. M. dies leaving a son; J. died without issue; the Master of the Rolls decreed the moiety of M. to her son, and the moiety of J. to the three sons (his uncles). The question upon a re-hearing was, who should have the moiety of J. it was admitted by the council for the sons, that M. and J. were tenants in common by means of the word (*respectively*) but insisted that the subsequent limitation being founded on the first devise must receive the same construction, as to the children taking by purchase, and that testator's intent could not be fulfilled any other way, than by making M. and J. take by immediate devise, and that so the case must be considered as a devise of one moiety to M. and her issue, and the other to J. and her issue, and for failure of issue of either to go over to the sons; and that other construction would be contrary to the nature of a tenancy in common; but Lord Chancellor held that though the sons had the absolute property in the three fourths, yet M. and J. had not the absolute property in the other fourth, but only in the interest which was to be paid to them respectively during their lives, and that by this word (*respectively*) they are tenants in common; and that the next limitation vests the whole property in the children, and they take as purchasers according to WILD's case, 6 Rep. 16. a. and that he saw no reason why they must take respectively as well as their mothers, there being *no words of division in the devise to them*, but the whole is to go over either to their child or children; and that where-ever the testator intended a tenancy in common he expressed it, as by the words (*respectively*) in the case of the daughters, and the words (*equally to be divided*) in case of the sons; and declared his opinion that A.'s intent was, that any child of either M. or J. should take the whole of this fourth part, and no part to go over to the three sons till failure of such issue; and so decreed for the plaintiff. Sel. Cases in Chan. in Lord Talbot's time, 27. Pasch. 1734. Stephens v. Hide.

(M) *What Persons may be Jointenants, or Tenants* [ 493 ]  
in Common.

1. **A** *villein and his feme* purchase jointly; the lord enters; the villein dies; the feme or her heir collateral shall re-have the whole land; for there are no moieties between them. Br. Parliament, pl. 43. cites 40 Ass. 7.

2. Where it is *enacted by parliament that all estates made to J. N. shall be void, yet estates made to J. N. and his feme shall not be void if the feme survives*, but the feme shall have the whole; for there are no moieties; but of estates before the coverture, the moiety of the baron shall be void; per Fineux and Vavisor. Quære, because two justices were against three. Br. Jointenants, pl. 67. cites 5 H. 7. 30.

Br. Parl.  
pl. 43. cites  
5 H. 7. 31.  
S. C. that  
where  
estate was  
made be-  
fore the  
coverture  
to J. N.

and his wife in tail, and afterwards such statute was made, it is void to the wife as well as to the husband; for they are one person in law, and the feme cannot take but by the agreement of the baron;



baron; per Fineux and Brian Ch. J. but if estate had been made to *W. and another person*, and such act had been made, the estate is good for the moiety to the other, to which Vavisor accorded; but other three contra; and the law seems to be the same of baron alien born or attaint of felony or pre-munire.

• Br. Abbe,  
pl. 8. cites  
21 H. 6. 3.  
22 H. 6. 4.

3. If lands are given to two men, and to the heirs of their two bodies begotten, the donees have a joint estate for their lives; and if each of them hath issue and die, their issues shall hold in common, &c. But if lands be given to two abbots, as to the abbot of W. and to the abbot of S. A. to hold to them and to their successors, they have presently an estate in common, and not a joint estate; for that every abbot or other sovereign of a house of religion, before that he was made abbot, or sovereign, &c. was but a dead person in law, and when he is made an abbot, he is a man *personable* in law \* only to purchase and have lands, or tenements, or other things to the use of his house, and not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common; and if one of them die the abbot that surviveth shall not have the whole by survivor, but the successor of the abbot that is dead shall hold the moiety in common with the abbot that surviveth &c. Co. Litt. f. 296.

If lands are given A. de B. Bishop of N. and to a secular man, to have and to hold to them two and their heirs; in this case they are jointenants; for

4. If lands are given to two bishops to hold to them two and their successors; albeit, the bishops were never any dead persons in law, but always of capacity to take, yet seeing they take the purchase in their politic capacity as bishops, they are presently tenants in common; because they are seised on several rights; for the one bishop is seised in the right of his own bishoprick of the one moiety, and the other is seised in the right of his bishoprick of the other moiety, and so by several titles, and in several capacities, whereas jointenants ought to have it in one and the same right and capacity, and by one and the same joint title. Co. Litt. 189. b. 190. a.

each of them take the lands in their natural capacity. Co Litt. 190. a.

5. So if lands are given to two parsons, and their successors, or to any other such like ecclesiastical bodies politic or incorporate. Co. Litt. 190. a.

So if lands are given to the parson of D. and to a layman, to have and

6. If lands are given to an abbot and a secular man to have and to hold to them, viz. to the abbot and his successors, and to the secular man, to him and his heirs, they have an estate in common. Co. Litt. f. 297.

to hold to them, i. e. to the parson and his successors, and to the layman and his heirs; they are presently tenants in common for the causes above said; so if a bishop, &c. et sic de similibus. Co. Litt. 190. a. — Our author's rules do not hold in chattels real or personal; for if a lease for years is made, or a ward granted to an abbot and a secular man, or to a bishop and a secular man, or if goods are granted to them, they are jointenants; because they take not in their politic capacity. Co. Litt. 190. a.

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So likewise if there are two jointe-

7. If lands are given to the king and a subject, to have and to hold to them and their heirs, yet they are tenants in common and not jointenants; for the king is not seised in his natural capacity, but in his royal and politic capacity, in jure coronæ, which cannot stand



stand in jointure with the seisin of the subject in his natural capacity. *nants, and the crown descend to one*  
Co. Litt. 190. a.

of them the jointure is severed and they are become tenants in common. Co. Litt. 190. a.—*A man may be tenant in common with the king, and may join in presentment with the king. Br. Tenants in common, &c. pl. 23. cites F. N. B. fo. 32.*

8. A natural person and a corporation cannot be jointenants, or jointly seised of any lands. 2 Saund. 319. Pasch. 23 Car. 2. Bennet v. Holbeeck, *Pl. C. 239. a—Arg. S. P. 2 Lev. 12. Holbeeck v. Bennet.*

## (M. 2) Who are Jointenants notwithstanding the several and different Limitations.

1. **I**F a rentcharge of 10 l. be granted to A. and to B. to have and to hold to them two, viz. to A. until he be married, and to B. until he be advanced to a benefice, they are jointenants in the mean time, notwithstanding the several limitations; and if A. die before marriage, the rent shall survive; but if A. had married, the rent should have ceased for a moiety, & sic e converso, on the other side. Co. Litt. 180. b.

## (M. 3) In what Cases one may be Tenant in common with himself.

1. **I**F J. S. be dean of P. I may give land to him by name of dean, &c. and his successors, and to J. S. clerk and his heirs, and there he takes as dean, and also as a private man, and is tenant in common with himself; per Pollard J. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29. *S. P. Fin. Law, 8vo. 88.—So if rent be granted to J. S. dean, and J. S. clerk, which is one and the same person, he shall join with himself in avowry. Br Corporations, pl. 34. cites 14 H. 8. 2. 29.*

2. So where the dean and chapter are lords, and the dean purchases the tenancy to him and his heirs, he is tenant to himself, and he and his chapter shall make avowry upon himself, and those cases were granted, because he takes of another's gift, but all this does not prove that he may take of his own gift. Br. ibid.

## (N) Who are Jointenants, though the Estate vests at several Times.

1. **I**N some cases there may be jointenants and yet the estate may vest in them at several times; as if a man makes a feoffment in fee to the use of himself and of such wife as he shall afterwards marry for term of their lives, and after he takes wife, they are jointenants, and yet they come to their estate at several times. Co. Litt. 388. a. *D. 329. h. pl. 48. Hill. 17 Eliz. Brent's case—So it is if I disseise one to the use of two and the one agrees at one time, and the other at another, yet they are jointenants. Co. Litt. 188. a.*

2. If

Comb. 467.  
S. P. Mat-  
thews v.  
Temple.

2. If a man makes a *feoffment* in fee to the use of himself for life, then to the use of every one of his issue female and to the heirs of their bodies, then *to the issue of one daughter at one time, of a second daughter at another time, and of a third daughter at another time*, so that this is to vest severally in them, and afterwards to all; they are here jointenants, and yet they come at several times; but the reason of this is, because the *root was joint*; per Coke Ch. J. says it has been so adjudged. 3 Bulf. 101. Blandford v. Blandford.

3. If lands are *demised for life*, the remainder to the right heirs of J. S. and J. N.—J. S. has issue and dies, and after J. N. has issue and dies; the issues are not jointenants, because the one moiety vested at one time, and the other moiety vested at another time. Co. Litt. 188. a.

But if he  
had made a  
lease for  
years to be-  
gin at  
Michael-  
mas, it  
should have  
bound the survivor. Co. Litt. 185. a.

4. If two jointenants be of a term, and the one of them grants to J. S. that if he pay to him 10 l. before Michaelmas then he shall have his term, and the grantor dies before the day, and J. S. pays the sum to his executors at the day, yet he shall not have the term, but the survivor shall hold place; for it was but in the nature of a communication. Co. Litt. 184. b. 185. a.

### (O) What Things may stand in Jointure.

But a right  
of action or  
a bare right  
of entry can-  
not stand  
in jointure  
with a free-  
hold, or in-  
heritance in  
possession,  
and there-

1. **A** right of action and a right of entry may stand in jointure; for at common law, the alienation of the husband [of feme jointenant] was a discontinuance to the wife, of the one moiety, and a disseisin of the other, so as after the death of the husband, the wife has a right of action to the one moiety, and the other jointenant a right of entry into the other; but they are jointenants of the right, because they may join in a writ of right. Co. Litt. 188. a.

fore if the husband make feoffment of the moiety, this was a discontinuance of that moiety \* and the other jointenant remained in possession of the freehold and inheritance of the other moiety, which for the time was a severance of the jointure, and so are all the books, which seemed to vary among themselves, clearly reconciled. Co. Litt. 188. a. —————\* Ibid. Marg. says that by the stat. 32 H. 8. a. it is no discontinuance at this day.

2. If two jointenants are of a rent, and the one disseise the tenant of the land, this is a severance of the jointure for a time; for the moiety of the rent is suspended by the unity of possession, and therefore cannot stand in jointure with the other moiety in possession. Co. Litt. 188. a.

3. If a man devises lands to two, to hold to the one for life and the other for years, they are no jointenants; for a state of freehold cannot stand in jointure with a term for years. Co. Litt. 188. a.

Neither can  
a seisin in  
the right of  
politic capacity

4. A reversion upon a freehold cannot stand in jointure with a freehold and inheritance in possession. Co. Litt. 188. a.

stand in jointure with seisin in a natural capacity. Co. Litt. 189. a.

(P) Where

(P) Where two may have *Joint Estates for their Lives, and yet the Inheritances several, or to one of them.*

1. JOINTENANTS may have a joint-estate, and be joint-tenants for their lives, and yet have several inheritances; as if lands be given to *two men, and to the heirs of their two bodies begotten.* In this case the donees have a joint-estate for term of their two lives, and yet they have several inheritances; for if one of the donees hath issue and die, the other which surviveth shall have the whole by the survivor, for his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold the land between them in common, and they are not jointenants, but are tenants in common. . And such donees have a joint-estate for term of their lives, *for that* at the beginning the lands were given to them two, which words, without more saying, make a joint estate to them for term of their lives, and they shall have several inheritances, in as much as they *cannot have one heir between them ingendered*, as a man and a woman may have, &c. The law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs which the one shall beget of his body by any of his wives, &c. so by necessity of reason they have several inheritances. Co. Litt. f. 283.

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2. As it is said of males, *so* it is where it is given to *two females, and to the heirs of their two bodies ingendered.* Co. Litt. f. 283.

2 Vern. 545.—In assise; land

was given to *two sisters and the heirs of their bodies, and that she who survived should have the whole, the one had issue and died, and after the other had issue and died, and the issue of the survivor would have had the whole by the survivor of his mother and could not, for they were jointenants for term of life, and had several inheritances.* Br. Jointenants, pl. 40. cites 8 Aff. 33.

3. Note, albeit they have several inheritances in tail, and a particular estate for their lives, yet the *inheritance does not execute, and so break the jointenancy*; but they are jointenants for life, & tenants in common of the inheritance in tail. Co. Litt. f. 283.

4. If a man gives lands to *two men and one woman, and the heirs of their three bodies* begotten; in this case they have several inheritances; for albeit it may be said that the woman may by possibility marry both the men one after another, yet first she cannot marry them both in presenti, and the law will never intend a *possibility upon a possibility*, as first to marry the one, and then to marry the other. Secondly, the form of the gift is to the heirs of their three bodies which is not possible, and therefore they shall have several inheritances. Co. Litt. 184. a.

So it is if a gift be made to one man and two women, *mutatis mutandis.* Co. Litt. 184. a.

5. So if a gift in tail be made to *a man and his \* mother, or to a man and his sister, or to him and his aunt, &c.* and in this and like cases, albeit the gift is made to a man and a woman, yet they have several

\* S. P. Br. Tail & Dones, &c. pl. 9. cites

ra]

7 H. 4. 16. *ral inheritances, because they cannot marry together, and are with- And if it be to two* in the rule and reason of our author. Co. Litt. 184. a.

*man and the heirs of their bodies, or to a man and his daughter, and to the heirs of their bodies, there their several heirs of their bodies shall inherit; for it was never lawful that they might marry.*

*So of a devise to two daughters, and the heirs of their bodies, the rule of law is, that it is a joint estate for life, and*

6. A. devised land to his two daughters and their issue, and in default of such issue to J. S. they have a joint-estate for life and several inheritances; and if one daughter die without issue, there shall not be cross remainders, but her moiety shall go over to J. S. on the death of the daughters for want of such issue, viz. such respective issue. Per Lord Keeper. Pasch. 1706. 2 Vern. 545, 546. in case of Cook v. Cook.

several inheritances. But though the testator never meant that the surviving daughter should turn out the issue of her deceased sister, and that being a point before the House of Lords, and though the Lords inclined for the appellant (the issue) yet the judges all agreeing that the law was so settled, the Lords would not alter it; cited by Ld. Keeper. 2 Vern. 545. Pasch. 1706. as the case of \*Wilkinson v. Spearman. — \*S. C. cited by the Master of the Rolls. Trin. 1723. in case of Cray v. Willis,

2 Wms's Rep. 283. S. C. and the decree was affirmed in the House of Lords.

7. A devise to two, and the survivor of them and their heirs equally to be divided, they shall be tenants for life, and tenants in common of the inheritance; for otherwise the word survivor must be rejected, which the \*testator never could intend. 9 Mod. 157, 160. Trin. 11 Geo. 1. Barker v. Eyles and Smith,

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(Q) *Inter se.* What Acts of one shall bind, and conclude the other.

1. **W** H E R E the one jointenant charges, and after releases to all the others, they shall hold charged imperpetuum; per Littleton. But per Joce, they shall not hold charged imperpetuum, unless he who releases survives. Br. Jointenants, pl. 2. cites 33 H. 6. 4, 5.

2. If one jointenant in fee takes a lease for years of a stranger by deed indented and dies, the survivor shall not be bound by the conclusion; because he claims above it, and not under it. Co. Litt. 185. a.

3. If three jointenants are disseised, and they arraign an affize, and one of them releases to the disseisor all actions personal, this shall barr him, but it shall not barr the other plaintiffs; for, having a regard to them, the realty shall be preferred, & omne majus trahit ad se minus dignum. Co. Litt. 285. a.

But if two jointenants in fee are disseised by two, and one of the dis-

4. And in a writ of ward brought by two, the release of the one shall not grieve the other, but shall enure to his benefit; for he shall recover the whole ward and hold his companion out. Co. Litt. 285. a.

seisees release to one of the disseisors all his right, he shall not hold out his companion; because the release is but of the moiety without any certainty. Co. Litt. 276. a.

5. If there be two jointenants of a *ward*, and *one does wast*, both shall answer for it. Co. Litt. 54. a.

But though the wast of one jointe-

nant is the wast of the other also, as to the place wasted, yet the treble damages should be recovered against him only that did the wast. 2 Inst. 302.

6. Two jointenants make a lease for life upon condition, and one releases the condition; the condition is gone. Per Mounson J. 4 Le. 29.

7. Two jointenants are of a *term upon condition*, that they, nor either of them, shall alien any part of the land without assent of the lessor; they make partition, and one aliens his part; this is a *forfeiture* of the whole. Cro. E. 163. Mich. 31 & 32 Eliz. C. B. Gostwick's case.

D. 67. pl. 18. Marg. S. P. cites 31 & 32 Eliz. C. B. Gostwick's case

8. Every act by one jointenant for the benefit of his companion shall bind, but those acts which prejudice his companion in estate shall not bind; as the default of one, the surrender of the one, &c. And therefore if the two jointenants have the benefit of a condition to increase their estate, and the one will attorn in a quid juris clamor without saving it, it shall not hurt his companion but himself only. But in the matter of the profits of the land, the one may damnify the other, for there is quasi a privity between them, and it was his folly to join with one who would prejudice him; as where \* one takes the entire profits, the other had no remedy; so where two jointenants were of a seignior, and a wardship happened, if the one would distrain for the services before election of the wardship, it should bind his companion. Cro. E. 803. Hill. 43 Eliz. B. R. in case of Rud v. Tucker.

\* Altered by 4 Annæ, 16.

9. Two jointenants of a term by indenture; one gives the indenture to a stranger and dies; all the entire term survives to the other; yet he shall not have an action for the indenture. Noy. 36. Anon.

10. A. and B. two jointenants of the office of fines for original writs, committed the custody of the seal of the office, and the collection of the profits to J. S. They both commence a suit in equity against J. S. for an account of the profits. B. releases to J. S. all actions and accounts, whereupon A exhibits his bill against B. and J. S. surmising that the said release was by combination, and for a valuable consideration in money paid, &c. To this bill J. S. pleaded the release; and the court held it a good plea, though the bill seeks relief against it, for there does not appear any particular fraud or combination in obtaining it; and a general allegation or combination is not sufficient; for there may be a lawful combination, and defendant is not obliged to answer but to unlawful combination; and in this case the release is good in law, and no default in him, who obtained it for his own advantage; besides, it appears to have been obtained for a valuable consideration, and so equity ought not to set it aside; and if the plaintiff has any remedy in this case, it must be against his co-partner, and not against J. S. Hard. 168. Trin. 12 Car. 2. in Scacc. Griffith v. Manser and Vaughan.

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11. If one jointenant agrees to alien, and dies before it is done, it would be a strange decree to compel the survivor to perform the agreement.

agreement. Per Cur. 2 Vern. R. 63. Pasch. 1688. in case of Musgrave v. Dashwood.

12. The *attornment* of one jointenant is good; for both are tenants of the whole land, and the services are due for the whole land; and since the whole services are due for both, either may consent for the whole; and the distress grows to be notorious on the land for the whole. G. Treat. Ten. 83. l. 566.

### (Q. 2) Bound by *Forfeiture* of the other.

Br. Obligation, pl. 50. cites S. C.

1. *A. was bound to two* in 20 l. and the *one* of the two was *seised de se*, which was found by office; and per Chocke justice, the whole obligation is forfeited; contrary per Young, for by the death it is vested in the other by the survivor, and the office which came after could not divest that which was vested before; quære. Br. Jointenants, pl. 34 cites 8 E. 4. 4.

2. In debt by the king; *A. was bound to two*, the *one* was *outlawed*, the king got the obligation and after granted it, the duty, the action, and the execution, by patent, to another, and that he should sue it in name of the king. Per Port, the action ought to be in the name of those obligees; for the outlaw is alive; Newton said, that as one may by his release discharge the entire obligation, so may he forfeit it by outlawry to the king, therefore ruled the defendant to answer; and so see the survivorship determined. Br. Jointenants, pl. 39. cites 19 H. 7. 47.

### (R) How far *bound by his own Acts*, Grant, &c.

Per Williams J. 1 Bull. 3. Cro. C. 578. cites 7 E. 6. Br. tit. Inrolments.

1. **I** F there are two jointenants, and *one bargains and sells all the* land by deed, *the other dies*, so as he has all by survivor, and the deed is after inrolled, yet the moiety only shall pass. Cro. J. 53. Arg. in case of Bellingham v. Alsop.—Cites 7 E. 6.

2. A jointenant may make a *feoffment* of the entirety with *warranty*; for he is seised per my & per tout; and though it be a *disfrisin* of the moiety, yet the feoffment is good, and the warranty well annexed, and when they join in a feoffment with warranty every one warrants the entire. Cro. E. 690. Trin. 41 Eliz. C. B. Piper v. Wider.

3. If there are 4 jointenants, and they *covenant that survivorship shall not hold*, yet it shall hold. Arg. Skin. 7. Mich. 33 Car. 2. B. R. in case of Kingdom v. Jones.

### [ 499 ] (R. 2) Bound; how far, by *Charges* of his Companion.

B. P. Br. Distress, pl. 68. cites 11

1. **I** F there be two jointenants, and *one charges the land, his beasts shall be distrained*, but not the beasts of the other jointenant; but



but if *he who charges survives*; the charge is good for ever. Per H. 6. 28. *Strounge. Br. Charge, pl. 10. cites 5 H. 5. 8.*

fo. 33. That it is in a manner agreed, that where 5 jointenants are, and two charge the land with rent, and lease their part to one of the other 3, and the grantee distreins him, it is well; for by the taking of the lease of the part of the grantors, he should be in the same plight as the grantors themselves shall be, and e contra if he had occupied his first part only.

## (S) Charges. Relation to what Time.

1. **I** F two jointenants are, and one charges the whole, and then the *other disclaims*, the charge is good from the beginning. Arg. Goldsb. 8. pl. 11. Pasch. 28 Eliz.

2. If there are two jointenants *copyholders in fee*, and one *surrenders into the hands of two tenants to the use of his will*, and makes his will of that land and dies, and the surrender is presented, this shall bind the survivor; for being presented it shall *relate* to the first time of the surrender. Resolved and adjudged accordingly. Cro. J. 100. Mich. 3 Jac. B. R. Porter v. Porter.

Co. Litt. 59. b. S. 10

## (T) Charges. By Devise by one. In what Case good.

1. **I** F there be two jointenants of land in fee simple *within a borough where* lands and tenements are *devisable by testament*, and one of them deviseth his part, &c. and dieth, this devise is void; for no devise can take effect till after the death of the devisor; and by his death all the land presently cometh to his companion by the survivor, and therefore such devise is void. And the *survivor claims by the first feoffor*, and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise void; and the rule of law is that *jus accrescendi præfertur ultimæ voluntati*, and in consideration of the law there is *priority of time in an instant*, &c. Co. Litt. 185. b.

But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. Co. Litt. f. 287.—But wherethere were two joint purebafor, and one devised his

part for the payment of debts, the same was decreed in chancery. Toth. 142. cites Mich. 7 Car. Mather v. Godbold.

2. Two jointenants, *one by will giveth his part*, and good in equity. Toth. 183. cites 7 Car. Pettit v. Styward.

## (U) Leases by one. In what Case shall bind the [ 500 ] other.

1. **I** F two jointenants be seised of certain lands in fee simple, and the one *letteth* his part to a stranger for forty years, *and dieth before the term beginneth, or within the term*, in this case after his decease, the lessee may enter and occupy the moiety let unto him, during the term, &c. although the lessee had never the possession thereof

Cited by Coke Ch. J. 3 Bull. 131. and took a disforance be

tween a  
more collate-  
ral limitation,  
and where  
the same is  
mixed with  
an interest,  
and cited  
5 Rep. 9.  
Brudnell's  
case. —  
Bridgm. 43.  
S. P. Arg.  
—Roll. R.  
253. per  
Coke. But if he grants it on a contingent precedent and dies before it happens, it shall never take effect, cites Rep. Rector of Chedington's case.

thereof in the life of the lessor, by force of the same lease, &c. And the diversity between the case of a grant of a *rent charge* and this case is this, for in the grant of a rent charge by a jointenant, &c. the tenements remain always as they were before, without this, that any hath any right to have any parcel of the tenements, but they themselves; and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a jointenant to another for term of years, &c. presently by force of the lease the lessee hath right in the same land, viz. of all that which to the lessor belongeth, and to have this by force of the same lease during his term. Co. Litt. f. 289.

Bridgm. 43. 2. If two are *seised for life*, and one makes a lease to begin presently, or *in futuro* and dies, this lease shall bind the survivor, as it has been adjudged. Co. Litt. 186. a. b.  
S. P. Arg. —Cro. J. 91, 92. S. P. per Cur. Mich. 3 Jac. B. R. in case of Whitlock v. Horton. —Fin. Law, 8vo. 97. —Arg. 2 Roll. R. 405.

A moiety only passes. Le. 147. Hed v. Challoner. 3. Two jointenants, one leases the whole. The lease of the other jointenant's part is void, and the lessor shall not be said disseisor of the part of his companion; per Frowike Ch. J. Kelw. 60. b. H. 20 H. 7.  
—Two

jointenants of a house, the one made a lease for life by name of all that his house, and made livery; per Popham and Fenner the whole passed, but Gawdy contra. Cro. E. 615. Geary v. Holford.

4. If two jointenants be of lands, and a lease is made thus, viz. *testatur, that one of them with the assent of the other demiseth the land*, in witness whereof, he with the assent of the other hath put his seal; it is a good demise by them both; per Gawdy J. and seems granted by 2 other J. 3 Le. 11. 8 Eliz. C. B. in Clark's case.

5 Rep. 155. (f.) 5. Baron and feme jointenants for 99 years if they or any of them so long live, the baron makes a lease for 70 years to commence after his death, and dies living the feme: adjudged a good lease for 70 years against the feme. Mo. 395. cites it as the case of Growte v. Locroft.

6. A lease for years made by one jointenant for life shall be good against the survivor; and so it is, if one jointenant for life makes a lease for years to begin after his death, it is good; per Coke Ch. J. who says it was HARBIN AND BARTON'S CASE. 3 Bulf. 273. in case of Smalman v. Eigborrow.

7 Sonf jointenant in fee. Mo. 395. cites it as decreed in the dutchy chamber by the advice of Clench and Walmfley J. and Brograve attorney of the dutchy, in the case of Sharpner v. Hardenham. —It is a good lease upon a contingent, viz. If he die before his companion; for if his companion die before him it is void; per Coke, cites the case of HARDEN v. CHARDY AND BARTON, Roll. R. 309. Hill. 13 Jac. B. R. —S. C. cited per Coke, Ch. J. 3 Bulf. 133. —Noy. 158. Harbin v. Loby. —2 Vern. 323. Mich. 1694. Clerk v. Turner.

(W) *Leases.* In what Cases they shall not bind himself.

1. **A.** And B. jointenants; A. by indenture covenants with C. that he shall enjoy *the moiety which she holds with her sister in jointure for 60 years, if B. so long shall live, and A. demises to C. the other moiety from her own death for 60 years, if B. so long shall live.* Adjudged the lease void of both moieties; the one because it is of her moiety after the decease of her sister if she herself so long should live. The other is of the moiety of her companion after her own death, the which is only *possibility*, and not grantable. Mo. 776. Trin. 2 Jac. Whitlock v. Hartwell. Noy 14. S. C. says, it was adjudged that the first moiety paid by the covenant, &c. as the lease of that part which belongs to A.  
and then the lease of B.'s moiety was void.—Cro. J. 91. S. C. adjudged that it was good for A.'s part, had she survived B. but A. died first.

2. If two jointenants be for life, and *one leases the whole*; if the *lessor survives*, it shall be good for all; per Doderidge J. 3 Bulf. 132. Mich. 13 Jac.

(X) *Lease* by one or all. In what Cases it shall be said to be *determined*.

1. **JOINTENANTS** for life have each of them an estate only for his own life, but shall have all by survivorship. *But if one is ousted* of his estate, it determines by his death. 3 E. 6. 70. If they make *partition* and *one dies*, *lessor shall enter*, and has estate per my & per tout, and consequently when the one has estate for his own life, he cannot take estate for the life of his companion also. Arg. 2 Roll. R. 472. cites 28 H. 8. 12. Jo. 55. Estate v. Scowen. S. C.—D. 67. pl. 18. Farington's case.
  2. A. and B. are jointenants for life; A. makes a lease for 99 years to commence after his death, if B. shall so long live. B. surrenders to the lessor during the life of A. Adjudged that the lease is void by the death of A. For first the lessee had only a possibility to have it during the life of B. which is now destroyed by the severance of the jointure, and it is all one, whether A. or B. had destroyed the jointure; for the lessee shall not have it absolutely during their two lives, but upon a contingency and possibility that the jointure continues; but now it is destroyed, and the lease with it. Noy 157, 158. Harbin v. Loby als. Chard. Poph. 96. S. C. says, that the lease was adjudged good.—Adjudged good by all the justices of England. Goldb. 187. Harbin v. Barton—Mo. 395. S.
- C. Hill. 37 Eliz. reports it adjudged a good lease.—Cro. J. 91. cites S. C. by the name of Harby v. Balton.—[But neither of those books makes any mention of the surrender.]—And the case in Noy seems to be the case of DANIEL V. WADDINGTON reported Roll. R. 309. and in Cro. J. 377. which are upon the point of the surrender, according to Noy, only that Cro. J. states the surrender, as made by the same jointenant who made the lease, whereas the others state it as made by the other jointenant.

3. Two jointenants join in a lease for years to two, and afterwards they make partition, and one dies; yet the term continues for all. Noy 158. in case of Harbin v. Loby.

4. Two jointenants for life; one leases for *years*, if he and his companion *so long live*. By the death of the one the lease is determined. Roll. R. 310. Hill. 13 Jac. B. R. in the case of Daniel v. Waddington.

[ 502 ] (Y) Lease. Rent. How and to whom it shall be payable on such Lease not being made by all the Jointenants.

Mo. 139. cites S. C. —Co. Litt. 185. a. 318. a. S. C. cited—Poph. 145. cites S. C. —  
 1. **T**WO jointenants are for term of their two lives, and the one of them makes a lease by indenture for years of his moiety, reserving rent to him and his heirs; he who made the lease dies; it was held by the court, that the term continues; but lessee shall hold it discharged of the rent. Quære bien. D. 187. a. pl. 5. Mich. 2 & 3 Eliz.  
 1 Roll. R. 309. cites S. C. —Cro. J. 417. cites D. 2 Eliz. S. C. —Bridg. 44 Arg. cites D. 187. a. —S. P. per Coke. Ch. J. 3 Bull. 133. —The other shall not have the rent, because he claims by the first feoffor, which is paramount the lease and the reservation. 1 Rep. 96. a. (c) in Shelly's case. —Because not privy to the lease; per Doderidge J. 3 Bull. 330.

(Z) Lease. Rent. How and to whom payable, the Lease being made by all.

Kelw. 122. pl. 76. —  
 4 Le. 30. S. P. per  
 1. **I**F two jointenants make a lease for \* life, reserving a rent to one of them, the rent shall enure to them both; because the reversion remains in jointure. Co. Litt. 192. a.  
 Dyer. —Palm. 481. —Arg. Lat. 255. cites Litt. 346. and Perk. 652. —Vent. 161. S. P. per Hale Ch. J. in case of Sacheverell v. Frogate. —\* S. P. 5 E. 4. 4. both shall have the rent, because the lease is joint by them. —S. P. 3 Bull. 330. but contra of a lease for years; per Doderidge J.

S. P. per Dyer, 4 Le. 30. —  
 2. But if the reservation be by deed indented, then he only to whom it is reserved shall have it. Co. Litt. 192. a.  
 Palm. 481. S. P. —S. P. because of the estoppel. Vent. 161. —And because he is privy and not a stranger to the lease, the reservation is good enough. Co. Litt. f. 346.

But if tenant for life, and be in the reversion, join in a lease for life, or a gift in tail by deed, reserving rent, this shall enure to the tenant for life only, during his life, and after to him in the reversion; for every one grants that which he may lawfully grant; and if at the common law they had made a feoffment in fee generally, the feoffee should have holden of the tenant for life, during his life, and after of him in reversion, and so it was holden in B. R. Co. Litt. 214. a.  
 3. If two jointenants, the one for life, and the other in fee, join in a lease for life, or a gift in tail reserving rent, the rent shall enure to both; for if the particular estate determine, they shall be jointenants again in possession. Co. Litt. 214. a.

(A. a) Seised, How each shall be said seised.

1. **E**VERY jointenant is seised of the land, which he holdeth jointly, *per my & per tout*, and this is as much as to say, as he is seised by every parcel, and by the whole, &c. and this is true; for

for in every parcel, and by every parcel, and by all the lands and tenements he is jointly seised with his companion. Co. Litt. f. 288.

2. A. and B. were joint lessees of a mill; *A. grants his estate and dies*; and upon a supposition, that all came to B. by survivorship, *B. grants, bargains and sells* the same to J. S. by the name of *molendinum suum* generally, and all his estate, right, title and interest, and covenants to save him harmless from all former acts done by him, and entered into a bond for performance of covenants; J. S. may have debt against B. upon the entry of the grantee of A. For B. had nothing to do to grant that moiety which was granted by A. and the original agreement in this case, being to pass the whole mill, the bond was forfeited, by not performing an agreement. And an action in C. B. having been brought upon the bond for not performing the agreement, and the breach not being laid in the non performance of covenants, judgment was affirmed by 4 justices against one. Bull. 2 Hill. 7 Jac. B. R. Proctor v. Johnson.

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(B. a) *To what Purposes each has Right but to a Moiety.*

1. **T**OTUM tenet & nihil tenet, viz. *totum conjunctim & nihil per se separatim* and albeit they are so seised, (as for example, where there are two jointenants in fee) yet *to diverse purposes each of them has but a right to a moiety*, as to enfeof, give, or demise, or to forfeit or lose by default in a præcipe. If my villein, and another purchase lands to them two and their heirs, I may enter into a moiety. Co. Litt. 186. a.

2. Where *all* the jointenants *join in a feoffment*, each of them in judgment of law do give but his part. Co. Litt. 186. a. One joint-tenant has one moiety  
in law, and the other the other moiety, and therefore if two jointenants *make a feoffment in fee upon a condition, and that for breach thereof, one of them shall enter into the whole*, yet he shall enter but in a moiety; because no more in judgment of law passed from him; and so it is of a gift in tail, or a lease for life, &c. yet every jointenant may *warrant* the whole; because a man may warrant more than passes from him. Co. Litt. 186. a.

3. If an *alien and a subject purchase land jointly*, the king upon office found, shall have but a moiety. Co. Litt. 186. a.

4. If two jointenants are *of chattles*, the one can *not give more than a moiety*; per Keble. Kelw. 23. a. b.

(C. a.) *Considered as one Person, in what Cases.*

1. **A** demand of possession from a lessee, after the term expired, by one, is a demand of both, and the *delivery to one* is a delivery to both. Cro. J. 476. Hingen v. Pain.

(D. a) *Release by one to the other. How it shall enure or relate.*

1. **W**AST by A. supposing that the tenant held of his lease; the defendant said, that the plaintiff and three others leased to him, &c. judgment of the writ; the plaintiff said, that the other three released  
Qq 2 leased

*leased to him all their right, &c.* and the writ was awarded good; quod nota. Br. Jointenants, pl. 70. cites 46 E. 3. 17.

2. In assise; *three jointenants* were of land held of the king in capite, and the *one released to his two companions*, and pleaded pardon of it, quod mirum! for where three jointenants are, and the one releases to the other two, there needs no licence or pardon; for *the two are in by the first feoffor*, and not by him who released. Br. Alienations, pl. 4. cites 8 H. 4. 8. and the like agreed M. 37 H. 8.

S. P. and he and his companion shall hold the other 2 parts in jointure.

3. But where the *one releases to one of the other two*, there he who takes the release is in of the third part by him; contra if he had \* released to all his companions. Br. Alienations, pl. 4. cites 8 H. 4. 8.—And with this agrees 33 H. 6. 4. and so it is used in the Exchequer, that this is no alienation.

And as to the third part, which he hath by force of the release, he holdeth that third part with himself and his companion in common. Co. Litt. f. 304.—Such relesee shall be in in the part for the third part, of which the release is made, &c. Perk. f. 84. cites 33 H. 8.—In this case, this release enures by way of *mitter l'estate*, and not by way of *extinguishment*; for then the release should enure to his companion also. Co. Litt. 193. a.

\*[504]

And if the third release to the wife, not naming the husband in the re-

lease, then hath the wife the moiety which the third had, &c. And the husband hath nothing of this but in right of his wife; because in this case, the release shall enure to make an estate to him, to whom the release is made, of all that which belongeth to the releasor. Co. Litt. f. 305.

5. If two jointenants *make a lease for life*, they may afterwards release to each other without attornment or tenant for life. For since both of them have the reversion, the tenant for life is tenant to them both, and consequently there is no need of any subsequent consent to create a new tenancy; and paying the rent, and doing the services to one of them only, is a sufficient notoriety that the whole fee is in one only. G. Treat. Ten. 85.

(E. a) Release or Confirmation, by one Jointenant to Strangers. How it shall enure and relate.

1. **T**WO jointenants make *feoffment in fee on condition*, that if they pay 20 l. at Pentecost, then they may *re-enter*. Before the day one of them releases to the feoffee all his right, title and demand. The other jointenant pays at the day, and the feoffee receives it. Per Dyer, both have interest in the condition, and if one dies, the condition survives, and so one cannot dispence with it. Per Benloes, it seems also that by this release he cannot *dispence with part of the condition*, because it is entire; quod Dier concessit. Per Brown, if a man makes feoffment on condition, and has *issue two daughters*, and dies, one may dispence with the condition. Quod Dyer negavit and Brown e contra. Dal. 44. 33.

2. If two jointenants be of 20 acres, and the one makes a *feoffment of his part in 18 acres*, the other cannot release his entire part, but



but only in two acres; because the jointure is severed from the residue. Co. Litt. 193. b.

3. If two tenants in common be of *the wardship of a body*, and one ravishes the ward, and the one tenant in common releases *to the ravisher*, this shall go in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any bar to him. Co. Litt. 197. b.

4. So if two tenants in common be of *an advowson*, and they bring a *quare impedit*, and the one releases, yet the other shall sue forth and recover the whole presentment. Co. Litt. 197. b.

5. Two jointenants of a ward, *one releases to the ward*, and the other takes the value of the marriage; he who released shall have account, notwithstanding his release to the ward. Mo. 184. pl. 327. per Mead.

(F. a) Release by one to a Stranger. *How much [ 505 ] shall pass.*

1. **I** F two jointenants or tenants in common are, and they are *disseised*, and after one of them releases all the right that he hath in the moiety, he shall be *barred of his right in all*, and yet every jointenant is seised *per my & per tout*. Co. R. on Fines, 7. cites 45 E. 3.

2. But if two jointenants are of *two acres*, and are disseised, and the one releases *all his right* which he hath in *one acre*, this shall bar him but of the *moiety* of this acre only, and yet the moiety of two acres is one acre. Co. R. on Fines, 7. cites 45 E. 3.

(G. a) Release *to one*, or to his Lessee; By Stranger. How it shall enure.

1. **I** N some case a release shall enure by way of *extinguishment*, and in such case, such shall *aid the jointenant*, to whom the release was not made, as well as him to whom the release was made. Co. Litt. f. 307.

As if a man be disseised, and the disseisor makes a feoffment to

~~two men in fee~~, if the disseisor releases by his deed to one of the feoffees, this release shall enure to both the feoffees; for that the feoffees have an estate by the law, viz. by feoffment, and not by wrong done to any. Co. Litt. f. 307.—The reason of this diversity between the disseisors and their feoffees is, for that the feoffees, coming in by title and purchase, are intended in law to have a warranty (which is much esteemed) in fee, and therefore, least the warranty should be avoided, the release shall enure to both the feoffees in favour of purchasers, and so the right and benefit of every one saved. Co. Litt. 194. b.—And because, coming in by the legal notoriety of a feoffment, that feoffment must be defeated by an act of equal notoriety before the title can be altered, because the feoffment must stand good as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears, that the freehold is in another. And since the freehold is not defeated in this case, the feoffment continues, and the release enures to them both. G. Treat. Ten. 51.

2. If the disseisor makes a lease for life to A. and B. and the disseisee confirms the estate of A.—B. shall take advantage thereof; for the estate of A. which was confirmed, was joint with B. and in this case, the disseisee shall not enter into the land, and divest the moiety of B. Co. Litt. 297. a. 297. b.

Co. Litt.

f. 472.

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possessing can be altered; and therefore, though he possessed as a jointenant before the release, he shall oust his companion, because he was possessed of the whole before by wrong, and now being passed by right, it follows, that the possession of the other wrong doer is no possession at all. G. Treat. Ten. 50, 51.

3. In some cases a release shall enure to put all the right which the releffor hath in the releffee. As if a man seised of certain tenements is disseised by two, if the disseisee, by his deed, releases all his right, &c. to one of the disseisors, then such releffee shall hold all the tenements to himself alone, and \* shall oust his companion of every occupation of this. For the two disseisors were in against the law, and when one of them gets the release of him which hath right of entry, &c. this right, in such case, shall vest in him to whom the release is made, and he is in like plight, as if he which hath the right had entered and infeoffed him, &c. for he which before had an estate by wrong, viz. by disseisin, &c. hath now by the release a rightful estate. Co. Litt. f. 306.

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4. So, where there are two joint abators or intrudors, which come in merely by wrong. Co. Litt. 194. a.

5. But if two men do usurp by a wrongful presentation to a church, and their clerk is admitted, instituted, and inducted, and the rightful patron releases to one of them. This shall enure to them both; because the usurpers come not in merely by wrong, but their clerk is in by admission and institution, which are judicial acts, and therefore an usurpation shall work a remitter to one that has a former right. Co. Litt. 194. a.

6. If there be two disseisors, and the disseisee releases to one of them, he shall hold his companion out of the land. Co. Litt. f. 522.

This makes no alteration; for he confirms the estate in the same manner as it is. G. Treat. Ten. 72.

7. But if the disseisee confirm the estate of the one without more saying in the deed, some say that he shall not hold his companion out, but shall hold jointly with him, for that nothing was confirmed but his estate which was joint. Co. Lit. f. 522.

For by this he expresses a design of confirming the possession

8. But if the disseisee confirms the estate of the one disseisor, in the lands, to have and to hold the lands or tenements or the right of the disseisee to him and his heirs, he shall hold out the other disseisor Co. Litt. 298. a.

to him alone, so that the confirmation goes to the possession itself by the explanatory words in the habendum, and not to the manner of possessing; and such habendum makes the confirmation enure as a new grant of such his moiety. G. Treat. Ten. 72.

So if he releases to tenant for life, this shall enure to them all; because the release cannot alter the feudal scioffment. G. Treat. Ten. 52.

9. If two disseisors make a lease for life, and the disseisee releases to one of them, this shall enure to them both, and to the benefit of lessee for life also; for he cannot, by the release, have the sole possession and estate; because part of the estate is in another. Co. Litt. 276. a.

10. If lessee in tail be disseised by two, and releases to one of them, it shall enure to both. But if the king's tenant for life be disseised by two, and he releases to one of them, he shall oust his companion. Co. Litt. 276. a.

11. *So if two jointenants make a lease for life, and after disseise the tenant for life, and he releases to one of them, he shall hold out his companion; for the disseisin was but of an estate for life. Co. Litt. 276. a.*

12. *If two jointenants in fee, be disseised by two, and one of the disseisees releases to one of the disseisors all his right, he shall not hold out his companion, because the release is but of the moiety without any certainty. Co. Litt. 276. a.*

He cannot hold him out of the whole; for he has not the whole

right, and so there can be no act of notoriety, whereby the estate may appear to be in one disseisor. G. Treat. Ten. 54.

13. *If a man be disseised by two women, and one of them takes husband, and the disseisee releases to the husband, this shall enure to both the disseisors; because the husband was no wrong doer, but in a manner in by title. Co. Litt. 276. a.*

14. *So it is (as it seems) if the disseisors make a lease for years, and the disseisee releases to one of them, this shall enure to them both; for by the release he cannot have the sole possession. And it appears by Littleton, that he must have the sole possession, and hold his companion out. Co. Litt. 276. a.*

Because he cannot make it notorious that the estate is in him alone

for he cannot hold out his companion during the continuance of the lease for years. G. Treat. Ten. 53.

15. *But if the mortgagee upon condition, having broken the condition, is disseised by two, and the mortgagor, having title of entry for the condition broken, releases to the one disseisor; albeit they be in by wrong, yet the release shall enure to them both, for two causes, first, For that they are not wrong doers to the mortgagor, but to the mortgagee; and by Littleton's case it appears, that wrong is done to him that made the release; Secondly, That he that made the release has a title by force of a condition, and Littleton's case is of a right. Co. Lit. 276. a.*

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16. *If tenant for life be disseised by two, and he in reversion and tenant for life join in a release to one of the disseisors, he shall hold his companion out, and yet it cannot enure by way of entry and feoffment. But if they severally release their several rights, their several releases shall enure to both the disseisors. Co. Lit. 276. a.*

Because when the possession is notoriously in them both, each of

them is capable of a release; and when one has obtained a release, it makes his possession rightful; and his holding out his companion makes it immediately notorious, that the estate is in him alone. G. Treat. Ten. 53.

17. *But if A. be tenant for life, the remainder in fee to B. and A. is disseised by two, viz. W. R. and W. S. and A. releases to W. R.—W. R. shall not hold out W. S. for if W. R. had a rightful estate by the release, then the remainder would be revested; but the remainder cannot revest without some act of notoriety; for where there is a notorious possession by wrong, it may receive a release of the right without any act of notoriety; because the possession in itself is a notoriety; but the estate cannot alter without some act of notoriety, so that men may know in whom the fee is lodged, and therefore W. R. doth not take an estate for life, and revest the remainder; for W. R. has a longer estate than A. who released to him, and so if*

So if B. the remainder man had released to W. R.—W. R. should not hold out W. S. for if he might, then the estate gained by wrong would be left in both.

W. R.

during A.'s life since B. could not, by his entry, overthrow it during the continuance of the estate for life, and whatever right is acquired during the continuance of the unlawful possession, is acquired to them both; for if one were to acquire the whole right in remainder, there would be no notoriety of the beginning, or determination, of the estate for life in the other disseisor. G. Treat. Ten. 52.

not, by his entry, overthrow it during the continuance of the estate for life, and whatever right is acquired during the continuance of the unlawful possession, is acquired to them both; for if one were to acquire the whole right in remainder, there would be no notoriety of the beginning, or determination, of the estate for life in the other disseisor. G. Treat. Ten. 53.

18. If lord and two jointenants are, and the lord releases all his right unto one, this is good, and shall enure unto them both; for one of them only doth not hold of him; and it shall be prejudicial to no person that the services shall be extinct by the release, but unto the releasor himself. And always a deed shall be taken strongest against him that made it, &c. Perk. f. 69.

S. C. cited  
Arg. Mo.  
413, 513.  
—2 Roll.  
R. 473.—  
and Godb.  
127, 128.

19. Queen Mary, having a rent of 20 l. per ann. issuing out of a manor, of which a man and his wife were jointenants seised in fee, for and in consideration of money, and other considerations given and paid by the baron by her letters patents did give and grant, remise, release, and renounce, to the said baron and his heirs the said rent of 20 l. and after the baron died, and the feme survived. If she must pay the rent to the heir of the baron, or not, quære? and the point is if the letters patents should be taken in law for a release only, or may be used as a grant at the election of the baron, and his heirs, and not for a release or extinguishment. And Dyer thought, the patentee should have election to use the patent as to him seems best, and cited 9 H. 6. in quare imp. And in the case supra, the baron by his former will devised the rent to another, which was a declaration of his intent and election. And also in the *habend' & percipiend. redd. præd. præf. the patentee, and to his heirs and assigns*, the intent of the queen appeared to have the rent continue if the patentee would, &c. D. 319. b. pl. 16. Mich. 14 & 15 Eliz. Anon.

### (H. a.) Grant or Surrender to one. Enure how.

† No part of it shall enure to his companion; because the moiety belonging to his companion is in esse to him to whom the grant is made, the rever-

1. IF two jointenants in fee are of an acre of land, and lease the same acre unto a stranger for life, and the lessee + granteth his estate unto one of the lessors; it seems unto some men, that as unto one moiety, it shall enure by way of surrender, and as unto the other moiety, it shall enure by way of grant; and their reason is, because the grantee \* had but one moiety of the reversion of the land in right, in so much as if he had granted the whole reversion to a stranger, and the lessee attorne, yet but a moiety passeth from him; and by the like reason, the grant of the lessee shall enure by way of surrender but of the moiety, &c. Perk. f. 80. cites 5 E. 3. 19.

sion to the other in fee. Co. Litt. 192. a. — But if the lessee surrenders to one of them, it shall enure to them both; for they have a joint reversion. Ibid.

\*[508]

2. But others think that this shall enure by way of surrender for the whole; because every of the lessors is seised of the whole, and of the whole reversion; and the grant of the estate of the particular tenant cannot take effect by way of grant without livery of seisin, and the grantee cannot take livery of seisin of the same land, because he hath the reversion in fee of the whole in him immediate to the same particular estate, and in his own right. Perk. f. 82.

3. If

3. If lord and two jointenants are in fee, and the lord grants his seignior to one of the tenants, this grant shall take effect by way of extinguishment for the whole, &c. and to some it seemeth it shall enure by way of grant for the whole; and they say, that otherwise the lessee shall not have liberty to part with his estate to one of his lessors, &c. Perk. f. 83.

(I. a) In what Cases, and to what Purposes, such Inheritances shall be said to be executed in the Life of the Parties.

1. **O**F ancient time it has been said, that when lands have been given to two women, and to the heirs of their two bodies begotten, (as Littleton puts the case, f. 284.) that the husband having issue should be tenant by curtesy living the other sister; for that as some held, the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband to be tenant by courtesy, which he could not be if the women had a joint estate for term of their lives: and likewise it was said, that the issue of the one should recover the moiety in a formedon, living the other sister. But verba hæc sunt, and Littleton, grounding himself upon good authority in law, has \* cleared this doubt. Co. Litt. 183. (h).

\* Viz that they are

jointenants for life and tenants in common of the tail, and the reversion is several. Litt. f. 283.

2. If a man makes a lease for life, and after grants the reversion to tenant for life, and to a stranger, and their heirs; they are not jointenants of the reversion; but the reversion is by act of law, executed for the one moiety in the tenant for life, and for the other moiety he holds it still for life, the reversion of that moiety to the grantee. Co Litt. 182. b. (f.)

So it is if a man makes a lease to two for their lives, and after grants the reversion to one of them

in fee; the jointure is severed, and the reversion is executed for the one moiety, and for the other moiety there is tenant for life the reversion to the grantee. Co. Litt. 182. b. (g).—2 Rep. 60. 61. Westcote's case.

3. If lessee for life grants his estate to him in the reversion, and to a stranger, the jointure is severed, and the reversion executed for the one moiety by act of law. Co. Litt. 182. b.

4. If a man makes a lease for life, and grants the reversion to two in fee, and the lessee grants his estate to one of them; they are not jointenants of the reversion; for there is an execution of the estate for the one moiety, and an estate for life the reversion to the other of the other moiety. Co. Litt. 183. a.

2 Lutw. 1173.

(K, a) *Revive.* Where after a Severance the Jointenancy may revive. [ 509 ]

1. **T**WO disseisors are, and the disseisee releases to one of them upon condition; now he to whom the release is made shall hold his companion out; but if afterwards the condition be broken, they are jointenants again. Co. R. on Fines 6, cites 17 Aff.

2. The



Br. Entre  
Cong. pl.  
75. cites S.  
S.

2. The *baron and feme*, and *J. S. purchased jointly*; the *baron aliened the whole* and died, and after the *feme died*; *J. S. entered* and was ousted, and brought assise, and recovered the whole, because he and the feme by the death of the baron, were intitled to have a joint writ of right and revive the jointure; and of the alienation of the baron action of *cui in vita* is not given to *J. S.* and therefore he shall recover the whole. *Quod nota.* Br. Jointenants, pl. 29. cites 35 Aff. 15.

S. P. Br.  
Jointe-  
nants, pl. 6.  
cites 46 E.  
3. 21. Per  
Finch.

3. If two jointenants, the *one for life*, and the *other in fee*, *life by default*, the *one shall have a writ of right*, and the *other a writ of deforceat*; and yet when they have severally recovered they shall be jointenants again. Co. Litt. 188. a.

S. P. Br.  
Jointe-  
nants, pl. 6.  
cites 46 E.  
3. 21. Per  
Finch.

4. So it is if two jointenants are *disseised*, and an *assise* is brought, and the *one is summoned and severed*, and the other recover the moiety; and after another assise is brought, and he that recovers is summoned and severed, and the other recovers; albeit they severally recover, yet they are jointenants again. Co. Litt. 188. a.

Br. Jointe-  
nancy, pl.  
28. cites 14  
H. 6. 26.

5. But where the *disseisor infeoffs baron and feme*, and the *disseisee re-enters*, and the *baron re-enters claiming to him and his feme*, this vests nothing in the feme, because the jointenancy was defeated by the regrefs of the disseisee; and therefore he who *enters by wrong*, (as the baron here) cannot by his claim *vest any thing in a feme covert*, in an *infant*, nor in a *stranger to the entry*. Br. Entre Cong. pl. 41. cites 14 H. 6. 25, 26. and 1 H. 6. 5. to the same intent.

But if the  
barons had  
aliened seve-  
rally, this  
had been a  
severance of  
the jointure  
for a time.  
Co. Litt. 188. a.

6. If *two femes* are jointly seised, and they *take barons*, and the *barons join in an alienation* and die, the *wives are jointenants of the right*, and may join in a writ of right, and yet they may have several writs of *cui in vita* at their election; but when they have recovered in those several writs, they shall be jointenants again. Co. Litt. 188. a.

### (L. a) Survivorship. In what Cases.

1. **T**HE nature of jointenancy is, that the survivor alone shall have the intire tenancy of such estate, as if the jointure had continued. Co. Litt. f. 280.——Note, there is a *natural death* and a *civil death*, and Littleton is to be intended of both; and therefore if two jointenants be, and *one of them enters into religion*, the survivor shall have the whole. Co. Litt. 181. b.

2. Nota, that there shall *never* be any survivor, *unless* the thing be in *jointure* at the instant of the *death of him that first dies*; for the rule is, *nihil de re accrescit ei, qui nihil in re, quando jus accresceret, habet.* Co. Litt. 188. (u.)

3. There may be jointenants, though there be *no equal benefit of survivor on both sides*; as if a man lets lands to A. and B. during the life of A.——If B. die, A. shall have all by survivor; but if A. die, B. shall have nothing. Co. Litt. 181. b.

4. If *two lease land rendering rent*, and that if it be in arrear by two months, and lawfully demanded by the *said lessors*, they may *re-enter*, *one dies*, and the other who survives demands it, and  
it



it is not paid, he may re-enter. Br. Jointenants, pl. 62. cites P. 33 H. 8.

5. Father and son jointenants *for 100 years*, the son takes a *lease for 15 years* of his father of the lands to begin, &c. The same concludes the son to claim the whole term of parcel of it by survivor. 2 Le. 159. 21 Eliz. B. R. in Pleadal's case.

(M. a) Survivorship *destroyed*; so as the Part of one dying, or all, shall go to the Reversioner, &c.

1. **I**N assise; land was demised *to two for life, and the longest liver of them*; they made partition, and one died; the lessor entered, the lessee ousted him, thinking by these words (the longest liver of them) that the survivor shall have the whole; and the lessor brought assise and recovered; for these words, (the longest liver, &c.) is the common law, and *by the partition the jointure is severed for ever*. Quod nota. Br. Jointenants, pl. 28. cites 30 E. 3. 8.

S. P. Br. Entre Cong. pl. 66. cites 30 Aff. 8. Co. Litt. 191. a. D. 67. a. pl. 18. 9. P. 4 Rep. 73. b. B. C. cited.

2. Two jointenants for life; *one makes a lease for 60 years, if he and his companion live so long, and afterwards he surrenders his moiety, and takes back an estate and dies*. Adjudged, that the lease is determined by the death of him that made it; for it has no continuance longer than the jointure continues. Cro. J. 377. Mich. 13 Jac. B. R. Daniel v. Waddington.

3 Bull. 130. and Roll. R. 208. S. C. both state it that the other jointenant surrendered

and took a new lease.

3. A. and B. jointenants for life; *A. grants his moiety by fine by the word concessit to B. habend. to B. and his heirs during the life of A. and then A. dies*. It was adjudged, that one jointenant has not any estate but for his own life, but has only a possibility of survivor for the part of his companion, and when he grants over his estate or makes partition, upon his death his part shall resort to the reversion, and the possibility of survivor gone, and the grantee has only estate for his life. Jo. 55. Mich. 22 Jac. B. R. Eustace v. Scowen.

Both estates being vested in B. the law shall vest it in him as if he had it from the feoffor by the first limitation. Cro. J. 696. S. C. 2

Roll. R. 444. S. C. 485. S. C. See Release (L.) pl. 3. (Z.) pl. 2.

4. Upon a *severance of the jointenancy*, the estate does not continue during the life of each donee, but determines upon the death of one for his moiety; per Master of the Rolls. 2 Wms's Rep. 672. Mich. 1734. in case of Cowper v. Earl Cowper.

(N. a) *Diversities between Jointenants, Tenants in Common, and Parceners; and what Acts they may do the one to the other.*

See (G) (K) (L). See Disseisin, &c.

1. **T**HE essential difference between jointenants and tenants in common is, that jointenants have the lands *by one joint title, and in one right*; tenants in common *by several titles, or by one title, and by several rights*; which is the reason that jointenants have one joint freehold, and tenants in common have several freeholds. Only this property is common to them both, viz. That their occupation is divided, and neither of them knows his part in several. Co. Litt. 189. f. 292.

Br. Feoffment de Terre, pl. 15. cites S. C.—Co. Litt. 200.

2. If two jointenants are, one † cannot make a feoffment to the other, for he cannot make livery; the reason is, because *the other is seised*; Per Moyle, to which Newton agreed clearly. Br. Jointenants, pl. 19. cites 22 H. 6. 42.

b. S. P. because \* the freehold is joint.——But jointenants may release, Ibid.——† S. P. for they are but one tenant, and each is seised *per my & per tout*. Br. Feoffment de terre, pl. 45. cites 10 E. 4. 3.—S. P. for they are in by the first feudal contract; and therefore a second feoffment cannot give any other farther title or notoriety, because every person shall be supposed to be in by the elder and most ~~worthy~~ title, which is the prior feoffment; therefore the second feoffment is impertinent. Now is this any injury to a stranger's præcipe, for he may bring it against them all, according to the prior feudal contract; and if any of them disclaim, the rest must defend for the whole, or lose their interest. G. Treat. of Ten. 68.

But though one jointenant cannot enfeoff the other, yet he may make a lease to the other: for a lease is but a contract. Per Popham Ch. J. but Fenner J. doubted. Ow. 102. Pasch. 35 Eliz. in case of James v. Portman,

\*[511]

Co. Litt.

200 b. S. P. But \* not

3. But tenant in common may enfeoff his companion; for there is no privity. Br. Feoffment de terre, pl. 45. cites 10 E. 4. 3.

release, because the freehold is several.——\* S. P. Br. Feoffment de terre, pl. 45. cites 10 E. 4. 3.——By such release the moiety does not pass; for the other had not possession of the frank-tenement of that moiety at the time of the release. 10 E. 4. 3. b. Per Brian.——And if he makes livery and gives secundum formam chartæ, the livery is void, and also the release. Co. R. on Fines, 7. cites 10 E. 4.——They cannot release to each other, but they must pass their estate by feoffment; because this estate being established by different notorieties, each having passed by distinct liveries, they must pass to each other by a distinguishing livery, or else it cannot be known in whom such parts are, which formerly had passed by a distinct livery. G. Treat. of Ten. 68.

But if two tenants in common make composition to present by turn to the advowson, and after the one releases to the other, this is a good release. Co. R. on Fines, 7. Marg. cites 39 E. 3. 37. and Br. Releases, 77.

Coparceners come into one indivisible feud, and descend-

4. But coparceners may both infeoff and release; because their feisin, to some intents, is joint, and to some several. Co. Litt. 200. b.

ing from their father; and therefore may release privately to each other without any notoriety by feoffment, because they take by reason of the former contract, and descent to them, which establishes them in the possession, without a notoriety. But since the coparceners do also transmit distinct estates to their children, they may pass such estates by feoffment; for they have, in respect of the descending line, distinct estates, which they may pass by a distinct feoffment. G. Treat. of Ten. 67, 68.

### (O. a) Tenants in Common. Of what.

So if one lessee makes a lease of part of the term, &c. Co. Litt. 193.

1. THERE be tenants in common of chattles real and personal; as if a lease be made of certain lands to two men for twenty years, and when they are possessed, the one grants his part to another during the term, then the grantor and the other shall hold and occupy in common. Co. Litt. f. 319.

2. If two have jointly the wardship of the body and land of an infant within age, and the one of them grants to another his part of the same ward, then the grantee and the other which did not grant, shall have and hold this in common. Co. Litt. f. 320.

3. If two tenants in common be of a seignior, and a ward falls they are tenants in common of the wardship, as well of the body as land; and so it is if the land itself escheat to them they shall be tenants in common; and so it is of parceners. Co. Litt. 199.

4. If two have jointly by gift, or by buying, an horse or an ox, &c. and the one grants his part of the same horse or ox to another; the grantee and the other which did not grant shall have and possess such chattels personal in common; and in such cases where diverse persons

persons have chattels real and personal in common and by diverse titles, if the one of them dies, the other who survives shall not have this as survivor; but the executors of him who dies shall hold and occupy it with them that survive, as their testator did or ought to have done in his life-time, &c. because their titles and rights in this were several, &c. Co. Litt. 321.

(P. a) Ouster. *What shall be said an Ouster, &c. [ 512 ]*  
by the one of the other.

1. **I** F one tenant in common enters into the entire land, his possession shall be adjudged the possession of his companion also, and he shall not be put out of possession. Cro. E. 640. Mich. 40 & 41 Eliz. B. R. in case of Hemmley v. Price. Mo. 868.  
Trin. 12  
Jac. Small  
v. Dale.
2. Two jointenants are of a lease for years, and one bids the other go out of the house, and he went out accordingly; and it was held, that this was an actual ejectionment, of which an ejectione firm will lie, as well as if had thrust him out of the house. Clayt. 111. Beverley's case. Ibid. 131.  
Contra  
Anon.—  
If one jointenant offers to strike at the lessee  
of the other, or push him to get him out of the house in question, this will amount to an actual ejectionment of the moiety, &c. though the lessee do abide in the house a little while after such assault, and then depart. But note, words were also used by the defendant that he should not stay there, which did declare the intent of that assault. Clayt. 146. Greenwood's case.
3. One tenant in common cannot be a disseisor without an actual ouster; for the possession of the one is the possession of the other; per Holt Ch. J. 1 Salk. 139. Hill. 12 W. 3. B. R. in case of Fisher v. Wigg. Cro. E. 220.  
Cotton's  
case.—Le.  
212. S. C.  
—A bare  
perception of  
the profits is not enough to make a disseisin, but it must be actual disseisin, as turning him out, hindering him to enter, &c. 1 Salk. 392. Hill. 1 Annæ, B. R. Reading's case. — One nailed up the doors, and built up a wall to prevent the other's coming into the house, yet held to be no disseisin, Allen 8. Pasch. 23 Car. B. R. Waters's case.
4. If one jointenant levies a fine, it severs the jointure, but does not amount to an ouster of his companion. 1 Salk. 286. Hill. 2 Ann. B. R. Ford v. Grey. — Though the fine be of the whole. 8 Mod. 45. S. C.
5. A. died leaving a wife, a son, and a daughter; the widow entered upon the estate, and was seised as tenant in dower of one part, as tenant in common with her son of another part, and of a third part, as guardian in socage to him. The son went beyond sea, and died there under age, whereby the daughter became intitled; she during her infancy married the plaintiff, and together with him applied to the mother to be let into possession of the son's part, which the mother refused, imagining the son was still alive, and therefore insisted to hold the land for him. Upon this they filed a bill in chancery for an account, which was accordingly directed; after this the daughter died, and upon further application to the court by the husband, one question was, whether the seisin of the mother (after the son's death) being tenant in common with the daughter, was the seisin of the daughter, sufficient to make the husband tenant by the curtesy of her part. And the court held it was sufficient; for \* the entry and possession of one tenant in common, &c. is the entry and possession \* Indeed  
whereas  
enter: claim.

*ing the whole for himself in exclusion of* possession of the other, and accordingly it was decreed for the plaintiff. 25 Feb. 1739. *Sterling v. Penlington.*

*this companion*, this may not serve as the entry of his companion, being made directly against him; but that is not this case; for it appears that the mother's keeping possession of the whole against the daughter and her husband, was entirely owing to a mistake, in imagining her son was still living, and not with an intent to exclude the daughter from her right; and therefore no inference can be drawn from it. *ut supra.*

[513] (Q. a) Where Judgment shall be to hold in Severalty.  
See (E).

Br. Partition, pl. 19. cites S. C. —S. P. Br. Affise, pl. 155. cites S. C. —Br. Partition, pl. 11. cites 7 H. 6. 4. S. P. —Br. Jointenants, pl. 14. cites S. C. acc. that he shall have his prayer to hold in severalty, per Weston and Cheney. —But 6 Rep. 13. 2. contra in Morris's case. —So, Br. Partition, pl. 21. says the judgment shall be, that they shall not hold in severalty. Cites 28 Aff. 25. —And see (E) pl. 13. and the notes thereon accordingly. —So, Co. Litt. 187. a. says, that by Littleton's authority, it seems to him, that though the plaintiff prays it, yet no judgment shall be given to hold in severalty; for then, viz. (at the common law) there might not have been by compulsion of law a partition between jointenants and tenants in common; and by rule of law, the plaintiff must have judgment according to his plaint or demand.

1. I N affise, if one jointenant ousts the other, and he brings affise and recovers, the judgment shall be that he recover the moiety to hold in severalty, and this is a severance of the jointure for ever. Br. Jointenants, pl. 41. cites 10 Aff. 17.

See (S. a) per tot. (R. a) Actions. What lay at Common Law, or lie now for one Jointenant, &c. against another.

1. O N E tenant in common may have *præcipe quod reddat* against his companion; for where an action is to be brought against two tenants in common, a man shall have several actions, and by consequence one tenant in common may have an action against his companion. Per Finch. and others. Br. Tenants in common &c. pl. 4. cites 48 E. 3. 16, 17.

2. Note, by all the justices, that one tenant in common shall not have an action of trespass against his companion, nor an action upon the statute of \* 5 R. 2. nor upon the 8 H. 6. Br. Tenants in common, pl. 14. cites 14 E. 4. 8.

\* In trespass upon this statute, several held, that one tenant in common cannot maintain this action against his companion, for he shall recover nothing but damages for the occupation which is to them in common; but Fairfax and Priot said, that one tenant in common may maintain an action of forcible entry upon the statute of 8 H. 6. against his companion for the words are *quod ipsum expulit et dispossedit*, and one tenant in common cannot hold his companion out by the law. Br. Tenants in common, &c. pl. 10. cites 8 E. 4. 9. and 19.

Trespass upon this statute lies by one tenant in common against his companion; and if the defendant justifies in the moiety, it is no plea without pleading to the other moiety, and e contra in a common writ of trespass; per Brian. Br. Tenants in Common, &c. pl. 27. cites 10 H. 7. 27. —S. P. Noy. 4. in case of Williams v. Cook, and cites 10 H. 7. 27. 8 E. 4. 8. and 18 E. 4. 11. —S. P. 3 Le. 228. Trin. 31 Eliz. B. R. Bennington v. Bennington —4 Le. 148. 25 Eliz. C. B. Anon. —Trespass does not lie for one jointenant against another. 3 Le. 262. Mich. 32 Eliz. C. B. Hambleton v. Hambleton.

F. N. B. 118. —S. P. Co. Litt. 186. 3. If there are two jointenants or tenants in common of lands, and the one makes the other his bailiff of his moiety, he shall have an action of account against him as bailiff. Co. Litt. 200. b.

2. —But, though one tenant in common or jointenant, without being made bailiff take the whole profits, no action of account lies against him; for in action of account, he must charge him, either

either as guardian, bailiff or receiver, which he cannot do in this case, unless his companion constitute him his bailiff; and therefore all those books, which affirm that an action of account lies by one tenant in common or jointenant against another must be intended, when the one makes the other his bailiff, for otherwise, never his bailiff to render an account is a good plea. Co. Litt. 200. b.

4. 4 & 5 Anne, 16. §. 27. gives jointenants or tenants in common, their executors or administrators, an action of account against their companion \* (as bailiff or receiver) his executors or administrators for what he receives more than his proportion,

In an action of account the plaintiff declared that defend-

ant was bailiff to him of one 12th part of two messuages and 100 acres of land, and received the rents and profits thereof to render an account, when he should be required. Defendant pleaded, that he never was bailiff or receiver to the plaintiff to render an account in manner and form as the plaintiff declares. At the trial it appeared in evidence, that defendant never was in fact appointed bailiff or receiver; but that plaintiff and defendant were tenants in common of the premises, and that defendant received the rents and profits during the time laid in the declaration. And a case being made for the opinion of the court, they held clearly, that the plaintiff could not recover; for that defendant never having been actually appointed bailiff, the plaintiff ought to have charged him specially as tenant in common. And accordingly the verdict (which had been given for plaintiff, subject to the opinion of the court) was set aside. Trin. 14 Geo. 2. Wheeler v. Horne.

As no action lay between tenant in common, &c. at common law, it must be brought, if at all, upon the statute. Now, though the statute gives such an action by one against the other as bailiff, yet it differs much from an action of account at common law in which a bailiff was liable for what he might have received; whereas a tenant in common, &c. is, by this act, made answerable only for what he has received more than his just share and proportion. Besides, at common law, the auditors could not examine upon oath, as they may in the action given by the statute. Now, as the judgment is the same in both actions, (quod computet) these material differences will be lost, and the auditors not know how to behave themselves; therefore it ought to appear upon the face of the record. And the constant practice is to set forth, that the parties are tenants in common, &c. and then to declare against defendant as bailiff to the plaintiff, according to the statute. Nor can the want of this be helped (as was insisted) by entering a suggestion: it never was known, nor would it be proper; for the use of that is to bring matter upon the record, which could not appear upon the pleadings. But that is not this case. Ibid.

\* [ 514 ]

5. One jointenant may have a writ *de reparatione facienda* against the other. 1 Salk. 360. Mich. 3 Ann. B. R. in case of Tenant v. Goldwin. 6 Mod. 312 S. C.

6. One jointenant tenant in common or parcener, cannot bring *trover* against the other; because the possession of one, is the possession of both; if he does, it is good evidence upon not guilty. 1 Salk. 290, Trin. 7 Ann. B. R. Brown v. Hedges.

(S. 2) Actions or Remedy, in what Cases, by one against the other; and in what Cases Damages shall be recovered. See (R. 2) — Account (C).

1. [ N affise there were four jointenants, and two disseised the other two, they brought affise in name of all four, quod disseisverunt eos, and the writ awarded good. Br. Affise, pl. 252. cites 23 Ass. 9. So where two jointenants are disseised, and the one repairs the land yet the other shall have affise in name of both, quod disseisvit eos. Per Skip. Br. Ibid. — But when two jointenants are, and the one disseises the other, there disseisvit is false, and there affise lies for the one of the moiety against the other, and in casu supra, the others were summoned and severed. Br. Ibid.

2. In



2. In assise, where *land departible descends to three brothers A. B. and C. and A. holds out B.* there B. may have assise of the third part of 20 acres of land without C. for it may be that C. has his part, and that A. alone disseised B. Br. Assise, pl. 25. cites 23 Ass. 12.

3. *One tenant in common may abate that which the other builds, and he cannot have thereof an action of trespass.* Br. Trespass, pl. 230. cites 12 Ass. 28.

4. Note, that one tenant in common shall not have an action of *trespass of a close broken* against the other, but it is a good plea that he and the plaintiff are tenants in common, and *shall shew of whose feoffment specially*; the reason seems to be because it is of his own part, but if this had been pleaded in the plaintiff with a stranger, it would be otherwise as it seems, and so it appears there by the opinion of Danby. Br. Tenants in common, &c. pl. 22. cites 32 H. 6. 14. and Fitzh. Issue 91.

[ 515 ] 5. Though one tenant in common take the *whole profits*, the other has no remedy by law against him. Co. Litt. 199. b.

Br. Trespass, pl. 63. says it seems that trespass lies of *profits which arise from the soil, or chattels vested, &c.* cites 47 E. 3. 22.—So Br. Tenants in common, &c. pl. 6. cites 21 E. 3. 2. where *one carries away all the corn or hay, but contrary of trees cut*; for per Wilby, of trees cut he shall have writ of *waste per indiviso*, but not of profits carried away. Note the diversity.—Br. Trespass, pl. 429. cites 21 E. 3. 9. S. P.—But if two jointenants sow the land, and *one carries away all the corn*, the other shall not have an action of trespass. Br. Trespass, pl. 63. cites 47 E. 3. 22.—See (R. 2) pl. 4.

\* Br. Trespass, pl. 63. cites 47 E. 3. 22.—See infra, pl. 14, &c. 6. A tenant in common may have an action of \* *trespass* against his companion, in case he *destroys the same thing given them in the tenancy in common.* Noy. 14. Mich. 3 Jac. B. R. in case of Cross v. Abbot.—cites 47 E. 3. 22. 4 E. 2. Trespass 233. 2 H. 4. 11.

If two have estate in common for term of years, &c. and the one occupies all and puts the other out of possession and occupation; he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety, &c. Co. Litt. f. 322.

7. One tenant in common may have against his companion actions which concern *right* and interest, as of *ejectione firmæ*, ejectment *de gard*, *quare ejecit infra terminum* of a chattel real upon an expulsion or ejectment; but not for *bare taking the profits*; for the right is several, and the bare taking the profits in common. Co. Litt. 199. b.

Where two hold the wardship of lands or tenements during the non-age of an infant, if one ousts the other of his possession, he which is ousted shall have a writ of *ejectment de gard* of the moiety, &c. because those things are *chattels real*, and may be apportioned and severed, &c. but no action of trespass. (viz.) *quare clausum suum fregit, & herbam suam, &c. conculcavit, &c.* For one cannot have against the other *such like actions*; because each of them may enter and occupy in common, &c. Per my & per tout. Co. Litt. f. 323.

8. So a second diversity is between *chattels real*, that are *apportionable* or severable, as leases for years, wardships of land, interest of tenants by elegit, stat. merchant, staple, &c. of lands and tenements, and chattels real *entire*, as wardship of the body of a villein for years, &c. for if one tenant in common take away the ward or the villein, &c. the other has no remedy by action, but he may take them again. Co. Litt. 299. b. 200 a.



9. A third diversity is between *chattels real* and *chattels personal*; for if one tenant in common take all the chattels personal, the other has no remedy by action, but he may take them again. Co. Lit. 200. a.

*So of chattels real which cannot be severed, as where 2 are possessed*

of the wardship of the body of an infant within age; if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time. Co. Litt. s. 323.

10. If two be possessed of *chattels personal* in common by *divers titles*, as of an horse, an ox, or a cow, &c. if the one takes the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him, who hath done to him the wrong, to occupy in common, &c. when he can see his time, &c. Co. Lit. S. 323.

\* If he sells the ox, the other may have account against him. Br. Trespas, pl. 63. cites 47 E.

3. 22. — And account lies if one sells all the wood which they have, pro indiviso, &c. Br. Ibid.

11. Two jointenants for life, with the fee to the heirs of one; he that hath the inheritance shan't have *wast* against the other. Mo. 388. cites 21 E. 3.

12. If there are two tenants in common of a wood, *turbary*, *piscary*, or the like, and one of them does *wast* against the will of his companion, his companion shall have an *action of wast*; and he that did the wast, before judgment, has election either to take his first part in certainty by the sheriff, and the oath of men, &c. or that he grant, that from henceforth he shall not do wast, but according to his portion, &c. And if he make choice of a certain place, then the place wasted shall be assigned \* to him. But this extends not to *coparceners*, because they were compellable to make partition by the common law. And this, (as it is said) extends as well to tenants in common and jointenants for life as to an estate of inheritance. Co. Lit. 200. b.

13 E. 1. 22. — F. N. B. 59. (D) — Two tenants in common of a wood, one leases his part to the other for years, he cuts the trees, and does wast, he shall be punished for the

moiety of the wast, and the lessor shall recover the moiety of the place wasted. Mo. 71. pl. 194. Trin. 6 Eliz. Anon.

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13. If two tenants in common be of a manor to which *waif and stray* belong, and a stray happens, they are tenants in common; and if the one takes the stray, the other has no remedy by action, but to take him again. Co. Litt. 200.

But if by prescription, the one is to have the first beast happening as

a stray, and the other the second, there an action lies, if the one takes that which pertains to the other. Co. Lit. 200.

14. If one tenant in common or jointenant of a *dove-house*, destroys the whole flight of doves. No action of *wast* lies upon the statute W. 2. cap. 22. as some do hold. Co. Lit. 200.

So of a park and one destroys all the deer. Co. Litt. 200.

15. But if two tenants in common of a dove-house, and the one destroys the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of *trespass, quare vi & armis columbare le Pl. fregit & ducentas columbas pretii 40 s. interfecit, per quod volatum columbaris sui totaliter amisit*; for the whole flight is

Br. Trespas, pl. 63 S. P. cites 47 E. 3. 22.

destroyed, and therefore he cannot in bar plead tenancy in common; for there can be no tenancy in common of a thing destroyed. Co. Lit. 200. a. b.

16. So if two tenants in common be of land, and of *mete stones*, *pro metis & bundis*, and the *one* takes them up and carries them away, the other shall have an action of *trespass quare vi & armis* against him in like manner as he shall have for destruction of doves. Co. Lit. 200. b.

17. So if two tenants in common be of a *folding*, and the *one* of them disturbs the other to erect *hurdles*, he shall have an action of *trespass quare vi & armis*, for this disturbance. Co. Litt. 200. b.

18. If two tenants in common or jointenants be of a *house or mill*, and it fall in decay, and the *one* is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ says, *ad reparationem et sustentationem ejusdem domus teneantur*, whereby it appears, that owners are in that case bound, *pro bono publico*, to maintain houses and mills which are for habitation, and use of men. Co. Lit. 200. b.

S. P. Co.  
Litt. 206. b.

19. If A. and B. are jointly seised of a river, and A. has a house adjoining, if B. corrupts the water, A. shall have action upon the case; for B. is not jointenant with A. in the house to which, &c. Br. Action, sur le case, pl. 123. cites 13 H. 7. 26. per Brian Ch. J.

20. The plaintiff in an action upon the case declared that he and F. are tenants in common, and have common in the land of the defendant, and that the defendant had made trenches in it, by which the cattel of the plaintiff were in danger to perish, and the issue upon not guilty is found for the plaintiff, and now moved in arrest of judgment that the declaration is naught, because tenant in common cannot have an action in such a case. And that was allowed by the court for good cause. Noy. 84. Haman v. Witchbow.

21. Case does not lie for one tenant against the other for disposing of the whole, nor as Littleton, f. 222. says, has the other any remedy. 1 Lev. 29. Pasch. 23 Car. 2. B. R. Graves v. Sawcer.

22. A. and B. jointenants of a term; A. having the lease in his possession sells to C. his interest in the said term, and also the leased indenture, so as now C. is become tenant in common with B. In this case Trover does not lie for B. against C. for the said indenture, but C. may give this matter in evidence without pleading it. 2 Le. 220. Pasch. 16 Eliz. B. R. Anon.

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2 Roll. R.  
212. S. C.

by the name of Hudson v. Snelgar.

23. One tenant in common may distrain the other for rent, where the other comes in under a lessee of that one. Cro. J. 611. Hill. 18 Jac. B. R. Snelgar v. Henston.

24. In a *partitione facienda* by tenant in common against his companion an *estrepement* was granted for so much as the plaintiff had confessed was held in common, and not of more. But Bendlowes, cap. 5. fo. 4. seemed, that an *estrepement* does not lie between tenants in common. But in Mich. 6 Jac. it was ruled that the *estrepement*

estrepement should be granted, though Coke, Ch. J. held with Bendlowes. But note, that in 5 Jac. *LADY LUCY v. OXENBRIDGE*, an estrepement was granted in a partitione fac. because it is a real action, and no damages to be recovered, and Brownlow shewed precedents contrary to Bendlowes. Noy. 143. *Bayly v. Knighton*.

(T. a) *Pleadings in Actions by one against the other.* See (R. a) pl. 4. and the notes.

1. **T**WO tenants in common are without partition, and [in an action by one against the other] the defendant *said that the plaintiff built walls and incroached upon his severalty*, and he abated them in the day time, without doing any thing against the peace, and a good answer. Br. Tenants in Common, &c. pl. 10. cites 12 Aff. 28.

2. Trespass of trees cut and corn mowed, &c. the defendant *said, that the soil where, &c. is to them in common*, and a good plea prima facie; for where the soil is to them in common, it cannot be intended that the profit is to the one alone, and therefore a good plea to this; contrary to the corn; for of this one tenant in common may have trespass against his companion; and so of other profits taken by the one; for of those he cannot have waft pro indiviso against him. And so it seems that *trespass does not lie but of the profits which are severed from the land, and which are severable as corn and hay*. Br. Trespass, pl. 116. cites 21 E. 3. 9.

3. Trespass by A. against B. who *said, that he and W. purchased jointly for term of their lives, and W. granted his estate to A. and, that they are tenants in common & pro indiviso*, and for this cause as to the trees cut he demanded judgment *si actio*; and to the corn carried away, he *said, that he carried away only the moiety that belonged to him*, judgment *si actio*; and as to the trees cut he was barred, for he may have waft pro indiviso, though they are but tenants for life; and as to the corn the plaintiff *said that he carried away his corn, over and above that which belonged to the defendant's part; prift, and the other e contra*. Br. Trespass, pl. 117. cites 21 E. 3. 29.

4. Trespass of a close broken; the defendant *said, that A. was seised in fee, and had issue the feme of the plaintiff, and the feme of the defendant, and died, the daughters entered, and one married the plaintiff, and the other the defendant, and so the baron and feme defendants held in common with the plaintiffs, judgment si actio*; and so note that they *shall shew how they hold in common*. Br. Tenants in Common, &c. pl. 8. cites 15 E. 4. 2.

But of the trees cut, he may have waft pro indiviso. Br. Brief, pl. 429. S. C.

(U. a) Actions. By Jointenants or Tenants in Common. Where they *must* or *may* join.

If one tenant in common

1. **W** H E R E the wrong is *a wrong to both*, they ought to join; otherwise where the tort is particular. Lat. 153.

has a *particular les.*, as where the tenants in common are of a house, to which common is belonging; and his beasts are distreined or drove off the common, he may have action alone. Jo. 142. Trin. 2 Car. S. C. Hamond v. White.—Vid. 13 H. 7. 26. 35 H. 6. 56.

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2. Tenants in common shall join only in *personal actions*. 2 Sid. 2 per counsel. Mich. 1657. in case of Baker v. Berisford,

Br. Te-

nants in common, &c. pl. 2. cites 44 E. 3. 24. S. P.—As to actions personal, tenants in common may have such actions personal jointly in all their names; as of trespass, or of offences which concern their tenements in common; such as breaking their houses, breaking their closes, feeding, waisting, and defouling the grass, cutting their woods, for fishing in their piscary, and such like. In this case tenants in common shall have an action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realty, &c. Co. Litt. f. 315.—Lev. 109. admitted Arg. in case of Kitchen v. Knight and Bulkley.

3. If three are tenants in common, and *one disposes of goods ad communem utilitatem* of the other two; *one of the two* may bring account against the third, without joining the other with him; for perhaps the other would never join. Roll. R. 421. Mich. 14 Jac. B. R. Hackwell v. Eastman.

Br. Tenants in common, &c. pl. 25. S. P.—Inasmuch as they were te-

4. If two tenants in common join in a lease for life, rendering 10 s. per ann. and a hawk, pepper corn, or the like which are entire, and are disseised of them, there they shall have several assises of the rent, and one and the same assise of the hawk or pepper corn. Br. Joinder in Action, pl. 104. cites Libro Litt. tit. Tenants in Common.

tenants in common in several titles. And when they make a gift in tail, or lease for life, saving to them the reversion, and rendering to them a certain rent, &c. such reservation is incident to their reversion. Co. Litt. f. 314.—So it is of other rents and of other services which tenants in common have in gross by divers titles. Co. Litt. f. 314.—So that for the rent as namely 20 s. or a pound of pepper which may be severed, the one tenant in common may have an assise for the moiety of 20 s. and the moiety of a pound of pepper; de medietate unius libræ piperis; but he cannot have an assise of 10 s. or de dimidio libræ piperis. Co. Litt. 197.—But for a hawk or a horse, albeit they are tenants in common, they shall join in an assise; for otherwise they should be without remedy. Because one of them cannot make his plaint in assise of the moiety of a hawk or of a horse; for the law will never suffer any man to demand any thing against the order of nature or reason; for *lex spectat naturæ ordinem*. Also the law will never enforce a man to demand that which he cannot recover; and a man cannot recover the moiety of a hawk, horse, or of any other entire thing; *lex neminem cogit ad impossibilia*. Co. Litt. 197. a. b.—Vent. 328.—Br. Tenants in Common, &c. pl. 5. cites 14 H. 4. 31.

So that in real actions, and in actions also that are mixt with the personalty tenants in common

5. If two tenants in common be, and they are disseised, they must have two assises, and not one assise; for each of them ought to have one assise of his moiety, &c. For the tenants in common were seised, &c. by several titles. But otherwise it is of jointenants; for if 20 jointenants be, and they be disseised, they shall have in all their names but one assise; because they have not but one joint title. Co. Litt. f. 311.

shall sever in action; because they have several freeholds, and claim in by several titles; and therefore as they shall be severally by others impleaded, so shall they severally implead others, in all real

real and mixt actions, *unless* it be in case of necessity for a thing intire. Co. Litt. 195. b. ——— B<sup>r</sup>.  
 Tenants in common, &c. pl. 5. cites 14 H. 4. 31. — S. P. Lev. 109. Kitchen v. Bulkley. ———  
 2 Mod. 61. Curtis v. Bourne.

6. If there be *three jointenants*, and one releases to one of his companions all the right that he hath, &c. and afterwards the other two be disseised of the intierity, &c. In this case the two others shall have *several assises*, and in this form, viz. they shall have in both their names one assise of the two parts, &c. because they held their two parts jointly, at the time of the disseisin. And as to the third part, he to whom the release was made ought to have of that an assise in his own name, because he (as to that third part) is thereof tenant in common, &c. because he comes to that third part by force of the release, and not only by force of the jointure. Co. Litt. f. 312.

7. Tenants in common by a statute merchant ought to have *several assises*. Mo. 40. pl. 127. Trin. 4 Eliz. Anon.

8. Jointenants shall join in an action for *goods lost*. But if the goods are *bailed by one*, he only that bailed them shall have an action on the case; per Coke, Ch. J. 2 Bull. 311. Isaac v. Clerk. — cites F. N. B. 118. (H.) 43 E. 3. 21. Fitz. tit. Attaint, pl. 67.

9. Tenants in common may join in action on the case for \* *diverting a water course*; because this action is only in the personalty, and does not touch the title, but only possession, by which the profits of the land are diminished; otherwise in *assise of nuisance for diverting*, &c. Yelv. 161. Mich. 7 Jac. B. R. Stone & al. v. Brumwich.

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 Kelw. 114.  
 pl. 49. —  
 Godh. 160.  
 pl. 222. S.  
 P — \* And  
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*that it overflowed the meadow whereof they were tenants in common*; and held well brought; for it is but a *trespass* upon the matter in which they may join. Noy. 135. Stone v. Bonwick. — Cro. J. 231. Some v. Barwish. S. C.

10. A. B. and C. were *freightors of a ship*, and the voyage was stopped by the application, &c. of the East India Company, and a prosecution in the admiralty; A. alone brought an action on the case upon the statute of R. 2. for this prosecution in the admiralty, and the jury found damages to 2000 l. by loss of his voyage, and he had judgment in C. B. and upon error brought in B. R. this judgment was affirmed, though A. was tenant in common only with B. and C. of the goods and ship, and these being personal things, B. and C. ought to have joined, and of such opinion was the whole court. But Holt, Ch. J. said, that this was in *abatement only*, and nothing appears within the record that abates the *plaint*, and if it had been pleaded, he ought to have averred, *quod tempore captionis* and of the action brought the other tenants in common, who ought to join, *were alive*; for though they were alive *tempore captionis & arrestationis*, yet if it does not appear that they were alive at the time of the action brought, the plaintiff alone might have the action by survivorship, and therefore the judgment was affirmed. Skin. 361. Mich. 5 W. & M. B. R. Sands v. Child.

11. Tenants in common must have several writs of *cessavit*; per Weston. Mo. 40. pl. 127. Trin. 4 Eliz. Anon.

R r 3

12. They

But per  
Keeling J.  
the case of  
Littleton

12. They ought to join in *covenant* against lessee for years, *for not repairing* the thing demised. Raym. 80. Mich. 15 Car. 2. B. R. Kitchen and Knight v. Buckley.

is upon the personal contract. But it is a question if the *tenements are conveyed over*, and this contract destroyed, if the tenants in common may join. And in all cases put by Littleton, the parties are jointenants of the profits, but here it is a covenant, and this *concerns the profits*, and so of necessity they ought to join. Ibid. 81.——Lev. 109. Mich. 14 Car. 2. S. C. because it is a personal action.——S. C. Sid. 157. by name of Kitchen v. Compton.——They may join or sever in *covenant for rent reserved*. Carth. 289. Mich. 5 W. & M. Midgley and Gilbert v. Lovelace.

Br. Joinder  
in Action,  
pl. 104. S.  
P.—S. P.  
Br. Te-  
nants in  
Common,

13. If two tenants in common *make a lease* of their tenements to another for term of years, *rendring* to them certain *rent* yearly, during the term; if the rent be behind, &c. the tenants in common shall have one action of *debt* against the lessee, and not divers actions; because the action is *in the personalty*. Co. Litt. f. 316.

pl. 25.—2 Show. 446. Blanchard v. Dyer.——3 Mod. 109.——If two tenants in common *make a lease for years, rendring rent and one dies*; per tot. Cur. *the executor and survivor may join in action for the rent, or sever at their pleasure*. Godb. 283. pl. 404. Hill. 19 Jac. Anon.——But if the lease had been made *for life, rendring rent*, the court was clear of opinion, that they ought to sever in action. Ibid.——One jointenant cannot maintain an action of *debt for rent* without his companion, Carth. 329. Trin. 6 W. & M. B. R. in case of Pullen v. Palmer.——3 Salk. 204. Trin. 7 W. 3. DALSON v. TYSON, says they may either join or sever in *debt*.——S. P. in *debt for rent reserved*, though they are *not joint lessors*, but have each of them a several and distinct interest to a moiety of the reversion, as by a devise of one moiety to the one, and of the other moiety to the other. Carth. 289. Mich. 5 W. & M. B. R. in case of Midgely and Gilbert v. Lovelace.——So if they came to it by several grants. Sid. 157. Kitchen v. Compton.——But if they sever, they must not each demand such a certain sum, which amounts to a moiety, but it must be *de una medietate* of the whole rent, and therefore if they may join in debt, they may also join in *covenant*; per Holt, Ch. J. Carth. 289. Midgley and Gilbert v. Lovelace.

S. P. Br.  
Accompt,  
pl. 73, cites  
S. C.——  
S. P. for  
the act of

14. If two jointenants *have one bailiff of their manor, and one assigns auditors*, and he accounts and is *found in arrear*, it is held that both may have one action of debt upon the arrears of the account. Br. Jointenants, pl. 36. cites 18 E. 4. 3.

one is the \* act of both. Br. Debt, pl. 218. cites S. C.——For if *two have one horse in common, and one sells it*, both may have debt for the sale, for *this is the act of both*, to which Littleton agreed. Quere, if the other *did not agree to sell*, if he shall join in the action. Br. Jointenants, pl. 36. cites 18 E. 4. 3.

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15. In *debt on 2 Ed. 6.* three were jointenants of *tithes*, and *grant their parts* for three years to two grantees. Ruled that all three, though tenants in common, should join in this action, for it is a personal action as trespass. And though the *third had disclaimed in chancery* by his answer, that altered nothing; but a *release by the third inrolled in chancery* was admitted good evidence. Clayt. 28. Greenwood's case.

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16. If there be two tenants in common of a rectory for years, and *one is outlawed*, yet the other, upon shewing of the matter, may have *debt for the moiety*. Sid. 49. Mich. 13 Car. 2. B. R. per Twifden J. in case of Cole v. Banbury.

rent, but held it lay not, according to Littleton f. 316. because it is in the personalty; per tot. Cur. upon debate in motion on arrest of judgment. 2 Show. 446. Mich. 1 Jac. 2. B. R. Blanchard v. Dyer.



17. Two tenants in common shall join in a *detinue of charters*, and if the one be nonsuit, the other shall recover. Co. Litt. 197. b.

18. Tenants in common shall not join in an *\* ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c. because these actions concern the right of the lands which are several. Co. Litt. 200.

\* Cumb. 2. Mich. 1 Jac. 2. B. R. S. P.

—They must

make several leases in ejectment. Show. 342, Mich. 3 W. & M. Moor v. Furden.—Cro. J. 166. Trin. 9 Jac. B. R. MANTLE v. WOOLINGTON, per 2 J. against one, if two tenants in common make one joint lease, yet lessee must declare of two several leases of their several parts.—If tenant in common seal a lease of ejectment, he shall recover but a moiety; per Hale Ch. J. Mod. 102. Mich. 25 Car. 2. B. R. Anon. — If a man seised of the whole makes a lease to another of a moiety undivided, and a stranger ousts the lessee, he must bring his ejectment of a moiety, and so if they are both ousted, they must bring several ejectments. 2 Salk. 423. Hill. 1 Annæ B. R. in case of Reading v. Royston.

19. Tenants in common may join in an action upon the statute of 5 R. 2. per Kingsmil and Rede J. quod nota bene. Br. Tenants in common, &c. pl. 9. cites 21 H. 7. 23.

Br. Joinder in action, pl. 45. cites 21 H. 7.

22. S. C.—But Br. Joinder in action, pl. 89. contra, per Chock, Brian, Littleton, and Catesby, that they shall not join, cites 18 E. 4. 29.—But Brooke says, by 21 H. 7. 22. it is e contra; for this is only an action of trespass to recover damages.

20. In forging false deeds or slander of title they ought to sever; for that prejudices them with respect to the inheritance and franktenement. Noy. 135. in case of Stone & al. v. Browick.

Cro. J. 231. Mich. 7 Jac. B. R. Some v.

Barwith, S. C.—Kelw. 114. pl. 49.—They ought to sever and cannot join, because it touches the title which is several. Yelv. 161.—They may join in forging of false deeds. Arg. Raym. 80. cites 8 H. 6. 6, 7.

21. Two tenants in common of a manor brought a *parco fracto* and adjudged maintainable upon demurrer, without shewing how they became tenants in common, and one only might have had a parco fracto. Mo. 452. Pasch. 38 Eliz. Wentworth and Savil v. Russel.

22. Tenants in common shall join in *quare impedit* of advowson; for the thing is intire, and none of them shall have quare impedit of the moiety of the advowson of a church, nor of the third or fourth part, but shall join, and therefore they ought to agree in presentment. Br. Joinder in action, pl. 103. cites 5 H. 7. 8.

S. P. Co. Litt. 197. b. (m)—Mo. 40. pl. 127.—Br. quare impedit pl. 10. cites 33 H. 6. 11.

23. Tenants in common of a seigniorie shall join in a writ of right of ward, and ravishment of ward for the body; because it is entire. Co. Litt. 197. b.

24. In trespass of a close broken, the defendant said that the plaintiff had nothing in the close, but in common with J. S. not named in the writ, judgment of the writ, and a good plea, and so see that they ought to join. Br. Brief, pl. 64. cites 43 E. 3. 24.

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25. Where a man does trespass upon the land of two tenants in common, they shall join in action; because it is an action personal, and if the one dies the other shall have trespass of the whole; for in personal actions they shall join; contra in real actions. Br. Joinder in action, pl. 35. cites 22 H. 6. 12.

Br. Tenants in common, pl. 25.—Br. Joinder in action, pl. 104.—If

one tenant in common brings trespass alone, the defendant must plead it in abatement, and the jury's finding the jointenancy will not advantage the defendant. Cro. E. 554 Pasch. 39 Eliz. B. R. Deering

ing v. Moor.——But if defendant plead *not guilty*, it shall be good, but then plaintiff shall recover damages in a personal action only for a moiety; per Hale Ch. J. Mod. 102. Mich. 25 Car. 2. B. R. Anon.——For the plea in abatement must be at the first; but where the jointenancy or tenancy in common appeared by the declaration and confuſance of the plaintiff himſelf, judgment was arreſted. Lat. 152. Trin. 2 Car. Hammond v. White.

26. One jointenant brings *trover* againſt J. S. this is pleadable in abatement, but J. S. cannot take advantage of it in evidence. 1 Salk 290. Trin. 7 Annæ B. R. in caſe of Brown v. Hedges.

• West's  
Symb. S.  
197.  
cites S. C.  
—S. P. Co. Litt. 197. b.

27. Two tenants in common may join in \* *warrantia chartæ*; *contra in voucher*; note the difference. Br. Warrantia chartæ, pl. 26. cites 28 E. 3. 90. and Fitzh. Several tenancy 12.

28. If three are tenants in common *pro indiviſo*, and one commits waſt, the other two ought to join in action of waſt againſt the third. F. N. B. 60 (S) cites Mich. 3 E. 2. Waſt.

29. Tenant for life and reversion to two coparceners did waſt, the one parcener had iſſue and died, the tenant did waſt again, the other and the niece joined in waſt, and this matter was found, and they recovered the place waſted, and treble damages, viz. each recovered for the laſt waſt, and the other damages only for the firſt waſt; and ſo ſee that damages ſurvived. Br. Jointenants, pl. 48. cites 45 E. 3. 3.

30. Jointenants and parceners may join in waſt. Mo. 34. pl. 110. Trin. 3 Eliz. Anon.

Per Brown,  
they cannot  
join in  
caſu ſup.  
becauſe re-  
verſion  
was ſeveral  
at the time

31. Reversion of a leaſe for years was granted, the one moiety to A. the other moiety to B. leſſee does waſt; in this caſe they ſhall join in waſt after the leaſe determined, becauſe only damages are to be recovered, as in treſpaſs; but if the term had continued, the land in that caſe being to be recovered, it is otherwiſe. Mo. 40. pl. 127. Trin. 4 Eliz. Anon.

of action accrued. Ibid.—Mo. 34. pl. 110.—Mo. 388. Arg. cited in Perrot's caſe.—2 Mod. 62. Mich. 27 Car. 2. C. B. Curtis v. Bourne.—Mo. 40. pl. 127. S. P.—; Mod. 109.—It lies not during the term for one alone; for damages, and the place waſted, are to be recovered by moieties, or a third part, &c. and it is inconvenient that a moiety be recovered and delivered in execution. Cro. E. 357. Mich. 36 & 37 Eliz. C. B. Hill v. Hart.

32. If one tenant in common makes leaſe of his part, he ſhall have waſt, yet he ſhall declare on the demise of the moiety, but ſhall aſſign the waſt in a place certain, and ſhall have damages with regard to his moiety. Mo. 388. Mich. 36 & 37 Eliz. in Perrot's caſe.

Lat. 152.  
S. C.

33. They muſt join in action for plowing their common. Jo. 142. Trin. 11 Car. B. R. Hamond v. White.

34. Two ſemes jointly ſeiſed take barons; the barons join in an alienation and die; the wives are jointenants of the right, and may join in a writ of right, and yet they may have ſeveral writs of *cr̄i in viſa* at their election, &c. ſo if two jointenants, the one for lit and the other in fee, loſe by default, the one ſhall have a writ of right, and the other a *quod ei deſorceat*, &c. Co. Litt. 188.

(W. a) Actions. *Distress and Avowry.*

1. **A.** is seised of a third part in common, and B. of the other two parts in common with A.—A. lets his third part reserving rent, and B. puts in his cattle, or a stranger by his licence; such cattle are not distrainable for the rent. 2 Vent. 283. Hill. 2 & 3 W & M. C. B. Kemp v. Cory.

2. A jointenant, without any authority from his companion, may distress for the whole rent; but he must particularly avow in his own right, and as bailiff for the other; per Cur. 12 Mod. 77. Trin. 7 W. & M. Anon.

12 Mod.  
96 Anon.  
S. P.—S.  
P. 2 Lutw.  
1211. Of-  
mar v.

Sheaf.—S. P. 5 Mod. 73. Bonoyan v. Palmer.—Ibid. 150. Pullen v. Palmer. S. C.—Carth. 328. S. C.—L. P. R. 159. S. P.—\* S. P. but must join in avowry for damage feasant. Jo. 253. Hill. 7 Car. B. R. Lamshead v. Leate and Rowell.—They must sever in avowry, because it is in the realty. Co. Litt. 316, 317.—S. P. for it is in respect of the reversion; and so it seems that each of them shall not have the whole rent. Br. Tenants in common. pl. 25.—Br. Joinder in action, pl. 104. S. P.—S. P. therefore if three tenants in common distress three beasts, each of them must avow for one beast. 3 Salk. 204. Trin. 7. W. 3. B. R. Dalton v. Tyson.—One alone avowed for damage feasant and held good per two J. against one, and adjudged accordingly. Cro. E. 530. Mich. 38 & 39 Eliz. C. B. Willis v. Fletcher.—So for the third part of a penny, and held good. 2 Show. 26. Mich. 30 Car. 2. B. R. Edgcomb v. Burdell.

(X. a) In what Actions Tenants in Common may, or must, be joined.

See Ac-  
tions.

1. **SEVERAL** *præcipes quod reddat*, and not one joint præcipe shall be brought against tenants in common; for their titles are several. Br. Tenants in common, &c. pl. 18. cites 3 E. 4. 9. per Chocke.

Br. Joinder  
in Action,  
pl. 83. cites  
3 E. 4. 10.  
and that  
they shall

have several writs of moiety.

(Y. a) Pleadings in Actions by or between Jointenants; and what shall be recovered.

See (U. a.)  
pl. 10.—  
See (Y. a.  
3) pl. 32.

1. **I**N trespass of taking his beasts it is no plea to say, that the tator of the plaintiff demised to the plaintiff and defendant to distribute for his soul, and the plaintiff took them, and the defendant took them from him to distribute, &c. without saying *absque hoc*, that he took the beasts of the plaintiff, by which he laid accordingly. Br. Traverse per, &c. pl. 172. cites 30 Aff. 22.

2. In assise of rent against two jointenants one may plead ancient demesne, and the other may plead *hors de son fee*, and so it is admitted; for each has a moiety to lose. Br. Jointenants, pl. 42. cites 8 H. 6. 11.

3. In trespass upon the statute of 5 R. 2. the defendant said that A. was seised, and had two daughters, and died seised, and they entered as heir, and after one aliened her part to J. S. and the other is now plaintiff,

So where  
jointenancy  
is pleaded  
by the co-  
plaintiff,

nant with one A. of the gift and feoffment of B. by deed, or without deed, the other may say that sole tenant absque hoc, that he holds jointly without answering the special matter, for this is not the effect.

plaintiff, and so the plaintiff had nothing at the day of the writ purchased but in common with J. S. who is alive and not named in the writ, judgment of the writ; and Markham Ch. J. thought at first that the plaintiff in his replication ought to answer the special matter, but after, per Cur. because the plea did not amount to more than that the plaintiff held in common, &c. it is sufficient for the plaintiff to say, that sole seised, absque hoc, that J. S. had any thing, notwithstanding that the defendant had shewn special matter how they are tenants in common; and they held clearly that it is a good plea always for the defendant to say, that the defendant had nothing but in common, \* &c. without shewing how he held in common, and the plaintiff may say that sole seised, absque hoc, that he held in common, and the special matter shall be given in evidence. Br. Tenants in common, &c. pl. 12. cites 1 E. 4. 7.

Ibid.——But where he shews that he held in coparcenary, and shews the descents how, there it is no replication that he held sole and not in coparcenary, but shall answer to the special matter; for jointenants may be by disscisin, but e contra of coparceners; nota diversitatem. Ibid.

\*[523]

4. *Trespass upon the 5 R. 2. brought by three*, of entry into the moiety of a carve of land; the defendant pleaded recovery in writ of dower against one of the plaintiffs of the third part of the said moiety, and per Cur. it is a good plea against the three plaintiffs; for if the one leases for years, this is a good plea against all, per Cur. Br. Joinder in action, pl. 70. cites 18 E. 4. 28.

5. *A. B. and C. jointenants in fee; C. granted his part to D. and afterwards A. B. and D. leased for years, rendering rent, and afterwards A. died, and they brought an action of debt for the rent reserved, and declared generally; and upon the evidence, the special matter appeared, that two parts of the rent did belong to B. and but the third part to D. Per Cur. the declaration ought to have been special upon the whole matter; for prima facie it was conceived, that each of the plaintiffs ought to have had the moiety of the rent, and that is a supposal of the declaration. 2 Le. 112. pl. 148. Trin. 30 Eliz. Barefoot v. Luter.*

6. *Trespass for entering his house and land; the defendant pleaded it was the freehold of J. B. and he entered as her servant, and by her commandment; and the issue was, if it were her freehold or not, and the jury found it was the freehold of the plaintiff for two parts, and the franktenement of the said J. B. for the third part; and the question was, if the plaintiff should have judgment upon this verdict; and the court held clearly he could not; for although the issue is found against the defendant, viz. that all was not the freehold of J. B. yet it appearing a tenancy in common, so that the plaintiff cannot maintain his action, judgment shall be given against him, and it was adjudged for the defendant. Cro. E. 157. Mich. 31 & 32 Eliz. B. R. Benington v. Benington.*

7. In case of jointenants the property is not in one but in both, yet if one declare against the other, unless he plead the jointenancy in abatement, the plaintiff shall recover. Arg. 3 Mod. 97. Hill 1 Jac. 2 B. R. in case of Upton v. Dawkin.

8. If one tenant in common bring a personal action without his fellow joining in the suit; the defendant ought to take advantage of it in abatement; but if he plead not guilty it shall be good, but then he shall recover damages only \* for a moiety; per Hale Ch. J. Mod. 102. pl. 9. Mich. 25 Car. 2. B. R. Anon.

\* Three jointenants were of goods, and two only brought

action, to which defendant pleaded not guilty; upon this plea the plaintiffs recovered damages for two parts of the goods and shall not be nonsuit; the defendant might have pleaded this in abatement of the writ quoad so much; but having pleaded not guilty, they, though jointenants with another, shall recover damages for their parts, per Rainsford and Wilde at a trial in Middlesex (Hale being sick) to the which Sir Wm. Jones, counsel for the plaintiff, hestiter submitted. 2 Lev. 113. Mich. 26 Car. 2. B. R. Nelthorp and Forrington v. Dorrington.

9. If two tenants in common sever in debt, &c. they must not each of them make his demand of such a certain sum, which amounts to a moiety; but the demand must be de una medietate of the whole rent; per Holt. Ch. J. Carth. 289. Mich. 5 W. & M. B. R. in case of Midgley and Gilbert v. Lovelace.

(Y. a. 2) In what Cases a joint Action by Tenants [ 524 ] in Common, &c. shall survive.

1. WHERE two are disseised and the one dies the action and the entry shall survive. Br. Jointenants, pl. 13. cites 21 E. 3. 50.

2. Personal actions may survive between tenants in common. Per Prisot. Br. Tenants in Common, &c. pl. 18. cites 37 H. 6. 32.

3. If two tenants in common are, and a man does trespass to them, and the one dies, the other shall have action of trespass by survivor, and suppose the whole in all; the reason seems to be in as much as they should join in action. Br. Jointenants, pl. 24. cites 37 H. 6. 38.

S. P. for it is only an action personal. Br. Jointenants, pl. 18. cites

22 H. 6. 12. — Br. Tenants in common, pl. 7. cites S. C. and in personal actions they shall join; contra in real actions; and therefore the personal actions shall vest in the survivor, and he shall have action of the whole. — S. P. for of this action they are jointenants. Co. Litt. 198. a. — So if two tenants in common be of a manor, and they make a bailiff thereof, and one of them dies, the survivor shall have an action of account; for the action given to them for arrearages upon the account was joint. Co. Litt. 198. a. — So it is if two tenants in common sow their land, and one eats the same with his cattle, though they have the corn in common; yet the action given to them for trespass in the same is joint, and shall survive; for the trespass and damage done to them was joint. Co. Litt. 198. a. — So note a diversity between a chattel in possession, and a personal chose in action belonging to tenant in common. Co. Litt. 198. a.

4. Nota. Where damages are to be recovered for a wrong done to tenants in common, or parceners, in a personal action, and one of them dies, the survivor of them shall have the action; for albeit, the property or estate be several between them; yet the personal action is joint. Co. Litt. 198. a.

5. If two tenants in common be of an advowson, and a stranger usurps, so as the right is turned to an action, and they bring a writ of quare impedit, which concerns the realty, the six months pass, and the one dies, the writ shall not abate, but the survivor shall recover, otherwise there should be no remedy to redress this wrong; and so it is of coparceners. Co. Litt. 198. a.

(Y. a. 3)

(Y. a. 3) Actions and Pleadings *by Survivor.*

But in this case he may plead the Alienation of both in bar, judgment for the moiety of the other,

and for the other moiety, that the demandant was of full age; and so see that the one infant shall not recover the whole; quod nota; for if they had not been alive they should have several writs of dum fuit infra ætatem, as it seems, and then the action shall not survive. *Ibid.* So it is in the original, but it seems as if (not) should be omitted.

1. **I** F two infants alien, the one dies, and the other brings *dum fuit infra ætatem*, supposing the entry of the tenant by him alone, it is no plea that he entered by him and the other; for he cannot have other writ. Br. Jointenants, pl. 13. cites 21 E. 3. 50.

2. In assise, obligation is made to two and one dies, the other brings an action, and declares that the other is dead before the writ brought; per Newton, it is sufficient to declare that he is dead, without more. Br. Jointenants, pl. 17. cites 22 H. 6. 11.

3. If two tenants in common are, and trespass is made upon the land, and after one dies, the other shall not have trespass of the whole, but *quod medietatem ingressus est*; but otherwise it is of common writ of trespass; per Prisot. Br. Trespass, pl. 397. cites 37 H. 6. 38.

[ 525 ]

## (Z. a) Equity. Cases in Equity.

See (Q)

Griffith v. Manfer.

So if lands be severally given by one deed to two

men; he who has the deed shall be compelled here to shew it for defence of the other's title. Cary's Rep. 21. cites 9 E. 4. 41.

1. **I** F two coparceners, or jointenants, join in a *quare impedit*, and the one will plead *covenously*, he shall be compelled here to join with the other in plea or presentment. Cary's Rep. 20, 21.

2. C. and P. married two sisters jointly possessed of a lease for years; the wife of C. died; P. claimed the whole by survivor; C. exhibited a bill, suggesting that P. had in her life-time severed the jointure by some act secretly. The Lord Keeper over-ruled, that the defendant should not answer. Cary's Rep. 13. cites Mich. 39 & 40 Eliz.

3. A tenant in common of a manor, (for long time occupied wholly by the other tenant in common,) who knows not the quantity of the manor, by reason the other has also sold lands intermingled, had the sight of the court rolls, and writings of his companion, concerning only the quantity of the manor, but not concerning the sold lands, nor his title to the manor, and the other was ordered also to shew the like on his part. Cary's Rep. 22, 23. cites 1599. Capell v. Mym.

4. Two jointenants, the one takes the whole profits; no remedy is for the other, except it were done on agreement or promise of account. Cary's Rep. 29. cites 8 June, 1602. 44 Eliz.



5. Two tenants in common were of an *annuity*, one got possession of the deed of grant, so that the other could not avow. Decreed the moiety to be paid the plaintiff. Fin. R. 292 Pasch. 29 Car. 2. Stokes v. Verrier.

6. In case of joint farmers of excise, though there be no covenant that their parts should survive, yet in equity they ought, by reason of the joint charge and expence; but if there had been any agreement that it should not survive, that might have altered the case. Hill. 1681. Vern. 33. Hayes v. Kingdom.

7. If four tenants in common are of land, and one or more stock the land, and manage it, the rest shall have an account of the profits; but if a loss come, as if the sheep, &c. die, they shall bear a part. Per Ld. North Skin. 230. Hill. 36 & 37 Car. 2. Anon. in Canc.

8. A. and B. are jointenants by two several leases, of two several houses, and received the rents during their joint lives. A. died and made M. his wife executrix; one of the houses was taken in execution, at the suit of J. S. and sold by the sheriff to J. S. Afterwards J. S. and M. for 240 l. assigned all their interest to the plaintiff. After A.'s death, B. assigned one of the leases to E. for 800 l. debt; E. for 410 l. assigned to W. R. but W. R. denied that before his purchase he had any notice of the plaintiff's title, and confessed that the lease of the other house was not assigned to him by any express words, but conceived it did pass; for that the buildings were intermixed upon both tofts of ground, and that one could not be enjoyed without the other. The Master of the Rolls dismissed the bill without costs, and the rather because the plaintiff did not bring his bill till after the defendant's purchase, though the plaintiff's purchase was made two years before. Vern. 360. Hill. 1685. Usher and Prime v. Ayleworth and Edmonds & al.

9. A. and B. had enjoyed a church lease in moieties under an agreement against survivorship. On the last renewal the lease was taken in both their names, and no express agreement against survivorship. A. being sick, by deed assigned his moiety to his wife, and by his will devised it to her. Per Cur. The grant to the wife is absolutely void, and the will cannot prevent survivorship, and no agreement appearing to exclude it dismissed the bill. Mich. 1700. 2 Vern. 385. Moyse v. Gyles.

10. If two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade, or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead. Abr. Equ. Cases. 291. Trin. 1729. Lake v. Gibson.

[ 526 ]

## (A. b) Pleading the Plea of Jointenancy.

34 E. 1. stat. **FORASMUCH** as it chanceth many times in I. s. 2. 1. **A**ffises of novel disseisin, that the tenant doth except against the plaintiff, that he holdeth the tenements in demand jointly with his wife, not named in the writ, and some time with a stranger not named in the writ, and sheweth forth a deed testifying the same, and demandeth judgment of the writ.

In affise the defendant pleaded jointenancy with a stranger by fine, not named in the writ; judgment of the writ;

S. 3. It is agreed and ordained, that if the plaintiff will offer to aver by affise, that the day of his writ purchased, he that alleged the exception was sole tenant, so that neither his wife nor any other had any thing in the said lands, then the justices before whom the affise is arraigned, shall retain the same deed safely in their keeping, (until the affise be tried between them thereupon) as that which is in a sort denied.

the plaintiff said, that not comprised, Prist, &c. & non allocatur, for the statute wills, that where a jointenancy by deed is pleaded, the plaintiff may say, that sole tenant at the day of the writ purchased, which shall be a good answer; but jointenancy by fine is at the common law, and not revived by the statute, nor by the equity of it, quod nota; and \* at the common law, where jointenancy by deed or fine was pleaded, the writ should abate immediately; and as to the jointure by deed, answer is given to the plaintiff by this statute, but not against him who pleads jointenancy by fine. Br. Jointenancy, pl. 22. cites 24 E. 3. 51. — But the book seems to be misquoted. \* — S: P. per June. Ibid. pl. 26. cites 14 H. 6. 8. 25.

If a man pleads jointenancy without deed in affise, the plaintiff may say, that sole tenant the

S. 4. And they shall let the party absent to understand by their writ under their testimony, and also to the jointenant that is present, of whom the deed maketh mention, that he be present at a certain day with the other tenant, to answer unto the party, plaintiff, as well upon the exception alleged, as of the lands demanded and put in view, if it seem expedient for him;

day of the writ purchased, which shall be enquired by affise by common law, without making process by the statute de conjunction feoffatis; for it seems, that the writ was not abated by jointenancy immediately by the common law, but where it was pleaded by deed or fine; quod nota inde. Br. Affise, pl. 41 5. cites Mich. 12 E. 1. — In affise; if the tenant pleads jointenancy by deed with a stranger to the writ, there the process upon the statute shall be by writ, and not by precept without writ. Br. Jointenancy, pl. 42. cites 25 Ass. 14.

S. 5. At which day, if both that are named tenants do come in, and do justify the same feoffment, they shall answer and maintain the exception alleged by one of them, and further shall answer unto the affise, as though the original writ had been purchased against both of them jointly.

\*[527]

See Amercement (F. a. 2) —

In affise; if the defendant pleads jointenancy

S. 6. And if it be proved by affise, that the exception was moved maliciously to delay the plaintiff of his right, so that they held not the same land jointly the day of the writ purchased; then albeit the same affise do pass for the tenants and against the plaintiff, yet they that allege the exception, shall be punished by one year's imprisonment, whence they shall not be delivered without a grievous fine.

by deed with

a stranger, \* who comes by process and maintains the exception which passes against them, yet he who joins shall not be imprisoned, but he who pleads it; for this statute is, that they who alledge, &c. Br. Jointenancy, pl.

pl. 34. cites 16 Aff. 8.——In assise against J. N. he pleaded *jointenancy with his feme*, who came and maintained the exception which passed against him, and yet *the feme was not imprisoned*, according to the statute; for the statute is, that they who alledge, and which was the baron: but Brooke says, quære if this be the cause, or because feme covert is not expressed in the statute, and then by equity imprisonment *shall not extend to her nor to an infant*. Br. Jointenancy, pl. 69. cites 16 E. 3. and Fitzh. Peyne. 6. and Br. Imprisonment, pl. 51. cites S. C. but adds quod mirum.——Br. Imprisonment, pl. 46. cites 16 Aff. 8. acc.——So where he pleaded it with his feme and son, he only was imprisoned. Ibid. pl. 91. cites 31 Aff. 11.——*Assise by H. against W. and others; W. said, that he held the tenements jointly with his feme, and A. his son not named in the writ; judgment of the writ; and shewed thereof a deed, (as he ought if he will have process upon the statute) the plaintiff said, that sole tenant the day of the writ purchased, Prist, &c. and process was made upon the statute, and the baron and feme came but not the son; and it was demanded of the feme, if she would maintain the exception, who said she would; and upon this the assise was charged, and said, that H. the plaintiff infeofed N. upon condition that he infeof W. now tenant, and his son, upon condition to find estovers, and vesture to H. the father during his life; and N. infeofed the said W. and his feme, and their son, in whom the jointenancy is alledged contrary to the condition, upon which H. the father entered, and W. ousted him, and infeofed of part, M. named in the writ, and for breach of the condition the entry is lawful, and by this the jointenancy is defeated, by which the plaintiff recovered seisin, &c. and double damages, and the baron and feme were sent to prison; nevertheless quære of the imprisonment of the feme, for the statute says, only that he who proposed the exception shall be imprisoned, and not he who maintained it. Br. Jointenancy, pl. 38. cites 21 Aff. 28.——If jointenancy by deed was pleaded before the statute, the plaintiff might have confessed and avoided it, as to say that he was seised, and disseised by A. who made a joint estate, and he re-entered, and was seised quousque, &c. or to say that he aliened to J. S. within age, who made the joint estate, and he entered and was seised, quousque, &c. But now jointenancy by deed is gone by the statute de conjunctim feoffatis, the plaintiff may aver that the defendant was sole tenant the day of the writ, and shall have a scire facias against him with whom the jointenancy is pleaded by deed; and at the day, if both maintain the exception, and the assise pass against them, they shall be imprisoned for a year, as well be who joined in the maintenance of the exception, as the tenant who pleaded it; for at the common law, before this statute, jointenancy by deed abated the writ without answer; and soe that by the statute the assise shall remain till the others come, or are warned to come, and the exception shall be tried by the assise, and by no other inquest; and by this statute double damages are given, as well as imprisonment; but jointenancy pleaded in assise by fine is at the common law. Br. Jointenancy, pl. 64. cites 43 Aff. 6.*

S. 7. And let the justices be well advised, that from henceforth they do not allow an exception alledged by the bailiffs of any such tenants.

S. 8. And if he that allegeth the exception absent himself at his day, and the other that is named jointenant do appear, although he that doth appear doth disavow the same deed, and say that he hath nothing in the foresaid tenements, nevertheless the assise shall pass against the tenant that is absent by his default.

S. 9. And if it be found by assise, that they were not jointly infeofed the day of the writ purchased, and likewise that the tenant against whom the writ was purchased, or another named in the writ did disseise the plaintiff, then having regard to the exception that was falsely and maliciously alledged to the hurt of the party, and to the disseisin that they made, the party plaintiff, shall recover his seisin, and \* double damages, and they that allege the false exception shall have the punishment aforesaid.

\* Br. Damages, pl. 152. cites 22 E. 3. 51.——Assise against several; one alledged jointenancy by deed with a stranger,

who upon process did not come, by which the assise was awarded, where the other had pleaded misfeasance of the plaintiff, and all found for the plaintiff; and against him who pleaded jointenancy double damages were awarded, and single damages against the other; and the double damages shall be levied of him who pleaded jointenancy only, and the other damages shall be levied of him and the other in common. Br. Damages, pl. 104. cites 22 Aff. 1.

S. 10. But if neither of the tenants do come at the day, then upon their default the assise shall pass against them.

S. 11. And if it be found thereby, that the same exception was lawfully and truly alledged, and that they which alledged it were jointly seised

seised before the plaintiff purchased his writ against them, the assise shall pass no further, but the writ shall be abated.

S. 12. The same shall be observed if both or one only do appear, if it be found by assise that the exception aforesaid was truly alledged as before is said.

[ 528 ] S. 13. In the same order it is established and agreed, that in assises of mortdancestor & juris utrum, at the first day that the parties appear in court, if the tenant alledge the aforesaid exception against the demandant, shewing the deed thereupon, and the demandant will offer to aver by the assise or jury, that at the day of his writ purchased, he that alledged the exception was sole tenant, from thence the same process and manner of proceeding shall be used in assises of mortdancestor and writs of juris utrum, as before is ordained in assises of novel disseisin, and like punishment shall be inflicted upon the offenders and those that be convict.

S. 14. In other writs whereby tenements are demanded such process shall be made, that if at the first day that the parties appear in court, the tenant doth allege the foresaid exception of a joint feoffment, and the demandant will offer to aver by the country, that the day of the writ purchased, he that alledged the exception was sole tenant, then the same process and manner of proceeding shall be observed betwixt the parties, until a jury have passed between them thereupon.

S. 15. And if it be found by the jury, that the same exception was truly alledged, then the writ of the demandant shall abate.

S. 16. And if it be found by the jury, that the same exception was falsely alledged, and to the hindrance of the party, then the demandant shall recover his seisin of the tenements in demand, and the tenant shall be punished by the pain above limited in assises of novel disseisin as to the imprisonment, and as to the damages, according to the discretion of the justices.

2. In assise the tenant pleaded jointenancy of parcel by deed, and the plaintiff acknowledged it, and prayed to have assise of the rest, and had it; and herewith agrees 22 Ass. 6. And so see jointenancy of parcel, and confession by the plaintiff shall not abate the writ of all, but for this parcel only. Br. Jointenancy, pl. 59. cites 14 Ass. 8.

3. In assise the tenant pleaded jointenancy by deed with a stranger; judgment of the writ; the plaintiff said, that the tenant pending the writ made an estate to W. N. and re-took to him and the other, and so sole tenant the day of the writ, and yet the writ shall abate; quod mirum. Br. Jointenancy, pl. 36. cites 18 Ass. 6.

4. Ward against four; one made default at the grand distress, with proclamations, and three appeared and pleaded jointenancy with a stranger of the franktenement, and a good plea, though chattel only be in demand; for this writ lies against the tenant of the franktenement as it is there agreed. Quod nota, and the plea was, that the ancestor of the heir in his life infeoffed those four, and the stranger in fee, and so they had nothing but jointly with the stranger not named, judgment of the writ, and set forth the deed of the jointure; and the plaintiff

plaintiff said, that they were tenants and deforceors of the ward, *absque hoc* that the stranger had any thing. Belk. You *should say that they were tenants of the franktenement, absque hoc that the other had any thing*, quod Cur. concessit; and the plaintiff prayed process upon the statute of jointenancy pleaded by deed, and could not have it, because the jointenancy goes to the writ only and not in bar, and also a chattel only is in demand, and no franktenement; quod nota. Per Cur. Br. Jointenancy, pl. 10. cites 49 E. 3. 27.

5. Entry in the quibus; the tenant pleaded jointenancy with a stranger of the gift of B. Newton said, *we ourselves were seised till by the tenant himself disseised, a long time before B. had any thing, judgment, and the jointenancy was pleaded without deed*; and all the justices held this plea good in avoidance of the jointure. Br. Jointenancy, pl. 26. cites 14 H. 6. 8. 25.

6. It seems that he alledged pernancy of the profits in the tenant, and that he brought his action *infra annum, &c.* For this case is compared there to another case, the same year, fo. 3. where he averred the pernancy of the profits, as above. Br. Jointenancy, pl. 26. cites 14 H. 6. 8. 25.

7. And it is agreed there, that in the pleading of jointenancy as above, he shall say which estate continues, &c. and per Henst. the entry shall be of the other part that sole tenant as the writ supposes, *absque hoc that the other any thing had*; quod Paston concessit, and per tot. Cur. this is a good avoidance of the jointenancy. Br. Jointenancy, pl. 26. cites 14 H. 6. 8. 25. [ 529 ]

8. In quare impedit, jointenancy of the part of the defendant is no plea; for the suit is not upon the right, but upon disturbance, which is traversable in effect; per Cur. Nevertheless, contrary it seems of the part of the plaintiff. Br. Jointenancy, pl. 27. cites 14 H. 6. 24.

For more of pleadings on the above statute see the following divisions.

(A. b. 2) *Abatement of Writ in Part, or in all, by the Plea of Jointenancy.*

1. **I**N dower against two jointly, they pleaded purparty and detinuit of evidences, viz. each of them pleaded it by himself, and because they pleaded it in bar, and did not plead it to the writ, therefore good; but it seems there, that where it is brought against two, where they are several tenants by partition or otherwise, if it be pleaded to the writ, the writ shall abate. Quære. Br. Several Tenancy, pl. 13. cites 21 E. 3. 8.

2. Scire facias upon a fine was jointly sued against two, and in pleading it appeared, that the one is tenant by the curtesy, and the other is the coparcener of the feme of the tenant by the curtesy, and so several tenants of moieties; and yet the writ shall not abate, but shall proceed over upon aid-prayer. Br. Several Tenancy, pl. 14. cites 21 E. 3. 14.

3. Scire facias against W. and R. and three others; W. said, that he and one of the three held parcel jointly, &c. and the other was dead the day of the writ purchased, judgment of the writ; and R. said, that he held other parcel in severalty, judgment of the writ brought against them in common; by which the writ was abated. And note, that several tenancy of parcel shall abate all the writ. Br. Several Tenancy, pl. 12. cites 38 E. 3. 20.

4. Præcipe quod reddat against two of 16 acres, the one said that he was tenant of 12 acres, absque hoc that the other any thing had, and vouched; and the other said, that he was tenant of the rest in severalty and vouched; and by the best opinion, the demandant ought to maintain his writ, though the plaintiff does not conclude to the writ; and so it seems, that he who takes the several tenancy, ought to vouch or plead in bar; and yet, if the demandant answers to the voucher or bar, and does not maintain his writ, his writ shall abate. Br. Several Tenancy, pl. 4. cites 41 E. 3. 20.—And another such like case the same year, fo. 21. where upon several vouchers upon several tenancy the demandant maintained his writ. Ibid.

5. Scire facias against two; the one came, and the other made default upon garnishment; and he who came said, that he held part in severalty, absque hoc, that the other any thing had, and that the other held the rest in severalty, absque hoc that he any thing thereof had, judgment of the writ; and there it was awarded, that the one cannot plead several tenancy to the writ in absentia alterius, but where he appears and pleads with him; quod nota; therefore it seems, that he ought to have pleaded the several tenancy, and pleaded over



in bar, and upon this the plaintiff shall be compelled to maintain the writ, which see elsewhere. Br. Several Tenancy, pl. 5. cites 42 E. 3. 8.

6. *Scire facias* against three; the one pleaded sole tenancy of parcel, *absque hoc* that the others any thing had, and pleaded a release of the ancestor of the sole plaintiff with warranty in bar, and the other two took the intire tenancy, and that the third had nothing, and pleaded other bar; and so note, that he who pleads sole tenancy, or several tenancy, shall plead in bar, and shall not conclude to the writ; and yet see elsewhere, that upon this, the plaintiff shall maintain his writ. Br. Several Tenancy, pl. 7. cites 44 E. 3. 33.

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7. If in *præcipe quod reddat* against two, the one makes default, or appears and says nothing, and the other takes upon him the intire tenancy, and pleads in bar, the demandant may answer to the bar without maintaining the writ; but if he confesses that the one has nothing, the writ shall abate. Br. Several Tenancy, pl. 17. cites 8 H. 6. 13. Per June.

8. *Jointtenancy to parcel* shall not abate the writ for all, but only for this parcel; per Jenny, *quod non negatur*; which appears to be law very often. Br. Jointtenancy, pl. 66. cites 4 E. 4. 33.

S. P. Br. Jointtenancy, pl. 59. cites 14 Aff. 8.

9. Note, per Fitzh. That in *præcipe quod reddat* against four, viz. three confessed the action, and the fourth said, that he held jointly with two of the three, *absque hoc*, that the third any thing had; in this case, though the demandant prayed judgment against the three, he shall not have it; for *several tenancy* goes in abatement of all the writ; *quod nota, & nullus negavit*. And there the process shall be made against the jury upon the issue, and if it be found for the demandant, he shall recover the entierty, and if against him, all the writ shall abate; *quod nota*, that by *several tenancy* all the writ shall abate. Br. several Tenancy, pl. 1. cites 27. H. 8. 30.

(B. b) *In what Cases Jointenancy is no Plea.*

1. *A S S I S E* against several, one pleaded to the assise, and another pleaded jointenancy with him who pleaded to the assise, and with a stranger not named in the writ, and good, notwithstanding the plea of the other; for in actions real and mixt, the demeanour of the one shall not prejudice the other. Br. Jointenancy, pl. 60. cites 14 Aff. 16.

But where the tenant pleaded jointenancy by deed of the land put in view

2. *Affise in C.* the tenant pleaded jointenancy by deed of land in B. and it is said there, that where the deed varies from the assise in name or in quantity of land, the jointenancy is not to the purpose, nevertheless if B. be a hamlet of C. then it is well, as it seems. Br. Jointenancy, pl. 41. cites 24 Aff. 6.

and the deed was of tenements in B. and he did not aver that B. was a hamlet of C. yet held good, per Cur. Because he laid of tenements in view. Br. Jointenancy, pl. 43. cites 26 Aff. 2.

3. *Affise of rent against A. B. and C.*—A. took the tenancy, and pleaded jointenancy of parcel with E. and if, &c. no tort; and B. as tenant to parcel pleaded to the assise; and C. said, that he was tenant of the other parcel, and that E. was tenant of the rest, and was not named in the writ, judgment of the writ; and the plaintiff said, that B. held the whole land of him by the rent in plaint, and that the others are not named but as disseisors; and the assise was taken, and said that A. who pleaded jointenancy held of B. and B. over of the plaintiff, and the plaintiff distrained for the rent of B. and A. made rescous, and that C. was jointenant with A. and yet the plaintiff recovered by judgment, because it is of rent service; for in assise of rent-service, jointenancy of the rent is a good plea by the pernour of the rent, but not of the land; for if there is pernour of the rent, who is tenant of it in law, named in the assise, and disseisor, this suffices, and now the mesne was pernour, and one of the ter-tenants was disseisor, and therefore well; but in assise of rent-charge or rent seck, there jointenancy of the land is a good plea always, for there all the tertendants shall be named, but in assise of rent-service pernour & disseisor suffices. Br. Jointenancy, pl. 62. cites 31 Aff. 31.

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4. In *assise of rent* the tenant pleaded jointenancy by deed with his feme of the land whereof, &c. and the plaintiff pleaded estoppel, that to this he shall not be admitted; because the ancestor of the plaintiff, whose heir, &c. leased the land to the tenant by deed indented for term of life, judgment si contra factum, &c. and well, and was not compelled to take the answer given by the statute, that sole tenant the day of purchasing the writ; and this by the common law as it seems;

by

by which the tenant confessed and avoided the conclusion, because his lessor had but for term of life of the lease of W. N. which W. N. entered by this second lease made to his disinherittance, and after infeoffed the tenant and his feme in fee before the day of the writ, and the plaintiff maintained that the lessor had fee; quod nota. Br. Jointenancy, pl. 65. cites 45 Aff. 14.

5. In *assise of rent* the defendant pleaded *jointenancy* of the land, out of which the rent issued, with J. N. *by deed*, and demanded judgment of the writ, and it was admitted for a good plea. Br. Jointenancy, pl. 13. cites 12 H. 4. 21.

6. In replevin the defendant avowed for rent-charge, &c. and the plaintiff said, that he had nothing in the land charged but jointly with J. N. and prayed aid of him, and was ousted of the aid. For jointenancy in avowry or replevin is no plea in this case; because, whosoever has the land, *the avowry shall be as upon land charged to his distress, and upon no person certain*, and therefore no plea. Contrary, it seems in avowry for a tenure upon one, which ought to be upon two; note the diversity. Br. Jointenancy, pl. 2. cites 2 H. 6. 7.

In avowry the plaintiff pleaded jointenancy in him and his feme, (the avowry being upon him only) and a good plea. Br. Jointenancy,

cy, pl. 53. cites 7 E. 4. 27.——Ibid. pl. 67. cites S. C.

7. Action upon the case for not making of the wall, which he ought to repair by reason of his land in E. *by which the land of the plaintiff was surrounded* in Middlesex. Per Skrene, jointenancy in the plaintiff in the land surrounded, or jointenancy in the defendant in the land charged to the reparation, is a good plea, quod non negatur. Br. Jointenancy, pl. 12. cites 7 H. 4. 8.

8. In writ of *dower against guardian*, it is a good plea to plead jointenancy in the land, as it is of franktenement; per Belk. quod nota. Br. Jointenancy, pl. 10. cites 49 E. 3. 27.

9. In dower it was said, that where *three jointenants* are, and *their land is seised into the hands of the king*, that each by himself may sue for his part out of the hands of the king, and jointenancy is no plea. Br. Jointenancy, pl. 11. cites 2 H. 4. 23.

Br. Petition, pl. 6. cites S. C. by all the justices in Cam. Scacc.

10. Entry *sur disseisin* of certain land; the tenant said that the land is gavekind, of which A. was seised in fee, and had issue the demandant and R. and died, who entered as sons and heirs, and so the demandant has nothing but in common with R. judgment of the writ; and a good plea without averring the life of R. for if he be dead, his issue has title to the moiety, and if he has no issue, but the demandant is heir to him there the demandant shall have several writs of entry, the one of the one moiety, and the other of the other; quod nota. But if jointenancy had been pleaded, it had been no plea without averring the life of the other; for there may be survivor, and then survivor is in by the first feoffor. Brooke says, he wonders that the writ had not been awarded good for the one moiety. Br. Brief, pl. 200. cites 24 E. 3. 25.

11. In error; the *heir of him who last brought writ of error against the heir of him who recovered*; the *heir pleaded jointenancy with J. N.* and by the best opinion, it is no plea; for *the action is not brought against him as tertenant, but as heir by privity.* Br. Jointenancy, pl. 54. cites 10 E. 4. 13.

[ 532 ] 12. *And the same in contra formam collationis*; for this lies against the abbot, though he be not tenant, and after *scire facias* shall issue against the tertenant in both cases, Br. Jointenancy, pl. 54. cites 10 E. 4. 13.

13. If a *fine* is levied to two, and one does not enter, nor say any thing, and the other enters and is impleaded, there, per Hank, he may plead jointenancy with the other, notwithstanding that *he alone counts of the possession*, and that the other never entered; for the possession by the fine, and the entry of the one, shall be adjudged in law to be in both till the other disagrees by matter of record. And so see that disagreement to relinquish a thing shall not be but by matter of record; but agreement to take a thing may be by parol or matter in deed. Br. Jointenancy, pl. 57. cites 8 H. 4. 13.

14. *Quare impedit* against three, who said that B. was seised of the manor of B. to which the advowson is appendant, and infeofed those three and J. N. who is alive not named, judgment of the writ; and a good plea by award, though the disturbance be an act personal, and that the jointenancy be contrary to the nature of the writ. Br. Jointenancy, pl. 19. cites 19 H. 6. 33.

15. In *replevin*, the defendant justified as bailiff to W. N. because the plaintiff held of his master by service to be beadle, &c. and that the custom is, that the tenants choose a beadle of themselves, and if he depart, or shall not be sufficient, that the tenants shall answer for him, and they shall be charged, and at such a court they chose the plaintiff, who refused, and therefore he distrained, and justified as bailiff, and the plaintiff pleaded jointenancy in the same land with J. N. Judgment of the conusance made upon him alone, and a good plea. Br. Jointenancy, pl. 14. cites 14 H. 4. 2.

16. A brought *replevin* against B. which B. avowed upon M. a stranger to the avowry; there A. may plead jointenancy the day of the writ purchased with M. and that he is yet jointly seised with him; for though A. be a stranger to the avowry, he is party to the writ. Br. Jointenancy, pl. 55. cites 19 E. 4. 9.

17. *Scire facias* against A. and B. as several tenants, the one said that C. was seised, &c. and had two daughters, whereof one is named in the writ, and the other married N. and died, and N. is tenant by the curtesy after the death of his wife, and leased his estate to A. and the said B. is the other daughter, so they are tenants in common, and not several tenants; judgment of the writ brought as against several tenants; and per Wilby and Cur. the writ shall abate. Br. Brief, pl. 202. cites 24 E. 3. 29.

18. *Scire facias* upon office, which found that W. died seised; J. G. came and pleaded jointenancy by feoffment of W. to him and his  
 same,

feme, and son, & non allocatur; because the *defendant, by the office, is supposed abator*; by which he pleaded the said feoffment in bar. Br. Jointenancy, pl. 46. cites 29 Aff. 30.

19. Jointenancy of the franktenement is a good plea in *scire facias* upon a recognizance, and yet nothing shall be recovered but chattel by execution; per Belk. Br. Jointenancy, pl. 10. cites 49 E. 3. 27.

20. In trespass of chasing in his warren he shall not plead that the plaintiff has nothing in the land, in which he has the warren, but jointly with J. N. who is alive not named in the writ, judgment of the writ; for he may have a joint estate in the land, and yet be sole tenant of the warren; quod nota ibidem; for a man may have a warren in his own land. Br. Jointenancy, pl. 5. cites 36 H. 6. 55.

21. In writ of ward against J. the defendant said, that he held jointly by deed, which he shewed, &c. and a good plea. Br. Jointenancy, pl. 49. cites 37 Aff. 2.

(B. b. 2) Pleading Jointenancy by Fine. Good or Not. [ 533 ]

See (A. b) and the notes there on S. 6. of the Statute.

1. **I**N assise, the tenant pleaded jointenancy with his son by fine of render levied by W. S. to them; the plaintiff said, that the tenant himself was seised at the time of the fine levied, before, and after, and this estate has always continued, absque hoc, that he who rendered ever had any thing; and notwithstanding that this is a fine executory, and not a fine executed, yet this vests the franktenement in the other as to a stranger, as well as between them who were parties to the fine, so that the jointenancy is not avoided, and therefore the writ was abated by award; it seems that the possession of one is the possession of both. Br. Jointenancy, pl. 61. cites 14 Aff. 54.

2. If jointenancy by fine be pleaded in assise, the writ shall abate without answer; per Wiche, quod conceditur, & per ipsum, the plaintiff shall not say nient comprise; quod quære. Br. Jointenancy, pl. 64. cites 43 Aff. 6.

3. The statute of 34 E. 1. stat. 1. extends not to jointenancy, by fine, but to jointenancy by deed only, to take the general averment against the deed, that the tenant is sole seised, and extends not only to assises, but to writs of dower, and other real writs of præcipe quod reddat, but not to writs of ward, or the like. 2 Inst. 524.

(C. b) *At what Time Jointenancy may be pleaded, and where after a former like Plea by one Defendant.*

i. *A*SSISE against J. and R. J. pleaded to issue, and R. pleaded jointenancy with D. &c. and was received to it, notwithstanding that in the franchise of Beverley in assise of fresh force of the same disseisin, he had abated the writ by jointenancy with one N. and this writ was purchased by journey's accounts; for this matter ought to be averred by record, and this which was done in the franchise, is not of record here, by which the plaintiff said, that the said R. had nothing but jointly with J. named in the writ, who had pleaded to the assise, & non allocatur. Br. Jointenancy, pl. 31. cites 8 Ass. 8.

2. In *præcipe quod reddat* the tenant pleaded jointenancy by fine with one N. who is alive, judgment of the writ, and the demandant said, that the tenant had had the view, and after was essoigned upon the view, and after took a day by *prête partium*, and yet he had the plea and the writ abated. Br. Jointenancy, pl. 16. cites 21 E. 3. 8.

3. In *attaint*, if the first action passes for the tenant, who was sole tenant in the first writ, and the other brings attaint, the tenant shall not plead jointenancy in the attaint with a stranger to the first writ; but if the petit jury passes for the demandant or plaintiff, and the tenant brings attaint, there jointenancy of the part of the defendant in the attaint is a good plea, and so the writ awarded good, because he who pleads the jointenancy for him for whom the petit jury passes, was sole tenant in the first action; quod nota, by award. Quære of that judgment. Br. Jointenancy, pl. 44. cites 26 Ass. 12.

[534] 4. *Affise in O.* the tenant pleaded that the tenements are in B. and not in O. and if, &c. [then he pleaded further that] jointenant by charter with N. Fish said, you have pleaded to the assise, and have pleaded misnomer of the vill as sole party, and so have lost the advantage of the jointenancy, quod Curia concessit. Br. Jointenancy, pl. 47. cites 30 Ass. 2.

5. In *præcipe quod reddat*, at the grand cape the tenant came and pleaded jointenancy with a stranger, and also that he is ready to wage his law of non summons. Finch. said, that he ought to save the default, and cannot plead jointenancy now, and notwithstanding that he should wage his law, and not speak of the jointenancy, yet is a new action, he may have the view, and by consequence he may plead jointenancy, for this comes upon the view; therefore he ruled the



the tenant to answer, quod nota. Br. Jointenancy, pl. 56. cites 42 E. 3. 11. cites 14 H. 6. 4. — A man may

plead jointenancy or several tenancy upon the grande cape. Br. Non Tenure, pl. 4. cites 33 H. 6. 24.

6. If tenant in formedon in remainder demands what the demandant has of the remainder, and he shews deed, the tenant shall not plead jointenancy after this. Br. Jointenancie, pl. 7. cites 45 E. 3. 2. per Finch.

7. In scire facias the tenant pleaded jointenancy with J. N. by which the writ abated, and he brought a new writ by journey's accounts, and the two pleaded jointenancy with the third, and the plea was allowed, notwithstanding that the one pleaded jointenancy before with the other, without speaking of the third, and because the demandant could not deny it, the writ was abated by award; for though the one shall be estopped, the other shall not, and they two shall join in plea for the advantage of the one who was not party to the plea before. Br. Estoppel, pl. 40. cites 45 E. 3. 17.

8. Jointenancy may well be pleaded after ley gager; for this affirms him tenant; per Hank, which was agreed. Br. Nontenure, pl. 46. cites 7 H. 4. 8.

9. In præcipe quod reddat against J. S. the writ abated by jointenancy pleaded with A. and a new writ was brought by journey's accounts; he who pleaded jointenancy before, shall not plead jointenancy again, but he and the other may plead jointenancy; for his companion is a stranger to the first record; per Newton and Port. Justices. Br. Jointenancy, pl. 20. cites 22 H. 6. 54.

Br. Estoppel, pl. 91. cites S. C. pl. 29. S. P. cites 41 E. 3. 4. — for though J. S. can-

not, yet his companion may, and he cannot alone; the reason seems to be, because they should vouch all who ought to be vouched together and not two without the third. Br. Jointenancy, pl. 23. cites 39 E. 3. 36. — A. is not estopped by the first plea of J. S. and therefore for A.'s advantage both J. S. and A. shall have the plea. Br. Estoppel, pl. 195. cites S. C.

(D. b) Pleading Jointenancy. *How.*

Br. Brief,  
pl. 495.  
cites S. C.  
but Brook  
says quod  
mirum on  
the part of

1. **I**N trespass the defendant said, that the plaintiff had nothing unless in common with J. N. judgment of the writ; and per Martin and totam cur. he ought to shew how he holds in common, by alienation of jointenants or of coparceners; quod nota. Br. Tenants in common, &c. pl. 1. cites 3 H. 6. 56.  
the defendant who pleaded it in the plaintiff.——Br. Tenants in common, pl. 7. cites 22 H. 6. 12. that it is a good plea without shewing \* how they are tenants in common, otherwise it is if jointenancy & pro indiviso was shewn of the part of the defendant, and plaintiff maintained that it was his several tail, absque hoc, that A. B. had any thing, and so ad patriam.——Br. Tenants in common, &c. pl. 15. cites 18 E. 4. 26. S. P.——Ibid. pl. 19. cites 7 E. 4. 3. S. P.——Ibid. pl. 22. S. P. cites 32 H. 6. 14.——\* And of whose gift or scoffment. Br. Tenants in common, &c. pl. 17. cites 22 4. 87.

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2. Scire facias upon a fine against W. and T. and W. said that he is tenant of the whole, absque hoc, that T. any thing had and pleaded over in bar; and T. said that he had nothing but jointly with P. not named in the writ of the feoffment of H. absque hoc, that W. had any thing, judgment of the writ; Newton said, that W. and P. were tenants, as the writ supposed, the day of the writ purchased, Prist. and the other e contra. Br. Maintenance de Brief, pl. 8. cites 7 H. 6. 34.

3. Entry in the quibus, the tenant pleaded jointenancy with a stranger not named, &c. the plaintiff may say that he himself was seised, till by the defendant disseised, who made a feoffment to persons unknown and took the profits; and by the best opinion it is a good plea, notwithstanding that the statute does not speak but of nontenure; for jointenancy is taken by the equity, for equal mischief. Br. Maintenance de Brief, pl. 40. cites 9 H. 6. 14.

But where  
two are im-  
pleaded and  
the one pleads  
jointenancy  
of the whole

with a stranger and the other the like to himself with another stranger, he shall say absque hoc that the other had any thing; note the pleading. Br. Jointenancy, pl. 17. cites 19 H. 6. 13.

Demandant  
shall not  
maintain  
that he is  
tenant as  
the writ  
supposes,  
absque hoc

4. In formedon, if he, who is impleaded, pleads jointenancy with a stranger not named of the gift of J. N. judgment of the writ, he shall not plead with a traverse. Br. Jointenancy, pl. 17. cites 19 H. 6. 13.

5. In cui in vita the tenant said that the day of the writ purchased, he held jointly with J. of the gift of W. which J. is alive and not named, judgment of the writ; Billing said that it may be, he held jointly the day of the writ and made alienation, and retook to himself alone, therefore he ought to say that he was jointenant the day of the writ purchased, and always after; & non allocatur,

allocatur, and the plea awarded good; *but of nontenure he shall say, that he was not tenant the day of the writ purchased nor ever after; note the difference.* Br. Jointenancy, pl. 24. cites 26 H. 6. 16.

that he holds in jointenancy with J. but shall say, that he is

tenant as the writ supposes without that, that the other any thing has. Br. Maintenance de, &c. pl. 11. cites 22 H. 6, 16. per Browne.

6. In *præcipe* against four if two make default, and the other two plead jointenancy with a stranger *absque hoc*, that the other two any thing have, it is sufficient for the demandant to say that all are tenants as the writ supposes, without any traverse that the stranger any thing has. Br. Traverse per, &c. pl. 28. cites 34 H. 6. 16.

S. P. Br. Maintenance de Brief, pl. 2. cites S. C. per Prisot and

Moyle; for where the tenants first have taken a traverse, there is no need for the demandant to take other traverse; for one traverse suffices to make the issue.—And it is said there that anno 18 H. 6. it was held by Lord Richard Newton, that if in *præcipe* against two, the one pleads jointenancy with a stranger, *absque hoc* that the other had any thing, and the other pleads the like plea, or nontenure, or any other plea to the writ, in this case it is enough for the demandant to maintain his writ ut supra, without traversing that the stranger had any thing; for he who pleaded jointenancy had taken traverse before, and therefore it suffices for the demandant to answer to it. Note the diversity.

7. But where all the tenants plead jointenancy with a stranger, there the demandant ought to say that tenants as the writ supposes, *absque hoc* that the stranger any thing has; for there the tenants do not take traverse as above, and the one of them ought to take traverse. Br. Ibid.

S. P. Br. Maintenance de Brief, pl. 2. cites S. C.

8. Where jointenancy of the feoffment of B. is pleaded, the feoffment shall not be traversed; for they may be jointenants by disseisin, or other means; but the demandant shall maintain that sole tenant as the writ supposed, *absque hoc* that they held jointly, prout, &c. Br. Maintenance de Brief, pl. 33. cites 1 E. 4. 7. and Lib. Intrat.

But where it is alledged that the tenant held in coparcenary with J. by descent

from C. their ancestor, there the mesne conveyance is traversable, viz. the descent, and not whether they held in coparcenary, but Brook says quere of these last cases. Ibid

9. In ravishment of ward the defendant said that J. N. was seised in fee and infeoffed the deceased and W. S. and the deceased died, and W. S. survived and infeoffed him; and per Needham, Choke, and Moil justices, he need not traverse *absque hoc* that the deceased died seised in the homage of the plaintiff; for writ and count are only supposal; but bar, title, and such like, are matters in fact; and therefore, if it be alledged in bar or title, he ought to traverse; contra upon writ of count; note the diversity. Br. Traverse per, &c. pl. 213. cites 2 E. 4. 28, 29.

And where a man avows upon one he may say that he and another held the land of him, judgment of the avowry and well without traverse, \* &c.

Per Needham, the reason seems to be because it is pleaded in abatement, contra if it was pleaded in bar. Br. Ibid.—And in dower it is common to convey to the baron, and another, who survived, without traversing the sole seisin; per Choke Br. Ibid.—So in avowry, to say that he holds this land and other land, &c. Judgment of the avowry without traversing the sole tenure; per Choke by which Littleton passed over, Br. Ibid.

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10. In *assise* or *præcipe* quod reddat it is a good plea for the tenant that he holds jointly with J. S. who is alive not named in the writ, judgment of the writ, or seised in jure uxoris, not named, &c. judgment of the writ, without affirming seisin in fact in them, and without

Br. Traverse per, &c. pl. 237. cites 10 E. 4. 16.

*without traversing that he is sole tenant, or seised in jure proprio; for the writ is not but supposal, and he is to give him a better writ; but a title is matter in fact, therefore there ought to be alledged seisin in fact, and traverse as above. Br. Brief, pl. 372. cites 10 E. 4. 17.*

*And in writ of entry in the per by J. S. it is no plea that J. S. and N. infeoffed him without traverse that he did not enter solely by J. S. Br. Ibid.*

11. In *dum fuit infra ætatem* of alienation of his father within age it is no plea that the father and N. were jointly seised and infeoffed the tenant, and the father died, without traverse that the father did not infeoff him solely. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5.

12. In assise the defendant pleaded that J. A. was seised in fee and died seised, and the land descended to the defendant, and gave colour, and the plaintiff said that before J. A. any thing had W. S. was seised in fee and infeoffed the said J. A. and W. P. in fee, and J. A. died and W. P. survived and infeoffed the plaintiff, who was seised till disseised by the defendant, & hoc, &c. and did not traverse the discent; for the dying seised is the effect and traversable only, and not the discent; and the dying seised here is confessed and avoided by the jointenancy; and the defendant said that J. G. was seised and infeoffed the said J. A. in fee who was seised and died seised, and all as in bar absque hoc, that the aforesaid J. A. at the time of his death held jointly with the aforesaid W. P. & hoc, &c. and so see the jointenure put in issue, and not if W. S. infeoffed them jointly or not. Br. Traverse per, &c. pl. 6. cites 27 H. 8. 22.

### (E. b) Pleading Jointenancy how; Of whose Gift.

1. *WARD*; the defendant pleaded jointenancy in the manor with J. N. not named, judgment of the writ; and per Cur. he ought to shew of what estate, and so he did, that is to say, to them and their heirs; Horton, you must shew of whose gift; Hank. said, not unless upon jointenancy by deed; for if two disseise me, and I bring assise against one, he may plead jointenancy and yet shall not shew of whose gift. Br. Jointenancy, pl. 15. cites 14 H. 4. 15.

2. In *assise* it was agreed per Paston and tot. Cur. that he who would plead jointenancy shall say, that he holds jointly with one such, &c. who is alive and not named, judgment of writ, and shall not say in assise that he has nothing unless jointly, &c. but he may say so in *præcipe quod reddat*; note the difference; nevertheless see Lib. Intrat. And see elsewhere that he ought to shew of whose seoffment he is jointenant, and see all is one by the book of entries and no such difference as above. Br. Jointenancy, pl. 3. cites 3 H. 6. 51.

3. In quare impedit it was said by all the justices, that if a man will plead jointenancy in an action real brought against him; he ought to shew of whose feoffment or gift, for this is of his own part; but where the tenant pleads jointenancy in the demandant in the thing or interest demanded, there it is sufficient without shewing of whose feoffment or gift, the demandant held. Br. Jointenancy, pl. 18. cites 19 H. 6. 32.

*But per Paston in writ of right of advowson or darrein presentment the defendant ought to shew of whose*

gift, or when he held jointly the advowson, quod tota Cur. concessit. Ibid.

4. So in præcipe quod reddat, a feme prayed to be rescived for default of her baron named with her in the præcipe quod reddat, the demandant said that they were jointly seised before the coverture which estate continues, &c. without shewing of whose gift; because this is pleaded by the demandant in the feme and not in himself, as he who pleads jointenancy in himself, or to S. he shall shew of whose gift, because there he has notice thereof; contra when this is pleaded by one in another. Br. Pleadings, pl. 136. cites 10 E. 4. 2.

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*So in attaint where the tenant or defendant pleads jointenancy of the part of the plaintiff, he shall not*

be compelled to shew of whose feoffment or gift, contrary if he pleads this of his own part; per Cur. note the diversity; for there he ought to shew of whose gift. Br. Jointenancy, pl. 21. cites 13 H. 7. 9.

5. In quare impedit, if the tenant in action pleads jointenancy of the gift of W. N. with a stranger, the gift is not traversable, but the sole tenancy; for if he be jointenant of the gift of W. N. or any other it is sufficient to abate the writ; quod nota. Br. Traverse per, &c. pl. 352. cites 19 H. 6. 31. 32.

6. In cui in vita, he who pleads nontenure ought to say, that he was not tenant the day of the writ purchased, nor ever after; but of jointenancy it is sufficient to say that he held jointly with J. N. not named, the day of the writ purchased of the gift of N. judgment of the writ. Br. Nontenure, pl. 25. cites 37 H. 6. 16.

## (F. b) Process upon the Statute against pleading Jointenancy in what Cases and How.

1. **I**N assise, it was said that where jointenancy by deed is pleaded to the writ in assise, process shall not be made upon the statute de conjunctim feoffatis, but where the deed is denied and not where it is confessed and avoided; but the statute wills that process shall be made where the demandant avers that the tenant was sole tenant the day of the writ. Br. Jointenancy, pl. 30. cites 7 Ass. 20.

Br. Assise, pl. 128. cites S. C.

2. In

2. In *assise* the tenant pleaded bar for part, and jointenancy by deed with a stranger of the rest, and shewed the deed, &c. the plaintiff said that sole tenant, prist. &c. and prayed process secundum statutum. And so see sole tenant, &c. a good replication; and after the plaintiff had *assise* of the rest and confessed the jointenancy, and the writ did not abate, but only for this parcel. Br. Jointenancy, pl. 37. cites 19 Aff. 14.

3. In *assise* a man pleads jointenancy by deed, and process is made by the statute, and at the day he alleges jointenancy by fine, & non allocatur; and held that he, who pleads jointenancy, cannot plead misnomer, of the plaintiff also; for this is triable by the assise only, and the other is dilatory and shall stay process upon the statute. Br. Jointenancy, pl. 39. cites 22 Aff. 1.

\* Orig. (by demist.)

4. In *assise* the tenant pleaded jointenancy with his feme by deed, the plaintiff said that sole tenant the day of the writ purchased, and that he \* conveyed to another pending the writ and retook to him and his feme; and Thorp denied in this case to grant process upon the statute, because the jointenancy now is not denied but confessed and avoided; which was contrary to the opinion of several; for the issue shall be if he was sole tenant the day of the writ purchased or not, and then it is fully in case of the statute, and therefore ought to have process upon the statute. Br. Jointenancy, pl. 40. cites 23 Aff. 13.

5. In *assise* the tenant pleaded jointenancy in him and J. N. not named by devise by will in writing, and shewed the will; the plaintiff said that sole tenant, prist by assise; the defendant prayed process upon the statute, and could not have it, but the assise awarded. Br. Jointenancy, pl. 45. cites 27 Aff. 70.

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6. A man shall not have process with *testatum* where jointenancy is pleaded without deed; for this is out of the case of the statute. Br. Jointenancy, pl. 58. cites 9 H. 6. 1.

### (G. b) Replication, good to the Plea of Jointenancy.

So to say that the feoffor was his tenant at will and he re-entered and seised quousque, &c.

1. **I**N assise, if the tenant pleads jointenancy with N. not named, &c. it is a good replication, that the plaintiff himself infeoffed the tenant and N. within age, and entered, and was seised till disseised by the defendant. Br. Jointenancy, pl. 48. cites 32 Aff. 4.

Br. Maintenance de, &c. pl. 1. cites S. C.

2. *Præcipe quod reddat* against two; one pleaded non tenure, and the other pleaded jointenancy with a stranger without deed, *absque hoc* that the other any thing bad, and the demandant said that they two were tenants as is in the writ supposed, *absque hoc* that the stranger any



any thing bad; Godred, you ought to have made two replications, the one against him who pleaded nontenure that he is tenant, prist, and against the others that they are jointenants as the writ supposes, absque hoc that the stranger had any thing, and it was over-ruled by Paston, and that the first replication was good against both, quod nota. Br. Jointenancy, pl. 58. cites 9 H. 6. 1.

(H. b) Several Tenancy; good Plea in what Cases.

1. **T**WO coparceners recovered in assise, and in the attaint brought upon it, it appeared that partition was made between them, so that they are several tenants, judgment of the writ which is intire; for it shall be by several summons, as in mortdancestor, & juris utrum; & non allocatur; for it is founded upon \* assise, in which several tenancy is no plea to the writ. Br. Several Tenancy, pl. 20. cites 30 Aff. 24.

So in other actions where no land is demanded in certain, note well the diversity. Br. Several Tenancy, pl. 18. cites

24 H. 8.—So *nuper obiit* is no plea, per Newton. Br. Several Tenancy, pl. 15. cites 7 H. 6. 2.

2. Dower was brought of certain land against two by several *præcipes*. And so see that several tenancy in writ of dower shall abate the writ; contra in assise. Br. Several Tenancy, pl. 30. cites H. 39 E. 3. 4.

3. Several tenancy pleaded in *scire facias* shall abate the writ as well as in *præcipe quod reddat*. Br. Several Tenancy, pl. 29. cites 31 E. 3. Fitzh. *Scire facias* 146.

4. *Scire facias* against baron and feme upon recovery against them; and the baron came, and the feme not. Cand. prayed execution by default of the feme; and the baron said, that the feme had nothing, but he is sole tenant of the intierity, and ready to answer, and by the opinion of Finch. clearly, the baron may well save the land; by which the demandant passed over and the baron pleaded in bar. Br. Several Tenancy, pl. 8. cites 45 E. 3. 5.

*Præcipe quod reddat* against baron and feme, the baron cannot plead sole tenancy as the grand capr wishes

out bringing in his feme, and ought to bring her in, under pain of losing the land. Br. Several Tenancy, pl. 25. cites 41 E. 3. 24.

5. *Scire facias* out of a fine of rent against several tenants; the one said that he held a house parcel of the tenements, out of which the rent in demand, &c. is supposed to be issuing, by itself, absque hoc, that the other any thing bad, judgment of the writ; and that another held four acres, parcel of the land out of which the rent in demand is supposed to be issuing, &c. by itself ut supra. Huls said, that the writ is of a rent charge, judgment, &c. And per tot. Cur. he who pleads several tenancy shall plead over in bar; quod nota. Br. Several Tenancy, pl. 11. cites 5 H. 5. 4.

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6. He who pleads several tenancy, or sole tenancy, absque hoc that the other named with him any thing bad, shall not conclude to the

Br. Traverie per

sauns, &c.  
pl. 70. cites  
19 H. 6. 13.  
—\* S. P.  
Br. Several  
Tenancy.

the writ but *shall* \* *vouch* or *plead in bar*; but the demandant shall not answer to the bar, nor to the voucher, but shall maintain his writ, that tenant as the writ supposes, prist; quod nota. Br. Several Tenancy, pl. 16. cites 19 H. 6. 14.

pl. 4. cites 41 E. 3. 10.—S. P. and shall not conclude to the writ. Ibid. pl. 19. cites 28 Aff. 29.  
——— S. P. Ibid. pl. 24. cites 30 E. 4. 8. but it should be (10) E. 4. 8. accordingly.

## (I. b.) Pleadings of Sole Tenancy, and when.

1. **P RÆC I P E** quod reddat against four, the one disclaimed, the second took the entire tenancy absque hoc that the others any thing had and vouched, and the third took the entire tenancy, likewise absque hoc as above, and pleaded ne dona pas; for it was in formedon, and the fourth made default by which petit cape was awarded against him, and the presence of the others recorded, and nothing was entered of the issue; for it might be, that he who made default is tenant of the whole, and shall save his default and plead for the whole afterwards, and therefore *idem dies* was given to the others, and when the other who made default has lost his answer, the issue of the others shall be entered; for if it shall be that the demandant recover seisin of the other part now, then it may be tried after, whether any of them who have pleaded is tenant of the whole. Br. Several Tenancy, pl. 9. cites 46 E. 3. 15.

Br. Ley  
Gager, pl.  
21. cites  
S. C.

2. In præcipe against two, the one at the grand cape took the entire tenancy, absque hoc, that the other who made default, any thing had and tendered his law, the demandant maintained his writ that tenants as the writ supposed prist, quod nota. Br. Several Tenancy, pl. 10. cites 47 E. 3. 14.

3. The demandant in dower, counted of 350 acres of gavelkind land; the plaintiff as to 50 acres pleaded jointenancy with J. S. but did not shew of whose gift, &c. demandant replied and issue upon the tenure, and as to the jointenancy, she averred sole tenancy in the tenant at the time of the writ purchased without traversing the jointenancy alleged. The tenant demurred, Vaughan Ch. J. delivered the opinion of all the judges, that the plea of sole-tenancy without traverse is not good; for it might be, that the tenant was both solely and jointly seised the same day. But where the replication is an affirmative, so contrary to the plea that both cannot be true, there no traverse is necessary. 2 Jo. 6. in C. B. Cobham (Lady) v. Tomlinson.

[See more as to Jointenants in general, under Summons and Seizance, Presentation, Damages, Judgment, and other proper Titles.]

# Jointress and Jointure.

## (A) Jointure. *What is.*

See Uses.

1. A Jointure (which in common understanding *extendeth* as well to a *sole estate* as to a joint estate with her husband) *is a competent livelihood of freehold for the wife of lands or tenements; &c. to take effect presently in possession, or profit after decease of the husband for the life of the wife at the least, if she herself be not the cause of determination or forfeiture of it.* Co. Litt. 36. b. S. P. 4 Rep. 2. b. 3. agreed.

2. A conveyance made by the baron to himself and his feme; and their heirs *in fee simple* is a benevolence and not a jointure. Br. Dower, pl. 69. cites 6 E. 6. per the justices. Quod nota. Vid. the notes at (H) on this case.

3. So a *devise* of land by baron to the feme, by will is a benevolence and not a jointure. Br. Dower, pl. 69. cites 6 E. 6.

4. Jointures are *instead of dower ad ostium ecclesie & ex assensu patris*. And in those cases of endowment if the feme entered after the death of her baron she was concluded from claiming other dower. Vid. Litt. f 41. and 4 Rep. 1. b. (d) &c. in Vernon's case.

5. An *assurance* was made to a woman, *to the intent it should be for a jointure, but it was not so expressed* in the deed; per Cur. It may be *averred* that it was for a jointure, and such averment is not traversable. Ow. 33. Trin. 7 Eliz. Anon. cites the case of the Queen v. Lady Beaumont. Vid. (I) Villers v. Beaumont, —And (H) pl. 7. Lawrence v. Lawrence.

6. Feoffment to the use of a stranger, *remainder* to his wife for a jointure. Tho' the stranger die before the husband, yet this will *not* make a jointure. 4 Rep. 2. b. Mich. 14 & 15 Eliz. in Vernon's case.—Hob. 151.

7. A. bargains and sells land to J. S. and J. N. by deed inrolled, and they suffer B. to recover against them by a *common recovery, to the use of A. and his wife*, who was the daughter of B. for her jointure. Resolved that this was assurance by A. himself for the advancement of his wife. Mo. 718. 29 Eliz. Bridges's case.

8. *Estate tail* is limited by the husband to himself, *and for default of issue then to the wife for her life*. Afterwards *he dies without issue*, yet this no jointure. For since it could not be said to be a jointure at the beginning whatsoever happens afterwards shall not make it to be a jointure. Cro. J. 489. Trin. 16 Jac. B. R. Wood v. Shirley.

9. The word *jointure* in an agreement implies, that the husband shall have an estate for life, as well as the wife. Hill. 20 & 21 Car. 2. Chan. Cases 125. More v. Grice.

See Inter-  
est, (D).  
pl. 2.

## (B) Jointress *Refrained or Favoured.* In what Cases.

1. A Jointress in tail *may make leases for three lives*, notwithstanding the 11 H. 7. per Cur. Noy. 41. in the case of *Greville v. Stapleton*.

But Jenkins is of opinion, that such lease will continue no longer than for the life of the jointress, (tho'

\*[541]

2. *Lease for 21 years upon a fine sur conusance de droit come ceo* by tenant in tail jointress *without any rent reserved* binds the heir in tail. For such lease is not an alienation; for the word alienation, in conditional estates among subjects, extends not to a lease for 21 years, \* or a life. Because such term is ordinary and reasonable as some think. Jenk. 275. pl. 97. cites 1 Cro. 689.

it be made by fine) by the meaning of the statute of 11 H. 7. 20. Jenk. 275. pl. 97.

3. A. possessed of a term for years, purchases in fee, and then makes a jointure on his wife and dies. The wife for a sum of money releases to A.'s executors *all her right to the personal estate of A.* and afterwards the inheritance is evicted, 'till which time she continued in possession of the land. Decreed, that the wife's right to the term is not barred by the release, and that she hold for so many years as she lives; and if the lease be renewed, she to pay proportionably to her estate for life, and afterwards to go to the executors of A. Pasch. 16 Car. 2. 1 Chan. Cases, 46. *Bawtry v. Ibsen*.

So where the husband in consideration of marriage agreed to settle certain copyhold lands in fee upon her for her life, and after the marriage he surrendered them by way of mortgage for money lent, and afterwards surrendered them to the use of his wife for life, remainder to his daughter in fee, and died, and the mortgagee did not bring in his surrender at the next court, but the wife brought in hers and was admitted; upon a bill by the mortgagee, the court would not impeach the wife's estate, she being in pursuant to

4. A. during a former marriage with M. did by deeds and fines settle the manors of D. and S. to the use of himself for life, remainder to his first, &c. sons in tail. Afterwards M. died without issue. And A. on a treaty of marriage with J. agreed with W. R. the father of J. in consideration of 1000 l. to be paid by W. R. to settle 300 l. a year jointure on her, of which D. was to be part. A bill was brought by J. for her jointure, and to set aside the settlement as fraudulent. At the first hearing there was no proof of payment of the 1000 l. by W. R. but it was proved, that W. R. maintained A. and supplied him with money for other uses. It was insisted for J. that \* marriage was a good consideration to make the jointress a purchaser, and that it was her father who was to pay the 1000 l. and not she, and that so she was clearly a purchaser; and that giving security for purchase money is payment, and Ld. Chancellor inclined to this opinion, that she was a purchaser. And afterwards a release appearing to have been given by A. and the cause coming on again before Ld. Chancellor and Baron Turner, the court declared the marriage a good consideration to make the feme a purchaser; and upon the release besides, it is clear that she was so; and that all voluntary conveyances are prima facie to be looked upon as fraudulent against purchasers, unless the contrary appear; and decreed the settlement by A. to be set aside as fraudulent. Chan. Cases, 99. Hill. 19 & 20 Car. 2. *Douglafs v. Wade*.

a bill by the mortgagee, the court would not impeach the wife's estate, she being in pursuant to

an agreement precedent to the plaintiff's title; but as to the daughter, whose estate was purely voluntary, it was ordered, that unless she would pay the plaintiff his money, he should hold and enjoy the premises against her, Chan. Cases, 170. Trin. 22 Car. 2. Martin and Seamore. —\* Show. Parl. Cases 21. Whitfield v. Paylor.

5. Articles to settle a jointure, the marriage takes effect, but the settlement not made; decreed that the articles be executed. But the lands being *mortgaged* to one that had *notice* of the articles it was decreed, that the widow should *redeem* and hold for her life, and that her executors should detain the land 'till the money was raised, that she had been out upon the redemption. Mich. 30 Car. 2. 2 Vent. 343. Haymer v. Haymer.

Hill. 27 & 28 Car. 2. Chan. Cases 271. cites the case of Bertue v. Stile.

6. A marriage agreement reduced into writing, but not sealed, was extremely rigid, so as the baron and his feme would thereby have more than the wife's father. (who was indebted) and mother, and two other daughters unpreferred would have left among them all. The marriage took effect, but in the mean time the young man had made addresses to another. And this matter coming before the court, the Ld. Chancellor did not decree the agreement, but if the plaintiffs could recover at law, he would leave them to that remedy; it was referred to the parties to agree among themselves, else to attend again. 2 Chan. Cases 17. Hill. 31 & 32 Car. 2. Anon.

A. upon a treaty of marriage with M. the daughter of B. was to settle 500 l. a year, and to have 5000 l. portion, but B. insisting, that if A. should die without

issue, M. should have the inheritance of the jointure, the same was refused. But afterwards A. renewed the treaty himself, and accepted of articles for payment of 5000 l. and settled a jointure of 500 l. a year; and likewise made another deed in nature of a mortgage of all his estate, as well the reversion of her jointure as the rest, for securing the payment of 5000 l. to her, in case A. died without issue. — A. died within a fortnight after marriage without issue. M. by bill prayed a foreclosure of the redemption on failure of payment. And the defendants, though they exhibited their bill for relief against this as a fraud, yet were decreed at the rolls, to pay that 5000 l. by a certain day without interest, but with costs, and if not the estate to be sold to raise it with interest from that day. And this upon a re-hearing was confirmed by the Ld. Keeper Somers, but gave a twelve month's further time for payment. Upon this an appeal was to the House of Lords, where for the appellant was urged the fickleness and weakness of A. and the unreasonableness of the agreement, that A. on his death bed declared, he made no such agreement, and M. being present did not contradict it. To which it was among other things answered, that all bargains are not to be set aside, because not such as the wisest people would make, but there must be fraud to make their acts void; that the marriage was of itself a good consideration for a jointure; and reasonable or unreasonable is not always the question in equity, if each party was acquainted with the whole, and meant what they did; much less is it sufficient to say, that it was unreasonable as it happened in event; for if at the time it was a tolerable bargain; nay, if at the time the bargain was the meaning of the parties, and each knew what was done, and there was no deceit upon either, the same must stand; and accordingly the decree was affirmed. Show. Parl. Cases, 20. Whitfield v. Paylor.

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7. A. on his marriage agrees to settle lands for the benefit of his wife and their issue, and after aliens part of those lands; per Ld. Chancellor, the wife and children are equally purchasers, and they must bear the loss in proportion. Hill. 1686. Vern. 440. Carpenter v. Carpenter. — And Wastborne v. Downs.

So in any case where the issue and jointress claim by the same settlement, if there be a

prior incumbrance, the jointress shall contribute and bear her proportion, and not hold over and lay the whole burthen upon the heir. Ibid.

8. Chancery will set aside a term for years in favour of a jointress against a purchaser, tho' it will not in favour of a dowress. Because a jointress has a fixed interest by the agreement of the party, but a dowress has an interest by law under particular circumstances.

cumstances. Per Ld. Somers. Mich. 1696. Ch. Prec. 65. in case of Lady Radnor v. Rotheram.

9. An *injunction* was granted against a jointress, [tho' by the settlement she was] tenant in tail after possibility, &c. *to stay wast*; and the court held, that she being a jointress within the 11 H. 7. ought to be restrained from aliening, and so granted injunction to *stay wilful wast*. Abr. Equ. Cases, 221. pl. 2. Hill. 1701. Cook v. Winford.

10. A *defective jointure* was decreed to be *made good* against those that claimed under a marriage settlement, and within the consideration of the marriage settlement. Arg. Pasch. 8 Geo. 10 Mod. 469. cites it as decreed, per Ld. Somers, in case of Barkham v. Barkham.

The reason why chancery does not relieve against marriage contracts for settle-

ments, jointures, or other provisions, tho' they may be *very unequal*, in favour of the wife; is because it cannot set the wife in statu quo, or unmarry the parties. 2 Wms's Rep. (612.) Trin. 1731. by the Master of the Rolls, in case of North v. Ansell.

11. A bill was brought by remainder-man to be relieved against a jointure made by tenant for life even upon his death-bed in consideration of, and previous to his marriage by virtue of a power reserved to him, but Ld. C. Parker assisted by Prat Ch. J. and the Master of the Rolls denied relief. Cited by the Master of the Rolls, 2 Wms's Rep. (619.) Trin. 1731. as the case of Wicherly v. Wicherly.

### (C) Disputes between her and the Heir.

1. *INJUNCTION* against a jointress to *stay wast*, as to buildings and lands. Hill. 27 Car. 2. Fin. R. 189. Basset v. Basset.

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But on a motion that all deeds, leases, and writings relating to

the inheritance, should be delivered up on confirming a jointure, it was opposed as to the leases; because *without them she cannot recover the rents*, and tho' the leases may be expired, there may be arrears of rent and covenants. But the court ordered all deeds and writings and expired leases to be delivered up, unless particular reasons be shewn to the contrary by the next seal. Sel. Ch. Cases, in Ld. King's time. 4. Mich. 11 Geo. 1. Limax v. ———

2. The heir is not intitled to see any *deeds* in the hands of the jointress, *untill her jointure be confirmed*, tho' the jointure was *made after marriage*. Mich. 1687. Vern. 479. Towers v. Davis.— But she insisting on a *lease for years* as administratrix, which she had owned by letter was intended *to attend the inheritance* she was made to quit all pretensions to it. Ibid.

### (D) Disputes between her and Creditors or Purchasers.

1. A. made a lease for 80 years, *without consideration*, to B. afterwards A. conveyed the land to his wife for a jointure after marriage. Resolved, because this last conveyance was voluntary and without consideration, that the wife could *not avoid* it by averring that it was fraudulent. Cited by Beaumont J. as resolved by



by two ch. justices and three other justices. Cro. E. 445. Mich. 37 & 38 Eliz. C. B. in case of Upton v. Basslet.

2. A jointure in money not to be touched for the *debts of her husband*. Toth. 181. cites Mich. 9 Car. Ash v. Lady Forrest. *The use thereof, in equity, shall go to the payment of debts.* Toth. 181. cites 8 Car. Knivet v. Baxter—and Pawlet v. Lady Malburgh.

3. A judgment prior to a jointure shan't *protect* an incumbrance subsequent (as a lease tho' made for a valuable consideration) and so turn the debt on the jointress. Hill. 26 & 27 Car. 2. Chan. Cases 247. Jacob v. Thatcher.

4. *Marriage settlement* fairly made and performed, and portion paid, is not to be *impeached* in favour of *creditors*. Pasch. 30 Car. 2. Fin. R. 358. Foot v. Clerk and Venner. *A fraudulent settlement made by a trustee and his confederate of the trust estate on the trustee's daughter in marriage was set aside.* Mich. 32 Car. 2. Fin. R. 469. Smeaton v. Povey and Vanleemput.

5. Jointress *parts with her jointure* in consideration of the *baron's giving a bond to a trustee* to settle other lands of equal value; the baron dies intestate, and no settlement made; the wife takes administration, and confesses judgment to the trustee. Decreed the bond and judgment to the trustee good so far as to secure the like value, (viz. 40*l.* per ann.) for the wife's life. But the bond being worded so that the baron was to have been tenant in tail, and so might have barred such settlement, if made, as to the children, therefore another *bond-creditor* shall come in before the children, tho' not till after the wife. Pasch. 1691. 2 Vern. 220. Cottle v. Fripp.

(E) . *Refusal. In what Cases it may be.*

1. **T**HE wife may refuse a jointure *made after marriage*, and demand her dower at common law. Goldsb. 84. Pasch. 30 Eliz. in case of Colthirst v. Delves.

2. If the baron makes a jointure during coverture, and after *devise* other lands in lieu of jointure, she may refuse the jointure, and hold to the devise, and this was held good by the statute (tho' it was moved to the contrary, because the statute is, that she may refuse the jointure, and hold to her dower) but they held, that if she *once agrees to the jointure*, she cannot waive it afterwards. Goldsb. 84. in case of Colthirst v. Delves.

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3. A jointure was made *after marriage* by the husband, who was not in possession; but the father, whose lands they then were, joined with him, but it was not to take effect immediately after the husband's death, as the statute requires. The husband died indebted, living the father, but charged all his lands, so that if the wife waived her jointure, the estate would descend to the heir at law, and so not liable to debts. And therefore Parker C. decreed that she should take this estate for life under this settlement, and assign it over in trust for the *creditors*, who should convey to her a third of the land of her husband free from incumbrances. Pasch. 8 Geo. 1. 10 Mod. 487. Mills v. Eden.

(F) Refusal. *What is a Refusal.*

1. **B**Y refusal *en pais*, she may waive her jointure, and hold her to her dower, and this is a sufficient election. Goldsb. 84. Pasch. 30 Eliz. in case of Colthirst v Delves.

2. If she once refuse her jointure *in her own house among her servants, and not to the heir*, it is a good refusal; Goldsb. 84. in case of Colthirst v. Delves.

3. *Bringing writ of dower* without more, is a good refusal; per Periam J. and he said he had so seen it in experience. Goldsb. 85. in case of Colthirst v. Delves.

4. A jointure is made after coverture. The baron dies. The wife does not enter. *A præcipe is brought against her. She disclaims or pleads non-tenure.* This is a refusal of her jointure. Brog. Reading on Jointures 96. Lect. 9. pl. 1.

5. Land is given to baron and feme for their lives for a jointure. The baron dies. She *brings writ of dower, and appears in person or by attorney authorised*, this is a refusal. But otherwise, if she appears not in person, nor by attorney; and if she sue the writ, and the tenant is not summoned, it is no refusal; otherwise if the tenants were summoned. Brog. Reading on Jointures, 96. Lect. 9. pl. 2.

6. So if the heir demands of the wife, if she will have her jointure, and she says no, that she will not have it; or if she say so to a stranger, this is not a peremptory refusal; but if she says so upon the land, whereof she is dowable to the heir, and prays him to assign her dower. This is a refusal peremptory to the jointure. Brog. Reading on Jointures, 96. Lect. 9. pl. 3.

7. An house is assured to husband and wife, for a jointure. The husband dies. The wife immediately on the husband's death departs from that house to another, this is no refusal. Brog. Reading on Jointures, 97. Lect. 9. pl. 5.

8. Land is given to the husband and wife, rendering rent for a jointure. The husband dies. She refuses on demand to pay the rent arrear; yet this is no refusal of the jointure. Brog. Reading on Jointures, 97. Lect. 9. pl. 5.

[ 545 ] (G) Agreement to the Jointure. *What is.*

1. **L**AND was given to husband and wife for their lives for a jointure. They levy a fine to a stranger. The husband dies; this is no agreement. Brograve Reading on Jointures, 97. Lect. 10. pl. 1.

2. So to husband and wife infants for a jointure. The husband dies; the wife within age takes another husband. She takes the profits or makes a lease before entry, or grants a rent out of it. This is an agreement. Brog. Reading on Jointures, 97. Lect. 10. pl. 2.

3. Land is given to husband and wife for a jointure. He dies. She before entry grants a rent out of all her land in D. Tho' she has no other land there but her jointure, yet this is no agreement. But

But if she grant a rent out of her jointure specially, this is an agreement. Brog. Reading on Jointures, 97. Lect. 10. pl. 3.

4. So, where after the husband's death, she before entry surrendered to the heir of the husband, this is an agreement. So, attornment is an agreement. Brog. Reading on Jointures, 97. Lect. 10. pl. 4.

(H) Bar of Dower. In what Cases Jointure is a Bar.

1. THERE is a diversity to be observed between a dower *ad ostium ecclesiæ*, or *ex assensu patris*, and a jointure, or an estate made to the wife in satisfaction of her dower; for one of those being assented to, was a bar of the dower at the common law; but a jointure was not. For a right or title which one hath to a freehold cannot be barred by acceptance of collateral satisfaction. But a woman cannot have a double dower, viz. *ad ostium ecclesiæ*, &c. and at the common law; for the wife of one husband can have but one dower. But the law is since altered by the following statute. Co. Lit. 36. a. b.

2. 27 H. 8. cap. 10. §. 6. Where persons have purchased, or have estate made of lands and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the wife, † or to any other person or persons, &c. to the use of the said husband and wife, or to the use of the wife for the jointure of the wife; every woman having such jointure shall not claim any dower of the residue of the lands that were her husband's.

The reason of adding these branches concerning jointures to this statute of uses was that before the making this statute, the greater

part of the land in England was conveyed to several persons to uses, and in as much as the feme was not dowable of uses, her father and friends upon her marriage procured the baron to take estate of the feoffees or others seised to his use to him and his feme before or after marriage for their lives or in tail for a competent provision for the feme after the death of the baron, now this statute transferred the possession to the use by which the barons were seised accordingly, and consequently if further provision had not been made, the femes would have had both dower and jointure; for no collateral satisfaction or recompence can bar any right or title of inheritance or franktenement. 4 Rep. 1. b. 2. a. Vernon's case——† This is left out in the abridgments.

Tho' this statute particularly expresses those five forms, viz. 1st. To the baron and feme and the heirs of the baron. 2dly. To the baron and feme and the heirs of their two bodies. 3dly. To the baron and feme and to the heirs of the bodies of one of them. 4thly. To the baron and feme for their lives. 5thly. To the baron and feme for the life of the feme. Yet these are only for examples, and not to exclude other estates to the like effect, and agreeing with the intent of the makers. And tho' the latter of the act imports a joint estate, and also the word (Jointure) therein mentioned implies the same, yet it was resolved that estate limited to the baron for life, remainder to the feme for life, for her jointure is within the intent of this act, it being of one and the same effect, and the one as beneficial to her as the other. 4 Rep. 2. a. The second resolution in Vernon's case.

If a jointure be made to the wife, according to the purview of this statute it is a bar of her dower, so as the woman shall not have both jointure and dower; and to the making of a perfect jointure within \* that statute, six things are to be observed. 1st. Her jointure by the first limitation is to take effect for her life in possession or profit presently after § the decease of her husband. 2dly. † That it be for the term of her own life or greater estate. 3dly. † It must be made to herself, and to no other for her. 4thly. ¶ It must be made in satisfaction of her whole dower, and not of part of her dower. 5thly. ¶ It must either be expressed or averred to be in satisfaction of her dower. And 6thly. It may be made either before or after marriage. Co. Lit. 36. b.

§ If baron makes a feoffment to the use of himself for life, and after to the use of B. for life, and after to the use of his wife for life for her jointure; this is not within the act tho' B. should die, living the husband. 4 Rep. 2. b.——So if it be made to a stranger for his life, and after to the wife

for life, for her jointure. Because at the time when the limitations were made, they were out of the statute, as being uncertain whether her estate would take effect immediately on the death of the baron, as by the statute it ought, and no *† subsequent event* can make them within the act; and therefore, tho' in such cases, she enters and takes the profits, yet she shall have dower in the residue; for if the act does not bar her, the common law will not. 4 Rep. 2. b. in Vernon's case.—Co. Litt. 36. b. S. P.—*†* See Wood v. Shirely.

*†* For an estate for life or lives of one or many others, or to her for 100 or 1000 years, &c. if she so long live, or without such limitation is no bar of her dower, tho' they be expressly made in satisfaction of her dower; because 'tis not within the said statute. Co. Litt. 36. b.

*†* If an estate be made to others in fee simple, or for her life upon trust, so as the estate remains in them; albeit, it be for her benefit, and by her assent, and by express words to be in full satisfaction of her dower, yet this is no bar of her dower. Co. Litt. 36. b.

¶ If lands are conveyed to the wife before marriage for part of her jointure, and after marriage more lands are conveyed to her for her full jointure, and in satisfaction of all her dower, and then the baron dies; if the wife waives the land conveyed to her use after the marriage, she shall have the land conveyed before the marriage, and her dower also in the residue; for land conveyed to her for part of her jointure, or in satisfaction of part of her dower, is no bar (for the uncertainty) of any part of her dower, 4 Rep. 3. a. Vernon's case.

¶ A devise by will can't be averred to be in satisfaction of her dower unless it be so expressed Co. Litt. 36. b.—See (I) Foster v. Pitfall.

*S. 7. Provided that if any such woman be lawfully evicted from her jointure, or any part thereof, such woman shall be endowed of as much of the residue of her husband's tenements, as the lands so evicted shall amount unto.*

But if the jointure be made before coverture, she cannot waive it after her

*S. 9. Provided also, that if any wife shall have lands assured after marriage in jointure, except the assurance be made by act of parliament; she may at her liberty, after the death of her husband, refuse the lands to her assured in jointure, and demand her dower according to the common law.*

baron's death and take dower, and this by force of this proviso. 4 Rep. 3. a. the fourth resolution in Vernon's case.

See (I) Ld. Dyer's remarks as to this case being misreported as to its being within this statute, whereas it belongs to

3. Where a man makes his feme joint purchaser with himself after the coverture, of any estate of franktenement, unless it be to him and his feme and their heirs in fee simple; this is a bar of dower, if she agrees to the jointure after the death of her husband; contra of fee simple; for such jointure is not mentioned in the statute. Nor *†* devise of land by baron to feme by testament is no bar to the dower; for this is a benevolence and not a jointure; quod nota per justiciarios. Br. Dower, pl. 69. cites 6 E. 6.

the statute of 11 H. 7. 20.—And Ld. Dyer further said, that the reason reported by Brooke, that fee simple is not a jointure within this act, is because such jointure is not spoke of in the statute; but that this is no reason in law for three causes. 1st. Because the principal case at bar, and divers other cases put before were out of the words of the act, and yet within the equity and intention of it. 2dly. Because it agrees with the description of a jointure agreed and resolved before. [See (E) and (I) Vernon's case.] 3dly. He said, that this estate in fee simple is within the express letter of the act; for the words of the said proviso are for term of life or otherwise in jointure, which word (otherwise) extends to all other estates conveyed to the feme not mentioned before in the act; for all other estates, which are as beneficial to the feme, or more than the estates mentioned in the act, are within this word (otherwise). For, note that this word is not indefinite, but (otherwise) in jointure, i. e. for a jointure, as much as to say, having all the effect of incidents to a jointure implied in the said five examples, or more. 4 Rep. 3. b. in Vernon's case.—

\* These words are omitted in the abridgement of the statutes, but are in S. 9. of the statutes at large.—*†* 4 Rep. 4. in Vernon's case, the reporter in a note there says, this is good law if well understood; and as to this some have said, that no estate devised by will can be a jointure. 1st. Because at the time of making this statute, a devise could not be made; for the 27 H. 8. transferred the estate to the use, and no land was devisable till 32 H. 8. so that a devise of land, which could not then be made, could not be within the 27 H. 8. 2dly. Every jointure intended within 27 H. 8. is made before or during the coverture, whereas a devise takes effect after the baron's death. But notwithstanding these reasons, it has been resolved, that if a man devise to his

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*feme for life generally, this cannot be averred to be for the jointure of the feme, and in satisfaction of dower.* 1st. Because devise imports consideration in itself, and as it cannot be averred to the use of any other than the devisee, unless expressed in the will, so neither can it be averred for a jointure, unless therein expressed, but shall be taken as a benevolence, and so is Brooke to be intended. 2dly. All the will of lands by the 32 and 34 H. 8. must be in writing and no averment to be taken dehors, but what can be inferred from the words in it. But if one *devise to her for life or in tail, &c. for her jointure, and in satisfaction of dower*, this is a jointure within the act of 27 H. 8. for as estate made for life for her jointure before marriage, is within the equity, so if made by devise which takes effect after dissolution of the marriage by death, is within the 27 H. 8. and tho' land was not devisable till 32 H. 8. yet a later act is frequently taken within the equity of one made long before. Cited as in the court of wards. Mich. 38 & 39 Eliz. Leake v. Randall.———And see (1) Foster v. Pittfall.

4. *A. the baron purchased lands to him and M. his wife, and to the heirs male of their two bodies.* Adjudged, that this was within the intent of the statute, tho' it be none of the five estates first limited therein, and that she is thereby barred of her dower, so as that she shall not have her dower and jointure also. D. 97. b. pl. 48. Pasch. 1 Mar. the Dutchess of Somerset's case.

S. C. cited 4 Rep. 2. b. in Vernon's case.

5. An estate was given by the baron to the feme *upon an express condition to perform his will*, which imports a consideration of making the estate; yet it may be averred to be for the jointure of the feme; for the one consideration stands with the other, and tho' not expressed, yet may be averred. 4 Rep. 3. a. b. 5. resolution in VERNON'S case, and cites D. 146. 4 & 5 P. & M. Villers v. Beaumont.

A. in *coffed* W. R. and T. S. of two parts of his lands to the use of himself and his wife and

*their heirs for ever, with condition, that if she survive him she should pay such sums not exceeding 200 l. to such persons as he by his last will should appoint.* Afterwards, he by his will appointed certain sums to be paid by certain persons, and devised the residue of his lands to divers of his kindred, and died, having no issue. She brought dower against the devisees, who pleaded the feoffment aforesaid, and averred the same to be made for the jointure of the demandant. But because no other matter or circumstance was proved to verify the averment; the court incited the jury to find for the demandant, which they did accordingly. Le. 311. Mich. 32 Eliz. C. B. Tracy v. Ivie.

6. *A. made a feoffment upon condition to enfeoff his son, and M. his son's wife in tail*, remainder to the right heirs of the feoffor. The estate is made, and the son dies. This is a jointure within this statute, tho' she claims by the feoffees, and not by the ancestor, and she shall be barred to demand her dower. Mo. 28. pl. 91. Trin. 3 Eliz. Anon.

But a bargain and sale upon confidence to make a jointure is not within this statute.

Mo. 29. in pl. 91. Anon.

7. *The father of the baron pursuant to articles of marriage to be had between the son and M. enfeoffed J. S. and T. S. before the marriage to the use of M. for her life.* The marriage took effect; the father died; then the baron died; and the question was, if M. should have the lands settled, and also dower out of the other lands of her baron, because she *was not wife at the time of the settlement, nor was it made of the lands of the baron, nor by the baron.* And the opinion was, that it was bar of dower. D. 228. a. b. pl. 46. Hill. 6 Eliz. Ashton's case,

4 Rep. 2. b. (f) cites S. C.—Mo. 28. in pl. 91. Trin. 3 Eliz. Anon.—D. 228. b. marg. says, that Dyer in the manuscript of this case

seems of opinion that the feme shall not be barred; because it *was not made in consideration of jointure, nor of lands of or by the baron* according to this act.—In this case, another question was, if the said M. should be received to aver and prove by commission in the court of wards, (where the case was depending) *that the said feoffment was not [intended or] thought of for her jointure, but that she should be at liberty to demand her dower after her baron's death,* D. 228. b.——[But nothing was said to this point].——An assurance was made to a woman, to the intent it should be for her jointure, but was not so expressed in the deed. The court was of opinion, that it *may be averred* that



that it was for a jointure, and that such averment was not traversable. Ow. 33. Trin. 7 Eliz. Anon. — Ibid. says, that it was so between the Queen and dame Beaumont.

Jointure before marriage is a bar of dower, if she was a party to the settlement, and if *it is expressed*, that it shall be in bar, but if it is not so expressed, it shall never be averred to be in bar, and so is VERNON'S CASE; and tho' the settlement was in consideration of a portion in marriage, yet it not appearing that the parties intended it to be in bar of dower, (which is a different consideration from that of a marriage portion) it was held in *domo proc.* that nothing but a plain and express intention of the parties shall bar the right of dower. per Cur. 9 Mod. 152. Trin. 11 Geo. in case of CHARLES V. ANDREWS, cites it as a case in 1717, between Lawrence v. Lawrence. — \* Fin. R. 368. Exton v. St. John.

[ 548 ] 8. Jointure upon condition is a bar of dower within the words and intent of the act of 27 H. 8. 10. if the wife after the death of her baron accepts it, 4 Rep. 2. b. (h) Mich. 14 & 15 Eliz. Vernon's case.

But estate made by baron to his wife, *durante viduitate sua*, for her jointure, is an estate for her life, and cannot determine without her own act, and is therefore a jointure within the act of 27 H. 8. 10. Ibid.

A. devised all his lands to his wife, and died; she entered by force of the will, and after that baron; She brought dower of part, and this was pleaded to the action. Dyer thought it no plea; for that this possession by the will was only a suspension of her dower during the time, the estate by the will being not so great and durable as the estate now demanded. But Weston contra, and that the one is no more a franktenement than the other, and therefore the one extinguishes the other, and he thought it as strong as a jointure. Bendiows thought, that when she had an interest in the land upon this condition, the taking baron after was a bar of her dower, it being her own act. Mo. 31. pl. 103. Trin. 3 Eliz. Anon.

10. Land was settled by J. S. uncle of the baron upon the baron and feme for a jointure, and to the heirs of the body of the baron; the baron dies seised of other lands in fee, she with some friends of her confederacy, entered privately into the settled land and claimed it for her jointure, and yet waived the possession and brought dower of the whole, and had a full third part of all assigned out of the other land by the sheriff, who was not let into the design; after which she entered publicly into the jointured land, and brought trespass against P. the ter-tenant for keeping her out. P. pleaded the feoffment of B. and justified; the plaintiff replied, that before B. anything had, J. S. was seised and gave to B. and her ut supra; P. rejoined, that the estate was made for her jointure, and that after B.'s death, and before the trespass she brought dower and recovered, &c. and averred that the land conveyed for her jointure is no part of the land assigned for her dower; plaintiff sur-rejoined, that before dower brought she entered claiming it for her jointure; defendant by way of rebutter said, that she should not be admitted to say this against the record of recovery on the writ of dower; plaintiff demurs. It was insisted for the plaintiff, that the entry gave her actual seisin of the land which cannot be waived or divested by bringing the writ of dower; but it was answered, that, tho' she may not waive it, yet she may foreclose and conclude herself from claiming the said estate, and that she has so done here; because the bringing dower, and judgment thereupon affirms that she has only title of dower and consequently no estate, and is estoppel to claim any estate in any part,



part, of which she demanded dower; and this was affirmed per tot, Cur. 4 Rep. 4. b. to 5. b. cited by the reporter as about the 18 Eliz. Sharp v. Purflow.

11. If a jointure be made to a wife of lands before the coverture, and after the baron and feme alien by fine those lands, she shall not be endowed of any other lands of her baron, Co. Litt. 36. b.

But if the jointure had been made after

marriage, there notwithstanding such alienation, yet seeing her estate was originally waivable, and her time of election was not till after the death of her baron, she may claim her dower in the residue; whereas in the other case the jointure being made before marriage was not waivable at all. Co. Litt. 36. b.—S. P. agreed per tot. Cur. Bulf. 173. Trin. 9 Jac. Anon.

12. The baron covenanted to stand seised to the use of himself in tail, and for default of such issue to the use of M. his wife for her life, remainder over, after which he made a scoffment to the use of himself and his wife for their lives for a jointure to her; the baron died without issue. This jointure was pleaded in bar of dower, but adjudged to be no bar; because the feme is remitted and in of her first estate, and the jointure avoided. See Mo. 872. Hill, 10 Jac. Rot. 810. WOOD v. SHIRLEY, and Cro. J. 488, 489. Trin. 16 Jac. B. R. S. C.

2 Roll. R. 33. S. C.—Remitter (M) pl. 1. S. C.—Jenk. 334. pl. 72. S. C. and says that the estate upon the first conveyance

was not a jointure to bar dower, though so limited, and she entered and claimed it; for a jointure to bar dower ought to be immediate at the baron's death, and the remainders limited after M.'s death by the different deeds being to different persons she cannot waive the first estate in prejudice of a third person and is remitted nolens volens to the first estate, and cites S. P. adjudged 41 E. 3. 17. John Say's case.

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## (I) Forfeiture, &c, by 11 H. 7. 20.

1. 11 H. 7. cap. 20. § 1. IF any woman which shall have any estate in dower, or for term of life, or † in tail, jointly with her husband, or to herself, in any lands or hereditaments of the inheritance, or purchase of her husband, or given to the husband and wife in tail, or for life, by any of the ancestors of the husband, shall, being sole, or with any after taken husband, discontinue, alien, release or confirm with warranty, or by covin suffer any recovery of the same, all such recoveries, discontinuances, alienations, and warranties, shall be ‡ void.

† A conveyance by the baron of lands to him and his wife and their heirs in fee-simple, is a benevolence and not a jointure

; per justiciarios, quod nota. Br. Dower, pl. 69. cites 6 E. 6.—But D. 248. pl. 78. contra by three J. against two. Hill. 8 Eliz. in Sir MAURICE DENNIS's case, but at the end of the case this of Br. Dower, pl. 69. is cited and said to be with the two J.—Dyer Ch. J. thought that tho' a fee simple be appointed over to the feme, where a joint estate is made to baron and feme in fee, it may be averred, unless expressed in the conveyance to the contrary, to be pro junctura contra to Br. tit. Dower, D. 317. b. pl. 7. Mich. 14 & 15 Eliz.—And Lord Dyer said that this case of Br. was misreported, for true it is that it was resolved, that an estate in fee simple conveyed to the feme was not any jointure within the statute, yet that is to be intended within the statute of 11 H. 7. cap. 20. which cannot be extended either in letter or intention where feme has estate in fee simple; for it would be repugnant to the estate and against a rule in law to restrain the alienation of such estate, nor is it within the letter or intent of the act; but he said that such estate was a jointure within the equity of the statute † 27 H. 8. 10. as was resolved in DENNIS's case, 4 Rep. 3. b. in Vernon's case.—† See more of this as to the stat. 27 H. 8. cap. 10. at (H) —Bridgm. 136. Arg. cites 4 Rep. 3. ut sup. as if it was resolved in VERNON's case there, but I do not observe that it was otherwise than as said by Lord Dyer.—A man and woman, being jointenants in fee of a manor, inter-married, and afterwards levied a fine thereof to a stranger, who rendered it to them in tail, they have issue three daughters; the baron dies; the feme takes a second baron, and they levy a fine and re-take it in special tail; the feme dies without issue by the second baron; the daughters enter; a lessee for years of the second baron distreins a copyholder for his rent; he brings

brings a replevin; the other avows, and did not aver the life of the second baron, and for that cause, it was held to be ill; and it was here moved, 1st. Whether the first estate tail be within the stat. of 11 H. 7. and held clearly, that for the one *assize*, it was, but for the other, not; 2dly. Whether the estate in fee be within the statute of 11 H. 7. and it was held by all the justices, that it was not, for it may go to a collateral heir; and this statute doth not provide, but for the heir in tail only. Cro. E. 524. Mich. 38 & 39 Eliz. B. R. Laughter v. Humphrey.—S. C. cited D. 248. Marg. pl. 78. says, that this estate was made in fee by the baron to the feme, and is not any jointure within the 11 H. 7.—Copyhold lands were surrendered according to the custom to the use of R. and M. his wife and their heirs lawfully begotten (who were admitted accordingly) remainder to S. in fee; R. died, M. aliened, Two questions arose; 1st. If copyhold lands are within the 11 H. 7. 20. and 2dly. If surrender to baron and feme and their heirs lawfully begotten (with remainder over) be a fee tail; as to the first it was held by Newdigate J. and Glyn Ch. J. that they are not; for by Glyn they are not named, nor are they within the mischief of this act; because they cannot convey by warranty, &c. nor any other way than by surrender; as to the second point, Newdigate held this a fee simple (in R. and M.) and not an estate tail, because it is not mentioned of what body; and Warburton J. to the same intent, but Glyn as to this second point said, he would not deliver any opinion, the first being so apparent; and so judgment was entered accordingly for the defendant. 2 Sid. 41. 73. Hill. 1657. Harrington v. Smith.—S. C. cited Arg. 4 Mod. 85. that the alienation of a copyhold which the feme had jointly with her husband was adjudged not within the statute.—But where the baron and feme were copyholders to them and their heirs, and the baron purchased the freehold to him and his wife and the heirs of their two bodies, and the baron dies leaving issue, and the feme enters and suffers a common recovery and the heir may enter by this statute; because the copyhold was extinguished by acceptance of the new estate. Cro. E. 24. Hill. 26 Eliz. C. B. Stockbridge's case.—So if a man takes feme copyholder in fee, and then he purchases the freehold of the copyhold to him and his wife in tail, this was agreed Arg. to be a jointure within the statute; because the copyhold is extinct, and all this is in the feme by the purchase of the baron when she accepts the purchase after the baron's death. Palm. 217. Mich. 19 Jac. B. R. in case of Kinaston v. Loyd.—† It is void as to strangers, but not between feoffor and feoffee. Br. Counterple of Voucher, &c. pl. 1. cites 27 H. 8. 23. by Fitzherbert.

S. 2. And it shall be lawful to every person, to whom the inheritance after the decease of the woman should appertain, to enter as if no such discontinuance, warranty, nor recovery, had been had.

[ 550. ] S. 3. And if any of the said husbands and women do make or suffer any such discontinuance, alienations, warranties, or recoveries, it shall be lawful to the persons to whom the tenements should belong after the decease of the said women, to enter according to such title as if the same women had been dead.

S. 4. Provided that the said women, after the decease of their husbands, may re-enter according to their first estate.

S. 5. And if the woman at the time of such discontinuance, &c. be sole, she shall be barred of her title.

S. 6. And the person to whom the title should belong after the decease of the woman shall immediately enter.

S. 7. Provided also, that this act extend not to avoid any recovery, discontinuance, or warranty, after the form aforesaid afore this time had made and suffered, but only where the said husband and woman, or either of them now being alive, or any other to their use, now having interest and title to the said manors, lands, tenements, or other hereditaments, aliened, discontinued, or suffered to be recovered after the form aforesaid, and therefore now taking the issues and profits, or any other person or persons to their use.

S. 8. Provided that this act extend not to any such recovery or discontinuance to be had with the heirs next inheritable to the woman.

S. 9. Or where they, that next after the death of the woman should have estate of inheritance in the tenements, be assenting to the said recoveries, where the same assent is of record or inrolled.

S. 10. Provided also, that it shall be lawful to every such woman after

after the death of her first husband, to give, sell, or make discontinuance, for term of her life only.

2. A. before the statute of 27 H. 8. 10. enfeoffed W. S. and W. R. to the use of himself and M. (then) his wife in tail special, remainder to the use of A. in general tail, remainder to A.'s right heirs; then the statute of 27 H. 8. 10. was made. A. and M. were seised; A. died; a *formedon in descender* was brought against M. and recovery was had against her by *nient dedire* the first day, but not said that execution was sued; it was held by all the justices, that this is within the words of this statute; but that however if it be not within the words, it is within the equity of it; and that the *not alleging that execution was sued of the recovery is not material*; for the statute speaks of recovery only, and it is a recovery, there be no execution and the statute intends recoveries without execution, as is made appear by a proviso in the statute, which says, that the said statute shall not extend to any recoveries before had, unless where such women were then alive, and took the issues and profits of the said lands then, or any other to their use, &c. whereas if they took the profits then, it follows of consequence, that execution was not made, and so the statute extends to such recoveries before execution. Pl. C. 38. b. to 60. a. Mich. 4 E. 6. *Wimbish v. Talboys*.

3. A. the great grandfather, M. the great grandmother, B. the grandfather, C. the father, D. the son; A. seised in right of M. did together with M. demise, bargain, and sell to J. N. for 30 years without rent, remainder to A. and M. for their lives, remainder to B. for life, remainder to C. and one S. the daughter of J. N. and the heirs of their two bodies begotten, remainder to the heirs of the body of B. begotten, without saying any thing of the fee simple; and covenanted to suffer a recovery to the same uses, and to no other intent by reason of the bargain aforesaid; and then immediately follow these words (viz.) for the which manor, bargain, and other the premises, the said J. N. covenants to pay the said sum of 70 l. at certain days, &c. so that no consideration is expressed or purported besides money. C. and S. inter-married and had issue the said D. afterwards within the 30 years, and before the statute of 27 H. 8. 10. A. and B. died, and M. survived and was seised by the statute 27 H. 8. remainder to C. and D. in tail, &c. then C. died, and S. survived, and she with her second baron levied a *fine come ceo*, &c. with warranty in fee simple, and retook estate in fee to the second baron only; the jury further found dehors the indenture, that the indenture, bargain, and recovery were as well in consideration of the marriage as of the money; and it was held by Staundforde, Browne, and Brook, (Dyer contra, and has a long argument) that the entry of D. was lawful by this statute; for they expounded the words (given by the ancestors, &c.) to be any way assured to the woman in jointure, either for money (as few marriages are now made without it,) or else freely; and that the effect of that which is found by the assignment of the *tam & quam* (viz. as well in consideration of the marriage as the money) is contained in the indenture, and so their finding not contrariant thereto. D. 146. a. pl. 68. to 148. b. pl. 78. Pasch. 4 & 5 P. & M. *Villars v. Beamont*.

do not change the nature of the said gift, notwithstanding the said gift was in remainder; and that

Br. N. C.  
32 H. 8. pl.  
182. S. C.

S. C. BendL  
39. reports that the justices held this case to be directly within the equity and meaning of this statute and that this indenture and recovery counterwailed in law as an immediate gift by A. and M. to C. and S. in tail; and that tho' the words were, demise, bargain, and sell, and that for 70 l. of money, and tho' the jury found other consideration also, viz. the marriage to be between C. and S. yet those considerations therefore

therefore the said fine was void and against this statute, and so it was adjudged.—Kelw. 208. a. pl. 6. S. C.—S. C. cited Mo. 93. pl. 231. and says that Plowden said, that this was so adjudged, *per Ignem*.

Co. Litt.  
365. b. 366.

2. (g).—So if feme seised of land in fee simple, and before marriage she enfeoffs the father of the person she intends to marry to the intent, that after the marriage, he shall give the land to her and her intended husband, with remainder over in tail, and after they inter-marry; and then the father gives the land to his said son and his feme, according to the intent, and they have issue; after the husband's death she levies fine to other uses; this is within the words but not within the intent of the act; for the father was only as an instrument, and that to make a jointure to the baron of the land of the feme. Pl. C. 464. b. per Cur. in the case of Eyston v. Studde.—Before the levying the fine she was seised in tail, and the fine was levied of it in fee. Kelw. 214. pl. 25. S. C.—Bend. 238. pl. 266. S. C. by name of Gistow v. Studd.

4. Baron and feme seised in fee in right of the feme levied a fine come ceo, &c. with warranty from them and the heirs of the feme, and the conusee granted and rendred to them and to the heirs of their bodies, remainder to the right heirs of the feme; they had issue; the baron died; she and her second husband aliened in fee and retook, &c. this was adjudged no forfeiture; for in this case the jointure is made by the wife upon the husband and not by the husband upon the wife, and therefore to restrain her would be against reason, and is quite foreign to the intent of the act: and tho' it be within the letter of the act, yet not being within the purview, the court awarded that the plaintiff take nothing by his writ. Pl. C. 463. a. 464. b. Pasch. 15 Eliz. Eyston v. Studde.

riage, he shall give the land to her and her intended husband, with remainder over in tail, and after they inter-marry; and then the father gives the land to his said son and his feme, according to the intent, and they have issue; after the husband's death she levies fine to other uses; this is within the words but not within the intent of the act; for the father was only as an instrument, and that to make a jointure to the baron of the land of the feme. Pl. C. 464. b. per Cur. in the case of Eyston v. Studde.—Before the levying the fine she was seised in tail, and the fine was levied of it in fee. Kelw. 214. pl. 25. S. C.—Bend. 238. pl. 266. S. C. by name of Gistow v. Studd.

5. A. had M. a daughter, and B. being about to sell land to C. for 160 l. A. paid 140 l. part of the 160 l. in consideration of C.'s marrying his daughter M. and that the land should be conveyed for her jointure; thereupon a conveyance was made to C. and M. and the heirs male of their bodies, and they inter-married and had issue a son; C. died, M. and an after-husband accepted a fine sur conusance de droit to a stranger, and rendered to the stranger for 100 years, rendering certain rent, and which was the ancient rent; this was decreed a void lease, and that the estate of M. upon the first purchase was within this statute; and that the taking the conveyance with render of a stranger for 100 years made the estate void by this statute. Mo. 250. Trin. 28 Eliz. Piggot v. Palmer & al.

Cro. C.  
244. S. C.  
reported to be by covenant to stand seised in consideration of money and marriage had, & for preferment of the blood of A. and resolved, that she was no jointress

6. A. had 4 daughters B. C. D. and E.—B. was married to J. S.—A. in consideration of 200 l. paid by J. S. the husband, and of the marriage, conveyed land of 140 l. value (as was affirmed at the bar, but the value was not found by the verdict) to the use of A. for life as to part, and as to the other part to the use of J. S. and B. the remainder of the whole to J. S. and B. and the heirs of the body of B. to be begotten by J. S.—A. died, J. S. died leaving issue by B.—B. and her second husband sold the land.—This was held not to be within this act; for the chief and principal consideration was the marriage and the father's love to his daughter, and the payment of the money not so much regarded, and so the chief motion of the assurance of the land moved from the wife and her father; and so judgment for the defendant. Jo. 254. Hill. 7 Car. B. R. Copland v. Piatt.

within this statute; for the land first moved from her father, and the preferment of the blood of A. showed the intent that the wife's and not the husband's heirs should be preferred.

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7. Baron pays the charges of the conveyance; per Manwood this shall not be said purchase within this act. Dal. 116. pl. 10. 16 Eliz. Anon.

8. If

8. If baron *makes jointure to his wife to have assurance of other lands*, this is a purchase by the baron within the statute; per Mounson. Dal. 116. pl. 10.

9. Feme sole makes feoffment, to the intent the feoffee shall *re-enseoff her and him whom she shall marry*; it is no purchase of the baron within the statute. Dal. 116. pl. 10.

10. If baron and feme *exchange*, and take other land in exchange, it is no purchase of the baron. Dal. 116. pl. 10.

11. One brother, in consideration of marriage had between his brother and M. his wife, covenanted to stand seised to the use of himself for his life, and after to the use of his brother and his wife for their lives; this is a jointure within the statute 11 H. 7. as given by the ancestor of the baron, and also within the 27 H. 8. which excludes dower. Pl. C. 300. to 309. b. Mich. 7 & 8 Eliz. Sharington and Pledall v. Strotten.

12. A. devised lands to his wife in general tail, the remainder to a stranger in fee, and died; she took another husband and had issue a daughter, the husband and wife levied a fine to a stranger; the daughter as next heir by 11 H. 7. entered. It was agreed by the whole court, that an estate devised to the wife, is within the words, but not within the meaning of the statute. 2dly. It was resolved, that no estate is within the meaning of the statute, unless it be for the jointure of the wife. 3dly. resolved, That the meaning of the statute was, that the wife so preferred by the husband should not prejudice the issues, or heirs of her husband; and here nothing is left in the issues, or heirs of the husband, so as the wife could not prejudice them; for the remainder is limited over. 1 Le. 261. 18 Eliz. B. R. Foster v. Pitfall. Cro. E. 2: S. C.

13. If baron is seised of land in right of his wife, and they levy a fine, and the conuses grants a rent to baron and feme in tail, and the baron having issue dies, and the feme aliens the rent; this is out of the statute of 11 H. 7. for the rent cometh in lieu of the land. Cro. E. 2. pl. 4. cites it as adjudged, 21 Eliz.

14. A. conveyed a manor, and rectory, and other lands to B. his son and heir apparent, and M. and their heirs in consideration of marriage intended between them; the marriage was had, and after they re-assure the land by fine to A. who renders to B. and M. and the heirs of their two bodies; A. died, B. died leaving only three daughters his co-heirs, named D. E. and F.—M. and J. S. her second husband, leased the rectory by indenture for 60 years to W. R. and after by indenture granted the reversion of the rectory and leased the manor for the life of M. to O. P. to whom W. R. attorned, and then suffered a common recovery; it was by the advice of Wray and Anderson Ch. J. decreed in the court of wards, that the first feoffment by A. to B. and M. before marriage in fee simple, was not an estate within the statute; but when they re-assured by fine, this was a conveyance by each for their moiety to A. which moieties they took divided before the marriage, and then the render of the whole to them in special tail, was, as to a moiety to B. which he gave by the fine, the gift of the father to the son and his wife within this statute; but as to the moiety which M. gave by the fine, and which



which the father rendered in special tail, this was not within this statute, but that the recovery of the feme as to this bound the issue; and so they took it, that *tho' M. and her second husband came in as vouchers, and not as tenants, yet such recovery is a recovery suffered by M. with her second baron within this statute.* Mo. 715. Mich. 32 & 33 Eliz. the Queen v. Savage.

The habendum is absolute and the use is another clause.

Godb. 141. Egerton's case.—

Cro. J. 525.

†Cro. E.

131. Pasch.

31 Eliz. B. R.

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2 Le. 56.

S. C. by the name of

ARDS V.

SMITH argued but adjourned

—Mo.

255. S. C.

by the name of

BRISCOT

V. CHAM-

BERLAINE,

adjournatur.

—2 And.

31. S. C.

by name of

CHAMBER-

LAINE V.

LINCOLN

COLLEGE

IN OXFORD, adjudged.

S. P. cited

by Plow-

den as ad-

judged Mo.

93. pl. 231.

—3 Rep.

50. b. S. C.

by the name of

Sir GEO.

BROWNS's

case, says

the lease by

M. was

for 3 lives.

—2 And.

44. S. C.—

And it was

resolved

2dly, that

if B. had

15. A jointress married again, and she and her husband made a *feoffment in fee* to B. G. and his heirs of the jointure lands, habendum to him and his heirs, to the use of a stranger for the life of the wife only; adjudged that this was a forfeiture of her jointure; for the *estate and the use of lands are several things*, and here by this feoffment the fee simple\* passeth to the feoffee, and the remainder of the use likewise; for tho' the use is afterwards limited to the wife for life, yet the law limits the remainder to the use of the feoffee. 1 Le. 125. † Pierce v. How.

16. A. enfeoffed J. S. and T. S. of the manor of D. to the intent that they give back the same to him and M. whom he intended to marry, and to the heirs male of the body of A. They convey it accordingly. A. and M. inter-marry and have issue B.—A. dies.—*B. in the life of M. adtunc tenens liberi tenementi, &c.* which shall be intended by, *disseisin* (no surrender or forfeiture being alleged) suffered a common recovery with single voucher by agreement between all to the intent that the recoverors infeoff L. and others to divers uses, and that M. for better assurance should release to them with warranty, which was done accordingly; resolved, that this is not within the meaning of this act; which is to restrain women from prejudicing the heirs in tail, or remainder-men &c. but not from corroborating estates made by such heirs, remainder-men, &c. which shall be intended to his or their benefit, and not to their prejudice; and such warranty in such case is not restrained by this statute. 3 Rep. 58. b. 60. 2 Mich. 37 & 38 Eliz. C. B. Lincoln college case.

17. A. seised in fee infeoffed J. S. and W. R. upon condition that they by advice of counsel re-grant it to him and M. his wife in tail; remainder to the right heirs of A.—J. S. and W. R. regranted it accordingly, but not by advice of counsel; A. and M. had issue B. a son; A dies; B. levied a fine with proclamations to C. in fee; M. made a lease to J. N. for his life, and afterwards she died. The question was, whether this were an estate tail in M. within the statute? because they are donees by feoffees, and also, because this gift varies from the condition as not being done by advice of counsel; and whether a lease for life only, and being without warranty be a discontinuance within the statute. As to the first, it was said that there was no great doubt but it was an estate tail within the statute; for the gift by the feoffees is by the provision of the husband, and the doing it by advice of counsel is no material part of the condition, but is well enough without it. 2dly. A lease for life



life without warranty is clearly a discontinuance within the intent of the statute; and the words *alien, discontinue, release, or confirm with warranty, &c.* do not intend warranty as requisite to all those acts, but only to release, or confirmation, which without warranty are no bar or discontinuance; so every act which is a discontinuance of itself tho' without warranty, is within this statute. Cro. E. 513. Mich. 38 & 39 Eliz. B. R. Lynch v. Spencer.

*granted out his remainder in fee only, he might have entered for this forfeiture by the express purview of*

the act; for if no discontinuance had been made, the land would have descended to the issue, and therefore he (B.) by the express letter of the act shall enter upon the discontinuee and not the grantee of the remainder; and 3dly. it was resolved, that in this case C. shall enter upon the discontinuees; for had no discontinuance been made, he should enjoy the land against B. and all the heirs of his body. 3. Rep. 51. a. S. C.—Cro. E. 514. S. C.—2 And. 45. S. C.—S. C. cited by Hobart Ch. J. Hob. 258. and said that C. might enter, not by the possibility of his estate arising out of the entail (for he could not have an interest in that, because the whole entail was actually without change in the mother) but by the fee simple; and that so is WIMBISH AND TALBOY's case; so then the tail cannot be aliened by the mother by reason of the restraint of 22 H. 7. nor can descend by reason of the fine by the issue in tail in her life.—Mo. 455. S. C. says the reason of the judgment was, because the lease for 3 lives was not agreeable to the statute of 32 H. 8. for want of reservation of rent and by reason of the remainder.

18. So if the ancestor of the baron makes a feoffment in fee upon condition, that they give to baron and feme in tail, and she aliens after the death of her baron, this is within the intent, tho' out of the words of the statute; for they are in by feoffment and not by the ancestor of the baron; and this was adjudged, as Plowden reported. Mo. 93. pl. 231. Pasch. 12 Eliz.

19. If the husband with his own money purchases, for the wife's jointure, land to them and the heirs of their two bodies, remainder in fee to the wife, and they have issue two sons and the husband dies; the wife suffers a recovery to the use of the youngest son, yet the eldest shall have the land by the statute of jointure. Brownl. 30.

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20. Gift of land to Thomas and to Mary his cousin, in consideration of service done by Thomas and for other considerations him moving, to them and the heirs of their bodies; this is not a jointure within the 11 H. 7. the donor not being any ancestor of Thomas, and Thomas took nothing by that; but it was a voluntary recompence given by the bishop in reward of the service past, and the statute intended a valuable consideration. Brownl. 137. Pasch. 5 Jac. Ward v. Willoughby.

Yelv. 101. Ward v. Walthew S. C.—S. C. cited Cro. C. 244. in case of Copland v. Pyatt.—The court varied in

opinion in respect, that no consideration was expressed but service, and the consanguinity is consideration implied, and Popham seemed to think that no consideration implied would raise an use; for if before the statute 27 H. 8. 10. one had enfeoffed his servant he should be seised to the use of the feoffor; but if he expressed the consideration to be for service, he should be seised to his own use; but Williams and Yelverton J. contra. If one enfeoffed his son the consideration is implied to change the use; and the same on a covenant to stand seised. Mo. 683. Ward v. Sudmun, S. C.

The naming Mary Cousin in the deed is not material, because it does not appear to be any consideration of the deed but by way of addition to her name; but since it is found in fact that she was his cousin and that a marriage was intended between them at the time of the gift, which after took effect, it shall be intended the cause of the gift as well as the service of the baron; but by Tanfield that can be only for a moiety, they taking by moieties as being purchasers before the coverture, so for a moiety she cannot be jointress within the statute. Cro. J. 173. Ward v. Walthew.—S. P. by Tanfield, and that by the baron's dying first she comes not to any part by the baron, but by the course of law by survivorship. Yelv. 101. in S. C. but he says quere of this conceit, for the other justices did not allow of it.

So it was resolved, 13 Eliz. in the court of wards in one EDMUNDS's case, where the father gave lands to the son and to a woman, whom he intended to marry in tail; they inter-marry and have issue; the baron dies; the feme surviving aliens; it was adjudged a forfeiture but for a moiety; but

Williams J. denied it to be law and said in such case it was a forfeiture for the whole. Cro. J. 175. in case of Ward v. Walthew.

A. seised in fee levied a fine to the use of himself for life, and after to the use of M. his wife and of the heirs male of her body by him begotten for her jointure; they had issue male; A. and M. levied a fine and suffered a common recovery; they both died. This was held to be a discontinuance within this statute tho' not within the letter of it, but being within the same mischief is also within

the remedy, the makers intending to avoid the disinheriton of heirs provided for by the jointure, and this was said to be a much stronger case. Co. Litt. 365. b. (f).

21. A. on marriage of B. his son with M. the daughter of J. S. covenanted in consideration of 200 l. paid by J. S. and also of the marriage to be had between B. and M. to convey land to the use of B. and M. and the heirs of the body of the said M. begotten, remainder to A.'s right heirs; the marriage is had; A. dies before the assurance; but B. in performance of A.'s covenant made the assurance accordingly; they have issue; B. enfeoffed W. R. and after B. and M. levied a fine to the said W. R. the issue entered for a forfeiture by this statute. Resolved, 1st. That this conveyance, tho' made for money paid to A. the father of B. by J. S. the father of M. the wife as well as for the marriage, is a jointure within this statute; and tho' not found expressly to be so, yet shall be said so. 2dly. That this was estate tail in the feme, and only for life in B. 3dly. That the alienation by M. with B. does not make any forfeiture within either the words or intent of the statute; for here M. was not sole, nor was the alienation with an after-taken husband, but with the same who married her before the conveyance; but Doderidge said, that if the conveyance had been made by A. to M. before marriage, it would have been, perhaps, a more difficult question. But B. joining with M. in the alienation, they held it to be out of the intent of the statute; and this statute being in restraint of the common law is to be taken strictly; and the intent of it was only to provide against disinherison to the heirs of the husband contrary to his intent; and adjudged for the defendant. Cro. J. 474. Pasch. 16 Jac. B. R. Kirkman v. Thompson.

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22. Baron and feme sold the land of the feme, and purchased other land with the money to the baron and feme; this was agreed Arg. to be a jointure within this statute, because the money is a chattel vested in the baron, which he might dispose of at his pleasure; and therefore when he purchased with it other land, the law will not construe it to be any other than a purchase by the baron, and so a jointure to the feme. Palm. 217, 218. Mich. 19 Jac. in case of Kinaaston v. Loyd.

\* Remainder to the daughter in tail general, remainder to the right heirs of his other daughter.

23. A. is seised of land in fee, having issue a daughter, the land being of the value of 20 l. per ann. upon marriage of this daughter with B. in consideration of this marriage and 115 l. paid by B. to A. he assures the said land to the use of B. and his said daughter in tail; \* they marry and have issue; B. dies; the wife aliens this land to a stranger and well; for it is not a jointure within 11 H. 7. because it was the land of her father. Jenk. 319. pl. 20.

Palm. 213.

Kinaaston als. Kinaaston v. Loyd. — Cro. J. 624. S. C. accordingly, Mich. 19 Jac. in the exchequer, Kinaaston v. Loyd. — Jo. 13. Mich. 18 Jac. S. C. but after the limitation to the feme in tail general, reports the limitation over to be to the right heirs of A. the father; and it was resolved by all the barons una voce to be out of the statute.

If this second feoffment by

24. Baron and feme tenants in tail of the purchase of the baron have issue two sons; the baron makes a feoffment to the use of himself for

*for life, remainder to the wife for life, remainder to the second son and his heirs; the husband dies; and the feme enters and makes \* feoffment to the issue of the second son; the eldest son enters for the forfeiture within the statute 11 H. 7. and it was adjudged without any difficulty, that his entry was lawful, and that this feoffment by the feme (tho' it be to him that had the reversion in fee) is a forfeiture within the said statute; for they all agreed, that by the entry of the feme she was remitted, and that there is not any difference as to this between estate at common law and this estate limited to her by the statute of uses. Sid. 63. Mich. 13 Car. 2. B. R. Jones v. Philpot.*

the feme was a discontinuance, then the entry of the eldest son was lawful as for a forfeiture by the statute 11 H. 7. and if it was no discontinuance (as they

held it was not being made to him in whom the reversion in fee was well lodged by the first feoffment) nor forfeited then the entry of the eldest son is lawful as heir to the first entail, the first discontinuance being purged by the remitter of the feme, and so quacunque via data be the second feoffment by the feme, forfeiture or not, the entry of the first son was lawful. Lev. 49. Jones v. Philpot. —  
 • Infeoffed the second son in fee. Lev. 49. S. C.

25. A man upon his marriage made a settlement, whereby he was tenant for life, then to his wife in special tail, of lands of 400 l. per ann. value, with remainder to the right heirs of the husband; the husband and wife joined in barring this settlement, and a new settlement was made in this manner, viz. to J. S. and his heirs in trust as to lands of 150 l. per ann. for the wife and the heirs of her body; and for want of such issue in trust for the husband and his heirs; the husband died without issue, and the wife suffered a recovery, and devised the lands for the payment of her debts and died without issue; on a bill brought by the heir of the husband against the defendants, creditors of the wife, the question was, whether this was such a jointure made on the wife, so as to make a recovery a forfeiture within the statute 11 H. 7. For the defendants it was objected, that a court of equity ought not to give any assistance, because the statute makes the recovery a forfeiture of her estate, and gives a remedy by way of entry; and in this case she has only a trust, and no estate to forfeit; it was likewise urged, that this case was out of the words and meaning of the statute; for the limitation here is to the wife in general tail; and on failure of issue of that marriage, the issue by any other husband, would have had the land, and might without doubt have suffered a recovery, and barred the remainder and the statute only intended to provide for the issue of the husband, whose the lands were; it was urged that these lands could not be said the husband's; for the wife by parting with her former settlement which was 400 l. per ann. for this of 150 l. per ann. was a purchaser of those lands; and if the wife, in consideration of this settlement had sold lands of inheritance of her own, it would not have been within the statute. On the other side it was said, that this was to aid a forfeiture; but as the statute makes the suffering a recovery a forfeiture, and gives an entry to the person that has the next estate, so in another place it makes all recoveries suffered by a jointress void; and upon that clause it is proper to come into equity, to have an execution of the trust; and this case is within the words of the statute, for the statute says any estate limited to the wife or to her use; and this statute was before the statute of H. 8. of uses,

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uses, at which time a use was the same thing that a trust is now; next the statute says, *limited for life or in tail*; now a general tail is as much an intail as a special one, and as much within the words of the statute, and the statute intended to provide for the remainder-man as well as the issue; the objection of her being a purchaser, is quite to take away the statute; for so is every jointress, and if she had kept her former jointure that had been under the same restrictions; and of the same opinion was my lord keeper, and decreed accordingly. Trin. 1700. Abr. Equ. Cases 220, 221. Symson v. Turner.

26. A. on marriage of B. his son with M. settles lands to the use of B. for life, remainder to M. for life, remainder to the heirs of their 2 bodies, remainder to B. in fee. *B. and his wife* by deed and fine mortgage in fee, and subject to the mortgage the lands are *re-settled to the use of B. for life, and after his and his wife's decease to the heirs of her body by him begotten*, remainder to his right heirs; A. dies; M. suffers a common recovery; Lord Keeper doubted, whether M.'s estate for life by the first settlement, and the limitation to the heirs of her body by the second did not consolidate, and tho' by several deeds. He said that the authorities are only in the affirmative, viz. that, if by the same deed, it shall consolidate, but not negatively, viz. that they should not if by different deeds; and said that in the case of PYBUS v. MITFORD, where is no express estate for life limited but ariseth by implication, it is held that the estate was consolidated. The court would advise. 2 Vern. 486. 489. Hill. 1704. Clifton v. Jackson.

27. Lord Wright was of opinion that *a trust or equity of redemption* was within the statute of 11 H. 7. which expressly extends to uses; but if it be a penal statute as the statute of Gloucester the heir shall not be aided or assisted in equity. Hill. 1704. 2 Vern. 489. in case of Clifton v. Jackson.

### (K) Forfeiture by 11 H. 7. 20. waived by what Act, and who must take Advantage of the Forfeiture.

*A. in consideration of service and other causes gives Black Acre to B. his servant, and C. his wife in tail, B. and C. intermarried, and the jury found an intention of marriage at that time.*

1. **I**F a jointress commits a forfeiture by the 11 H. 7. 20. and after such forfeiture committed *the remainder-man suffers a recovery by his own agreement against him*, and so disables himself to take benefit thereof, *his issue after his death shall not take benefit of it*; because his father was in esse at the time of the forfeiture, and could not enter, and a person, that is not in rerum natura, or that *has not the immediate interest at the time of the forfeiture*, never shall take benefit of this act when there was (one) in esse at the time of the forfeiture, and who could not enter, and yet had power to bar by fine or recovery such person as would claim the benefit of this act. 3 Rep. 61. 3d resolution in Lincoln College case.

Afterwards B. dies, leaving issue D. a son. C. married E. and she with her second husband enfeoffed D. the issue in tail, and then E. and C. the feme re-entered; D. *brings a fine for*

*conscience de droit to J. S. and after entered upon C. the feme for the forfeiture by this statute; but adjudged for the feme; because D. the son had barred himself to take benefit of the forfeiture by this statute, by his levying a fine. And J. S. the conscience shall not take benefit of the forfeiture; for it was a fine by estoppel only and no interest passed by it. In the case in 3 Rep. he that levied the fine had a real remainder in him. But in the principal case, D. had only a dry right to an estate tail after the death of the feme his mother. And so note the difference. And judgment was given against the plaintiff. Noy. 121. Ward v. Mathew.*

S. C. Cro. J. 174. Trin. 5 Jac. B. R. reports that after E.'s death C. re-entered, and afterwards D. levied a fine come ceo, &c. to the defendant, and C. after this enfeoffed G. her younger son, and that afterwards D. entered and enfeoffed the defendant, and then one R. S. cousin and heir of A. the donor entered, and let to the defendant, and the younger son entered upon him. It was resolved that, admitting this a jointure within this statute, which it is not, yet here neither the heir nor conusee shall take advantage of the alienation; for the feoffment by C. and E. is defeated by her entry after E.'s death, and the fine by D. gave no interest to the defendant but only by estoppel; because D. had nothing at the time of the fine, nor the conusee, yet D. had given his right to the entail, and concluded himself, that he cannot enter; and the conusee cannot, because he has nothing but by estoppel, and no reversion, whereas in SIR GEO. BROWN'S CASE, the heir in tail had a reversion in fee expectant, and by his fine gave that reversion to the conusee.

## (L) Equity.

1. **BARON** settles in jointure lands in mortgage and died intestate; she got administration, but decreed to account for the personal estate, and that to be applied towards the discharge of the mortgage, but rents of the jointure lands since her husband's decease not to be brought into the account, but to be made good by the defendant (the heir at law) with interest, and the plaintiff to enjoy the land during her life, and after the account the defendant to elect within a limited time to redeem or not, and give notice to the plaintiff to redeem on payment of principal interest and costs, and the defendants the mortgagees to assign. Fin. R. 97. Hill. 25 Car. 2. *Atkins v. Nunn & al.*

2. *Jointress paid off a mortgage.* She was decreed to hold over 'till she or her executors be satisfied, and interest to be allowed her. Chan. Cases 271. Trin. 27 & 28 Car. 2. *Cornish v. Mew.*

3. *Husband after marriage gives a voluntary bond to settle a jointure of 100l. per ann. and settles lands accordingly.* The bond is delivered up to be cancelled. The husband dies, the jointress is evicted. The wife took out administration. Decreed per Master of the Rolls, that since she was now intitled to dower, she should recover it at law, and what that fell short of the jointure in value should be retained by her out of the personal estate, notwithstanding the bond was after marriage and voluntary, and delivered up to be cancelled; for an agreement, tho' voluntary under hand and seal, ought to be decreed by this court, and the delivery up of the bond by a feme covert could no way bind her interest. Vern. 427. Hill. 1686. *Beard v. Nutthall.*

4. If there be a jointress, and a covenant that her jointure shall be of such a yearly value, and it falls short; tho' her estate be not without impeachment of waste, yet she may commit waste so far as to make up the defect of the jointure, and equity will not prohibit it. Mich. 1698. Abr. Equ. Cases 221, 222. *Carew v. Carew.*



## Journeys Accounts.

See (C. 2)

### (A) *What it is, and Proceedings.*

S. P. And I. **A** Writ newly brought by journeys accounts is *quodam modo* therein the *a continuance of the first writ*; resolved 6 Rep. 10. b. *defendant shall not take any advantage, but such as he had at the time of the first writ.* Hill. 45 Eliz. C. B. Spencer's case. Per tot. Cur. Cro. J. 59c. Mich. 18 Jac. B. R. in case of Walthal v. Aldrich.

And therefore the demandant must always shew certainly

2. A writ by journeys accounts is a taking up and pursuing the old action in a reasonable time, which is to be discussed by the discretion of the justices; per Lee J. Gibb. 290. cites 6 Rep. Spencer's case.

the time of abatement of the first writ, so that it may appear to the court, if the last writ was brought by journeys accounts. 6 Rep. 11. a. in a nota of the reporter in Spencer's case.

3. When a writ is purchased by journeys accounts, it is said in the replication, (*reciting the former writ, and that it abated, and shewing all in certainty*) *super quo the demandant per dietas computat. recenter tulit quoddam aliud breve, &c.* For the allegation of journeys accounts is always either by way of counterplea to oust the tenant of voucher, or by way of replication, as it most commonly is to oust the tenant of the plea of nontenure or jointenancy, or any other plea accruing \* upon matter after the date of the first writ. 6 Rep. 10. b. in a nota by the reporter in Spencer's case, cites Lib. Intratit. Journeys Accounts, fol. 382. b.

\* Orig. (sans) instead of (sur) as it seems.

4. In journeys accounts you shall never change your count; and the old way of journeys accounts was to pray a new writ, and then to proceed on the former roll. *Dieta is iter unius diei.* 12 Mod. 229. Mich. 10 W. 3. in C. B. Anon.

6 Rep. 11 by the reporter cites 18 E. 3. 24. and 32 E. 3. tit. Journeys Accounts, 16.

5. Fifteen days was the time allowed by common law; but if it were a case where an attorney might be, there must have been longer time, because he must give notice to his principal of the abatement of the writ; but the judges upon examination of circumstances are judges of reasonable time. Arg. Mich. 13 W. 3. 12 Mod. 575.

— 2 Inst. 367. says, the reason of fixing fifteen days was, that the same was accounted a reasonable time for the party summoned, &c. to appear in court from any part of England. — Writ brought within 30 days after abatement of the first is a recent prosecution. 1 Salk. 392. Mich. 9 W. 3. C. B. Estob v. Thoroughgood.

(B) In



(B) *In what Cases.*

See Fines  
(H. a)

1. **I**T lies in no case where a sole plaintiff or demandant dies; there his heirs or executors shall never have this writ, though in a *quare impedit*, where the death after the 6 months is peremptory. 6 Rep. 10. b. in Spencer's case, cites 19 E. 2. tit. Darrien Presentment, 21. F. N. B. 32. (C) 10 E. 3. 16. Dionise de la River's case.

A writ by journeys accounts is always where the writ is abated by the death of one

of the plaintiffs or defendants, or by reason of misprision in the first writ, or by some default or misprision in the clerk, or other like cause which ought to be manifested in the second writ. Arg. Cro. J. 590. Mich. 18 Jac. B. R. in case of Walthall v. Aldrich.

2. *Præcipe quod reddat*, the tenant pleaded jointenancy, the demandant averred that at another time he brought such another writ against the tenant, which abated for false Latin, as (*dicunt*) for (*dicit*) and he purchased this writ by journeys accounts, and the day of the first writ purchased, the tenant was sole tenant; and the tenant dared not demur but vouched, and therefore it seems that it well lies by journeys. Br. Journes, &c. pl. 10. cites 38 E. 3. 4.

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If the præcipe be abated by jointenancy of the part of the tenant, because every

jointenant is seised per my & per tout, and may occupy the whole, he shall have new writ by journey's accounts. 6 Rep. 10. a. Resolved in Spencer's case, — and cites 17 E. 3. 39. 38 E. 3. 26. 33 H. 6. 2. 41 E. 3. 4.

3. *Præcipe quod reddat* by feme against two; the one said, that he was tenant of the whole the day of the writ purchased, &c. *Absque hoc*, that the other any thing had and vouched, &c. The demandant said, that the baron and this feme brought another such action against those two, and they pleaded jointly to the action and the baron died, and the feme has freshly purchased this action within 8 days after the death of the baron, judgment if he shall be received to plead several tenancy, &c. and the writ awarded good; quod nota. Br. Journes, &c. pl. 5. cites 43 E. 3. 16.

Jenk. 90.  
pl. 75. S. P.

4. In dower the tenant pleaded non-tenure, and the demandant said, that at another time he brought such another writ against him and another, and named him J. W. who pleaded that his name was J. S. and found for him, by which the writ abated, and he brought this writ against them, and averred, that they were tenants the day of the first writ purchased by journeys accounts, and the opinion of the court was against him, and that he cannot have it by journeys accounts; for *misnoscner* is his own default. Br. Journes, &c. pl. 9. cites 14 H. 4. 23.

Jenk. 90.  
pl. 73. S. P.

5. But where the writ abates for false Latin, he shall have a new writ by journeys accounts. Br. Journes, &c. pl. 9. cites 14 H. 4. 23.

S. P. Ibid.  
pl. 6. cites  
46 E. 3. 14.  
— S. P.

Ibid. pl. 14 cites 21 H. 6. 8. — S. P. and so for variance or want of form; because this was the default of the clerk in Chancery, and not of the demandant; resolved 6 Rep. 10. a. Hill. 45 Eliz. C. B. in Spencer's case. — And for the like reason where the writ abates for default of good summons, which is the default of the sheriff. Ibid. Spencer's case. — If the first writ abate through the fault of the plaintiff, there shall not be a new one by journeys accounts, but where it abates by fault of the clerk there shall. 12 Mod. 576. Arg.

S. P. Jenk.  
90. pl. 75.  
For in this  
case it  
abates by the  
act of God.  
—In assise

against two, if one dies, the writ shall abate, but the survivor shall have assise by journeys accounts. Jenk. 130. pl. 64. cites 4 E. 4. 9.

6. So if it be brought against two and the one dies, he shall have it by journeys accounts against the other; per Skrene, quod non negatur. And so per Cur. he ought to aver, that they were tenants the day of this writ purchased; quod nota. Br. Journes, &c. pl. 9. cites 14 H. 4. 23.

7. Judicial writ shall never be purchased by journeys accounts. 6 Rep. 10. a. in SPENCER'S CASE, cites 22 H. 6. 62. 27 E. 3. 84. and 45 E. 3. tit. Journeys Accounts 10. And the reason is, because a judicial writ shall never abate for form, cites 4 H. 6. 3. 4.

But where  
the plaintiff  
in a quare  
impedit was  
made a knight  
pending the  
writ, Shelly  
thought

that inasmuch as this shall be accounted his own default, he shall not have a writ by journeys accounts, and agreed, that the books are clear that the writ shall abate. † D. 55. a. b. pl. 7. Pasch. 34 & 35 H. 8. Anon. — Br. Quare Impedit. pl. 75. cites 7 H. 6. 14, 15. — But it seems by the other part of the case, (though not clearly expressed) that if this being made a knight was not the act of the plaintiff himself, but that he had been compelled by the king to be made a knight, [as any man having lands of a certain value was compellable to be at that time, untill the 12 Car. 2.] then he might have \* had this writ. Vid. Ibid. — [And after this case it was enacted by 1 E. 6. cap. 7. that making a plaintiff, &c. knight, &c. should not abate the suit.] — † S. C. cited 6 Rep. 10. b. in Spencer's case.

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9. Dower; the tenant dies, the demandant brings another writ of dower; she shall not have advantage of journeys accounts in the new writ. Br. Journes, &c. pl. 13. cites 7 H. 6. 34.

S. P. For  
the time of  
its abate-  
ment ought to

appear to the court, that they may thereby see whether the second writ be sued out in convenient time. Arg. 12 Mod. 574. cites 14 H. 6. 7. 6 Rep. 10. b. 9 Ed. 4. 6.

S. P. In  
formdon,  
and shall  
avoid mesne  
feoffments,  
by which  
feoffments  
the tenant  
would have  
vouched in  
delay of the

11. Præcipe quod reddat is abated by wager of law of non-summmons, the demandant brought another writ, the tenant pleaded non-tenure, the demandant alledged this matter, and that he has brought this new writ by journeys accounts, and that the tenant was tenant the day of the first writ purchased; and per Newton, a man shall have writ by journeys accounts by \* abatement of writ by ley gager of non-summmons. Br. Journes, &c. pl. 15. cites 22 H. 6. 41.

demandant. Br. Journes, &c. pl. 21. cites 11 H. 6. 34.

12. Præcipe quod reddat is brought against the baron and feme, and the writ abated by death of the feme; the demandant shall have a new writ by journey's accounts against the baron. Br. Journes, &c. pl. 19. cites 21 H. 6. 42. b.

S. P. Jenk.  
90. pl. 75.  
— 6 Rep.

13. If writ abates by default of the plaintiff, as if he name the defendant esquire, where he is a knight, &c. of which he may have confuance,

consuance, he shall not have a new writ by journeys accounts; *contra where he cannot have consuance thereof* as of jointenancy, &c. Note the difference. Br. Journes, &c. pl. 22. cites 32 H. 6. 24.

10. S. P. resolved Hill. 45 Eliz. C. B. Spencer's case. —

And cites 32 H. 6. 23. but it seems misprinted [28] for [24].

14. It was said for law, that if the *tenant in præcipe quod reddat* pleads *non-tenure*, and the demandant confesses it, that he shall have a new writ by journeys accounts. Br. Journes, &c. pl. 1. cites 33 H. 6. 2.

If the writ abate for *non-tenure* of all, the demandant shall not

have a new writ by journeys accounts; because the *first writ* was commenced without cause or any probable colour of cause. Resolved, 6 Rep. 10. a. in SPENCER'S CASE, cites 33 H. 6. But a præcipe of a manor being abated by *non-tenure* of parcel, he shall have this writ; because the tenant was tenant of the residue, for which the new writ is brought, and it may be an hardship to compel him to know in whom the estate of every part of the manor consists. Ibid. cites 4 E. 3. 159. — [There is no such page, but it seems as if it means [15. b.]

15. *Formadon*; the tenant at the first day confessed the action, and it was alledged for the king, that this land belonged to the ward of the king, and prayed that by the confession of the tenant himself he shall be fined, because he had usurped upon the possession of the king; and of this it was doubted, and the demandant upon this said, that the defendant had nothing in the land, and prayed leave to inquire a better writ, and it was awarded that he take nothing by his writ, but he shall not have leave to inquire a better writ, for this was not the act of God but the folly of the party himself. Br. Journes, &c. pl. 3. cites 33 H. 6. 34.

16. Journeys accounts lies on death of testator in *quare impedit*. Brownl. 158.

The court granted it, but bid the

executor take care if it lies or not, and in what form the writ shall be. Cro. E. 174. Walter Moyle's case. — 6 Rep. 10. b. Contra in Spencer's case.

17. A second writ of journeys accounts will not be allowed. 7 Rep. (45) b. Mich. 4 Jac. in Kenn's case.

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*non-suited upon the first* he never shall have another writ by journeys accounts. Arg. 12 Mod. 574. 575. cites Fitz. Journ. Acc. 13. 16. and Hugh. Ab. 177.

If one be

18. A. and B. were jointenants for years. B. suffered C. to occupy his moiety with him, and A. brought a writ of partition against B. and C. supposing that B. had granted a part of his moiety to C. — C. shews that he was tenant at will to B. whereupon the writ abated. Resolved that A. might have another writ of partition against B. by journey's accounts; for the possession of C. was good colour for bringing the writ against him, and A. could not take notice what estate C. had, &c. Cro. J. 218. Hill. 6 Jac. B. R. Beedle v. Clerk.

19. If an assise be within 20 years after a disseisin, and before judgment 20 years pass, and then the demandant dies, the heir cannot have another assise, but he must have a writ of entry; and it will be hard to prove, the heir can proceed by journeys accounts in that case; for it is another writ he is intitled to now by the death of his ancestor, yet still he may be out of the statute of limitations; per Holt

Holt Ch. J. 12 Mod. 572, 573. Mich. 13 W. 3. in case of Heyward v. Kinsey.

[ See (D) per tot. ]

(C) *Who shall have it, and against whom.*

Journeys accounts is always between the

same parties.

If a *quare impedit* be well commenced, and the plaintiff dies after the six months, the heir cannot bring a new writ by journeys accounts; per Powel J. Comb. 428. Trin. 9 W. 3. B. R. Estobb v. Thoroughgood.—Br. Lect. Stat. Limit. 155. Nor by construction will it lie against his companion which was party as a jointenant.—12 Mod. 229. S. P. Anon.—Per Holt. Ch. J. 12 Mod. 572. in case of Heyward v. Kinsey.

1. **REGULARLY** it lies not but *between those that were parties to the first writ*; as where one of the plaintiffs or one of the defendants dies. 6 Rep. 10. b. in Spencer's case.

2. *Formedon by feme*; the tenant pleaded *non-tenure the day of the writ purchased nor ever after*; the demandant said, that A. gave to her father in tail who had issue the demandant and Alice, and the father died; the daughters brought *formedon*, and Alice died, by which the writ abated, and this demandant brought this writ *freshly* by journeys accounts, and averred that the tenant was tenant the day of the first writ purchased, judgment, &c. Per Newton the writ is good, because the demandant claims as heir to the whole immediate to her father, and not the moiety as heir of her sister; for then it shall not lie by journeys accounts. And after the writ was awarded good for all the first action; quod nota. Br. Journes, &c. pl. 12. cites 7 H. 6. 16.

3. If a man brings *action and dies*, by which the writ abates, his heir shall not have a new writ by journeys accounts; for it seems, that none shall have *action* by journeys accounts, but one who was party to the first writ, and against him who was party to the first writ; per Newton. Br. Journes, &c. pl. 12. cites 7 H. 6. 16.

But if two coparceners bring *præcipe quod*

*reddat*, the one has issue and dies; the other who survives and the issue of the other, shall not have a new writ by journeys accounts; and where the tenant in the second action pleads *non-tenure*, he need not aver that he was tenant the day of the first writ purchased; for the title of the one is descended after; per Rolfe. But Chant. contra. Br. Journes, &c. pl. 12. cites 7 H. 6. 16.—\* Orig. (in *daver*)

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So where debt was

brought against three executors, and one died, by which the writ abated; but upon plaintiff's promise of this to the court, and praying a new writ by journeys accounts, it was granted him. Le. 44. pl. 57. Mich. 28 & 29 Eliz. C. B. Knight's case.

Br. N. C. pl. 410. S. C.—6 Rep. 10. b. in Spencer's case.

6. *Quare impedit* by A. against B. incumbent, who was in by the presentation of the king, and therefore the writ was brought against him alone, and pending the writ of *quare impedit*, the plaintiff died after

after the six months past, and he had only the next presentation by grant; and by the justices of C. B. where the plaintiff dies, the executor shall not have writ by journeys accounts; but *contra* in some cases where the defendant dies pending the writ; and this writ was brought by the executor after the six months were past, and the executor intended to have saved the matter by the journeys accounts, but was not allowed. Br. Journeys, &c. pl. 23. cites 4 E. 6. Ogle v. Harrison.

7. In debt against an heir, who pleaded *riens per discent the day of the, &c.* The plaintiff pleaded, that heretofore he sued another writ of debt against the same heir, upon the same bond, in this court, and the defendant was outlawed; which outlawry, for the insufficiency of the proclamations, was reversed; and that he freshly brought this writ, and avers, that the defendant had assets the day of the first writ purchased; whereupon the defendant demurred. Hob. 248. Hill. 12 Jac. Spray v. Sherrot.

Ibid. says, the like hath been pleaded against the executor, but that no judgment hath been given in those cases.

A precedent was shewn to the court of this case, and that upon issue joined, whether assets the day of the first writ brought, the plaintiff had verdict and judgment. Cro. J. 589. And there in debt against an administrator *durante minori etate, &c.* who pleaded *riens* the day of the writ, and the plaintiff shewed outlawry and reversal as above, and that he brought another writ freshly, and upon like issue joined, verdict and judgment was given for the plaintiff; and upon error brought in B. R. the judgment was affirmed; and all the court held the writ well brought by journeys accounts; for when he pursues till defendant be outlawed, the first original is determined; and when the outlawry is afterwards discharged, there is not any default in the plaintiff. Cro. J. 588. Mich. 18 Jac. B. R. Waltham v. Aldrich. S. C. cited and affirmed to be good law; because otherwise the defendant himself would take advantage of his own ill plea, which the law will not suffer. Winch. 82. Pasch. 22 Jac. C. B. Anon.

8. A writ may be brought by journeys accounts against an executor; per Doderidge, who said it was so adjudged in C. B. in Sharpeley and English's case.

And so may a writ in nature of journeys

accounts be brought by an executor, but it should be within a year, unless a reasonable cause is shewn. Gibb. 290. Trin. 5 Geo. 2. B. R. Wilcox v. Huggins. It will not lie for the executor upon abatement of his testator's writ. 12 Mod. 229. Anon.

9. If testator makes A. executor with condition, that if he do such act, then B. shall be executor; in this case A. is absolute executor, unless he determine his office by his own act; and then B. is not privy to have journeys accounts. 1 Salk. 393. Mich. 9 W. 3. C. B. Estob v. Thoroughgood.

10. An infant executor plaintiff cannot take benefit of a suit commenced by administrator *durante minori etate*, to avoid the statute of limitations. Comb. 428. Estob v. Thoroughgood. But of a suit by executor *durante minori etate* of the infant executor he may. 1 Salk. 393. S. C.

## (C. 2) In what Court; and at what Time

[ 563 ]

1. NOTE, that a feme shall not have advantage of journeys accounts but in the same court in which the first action was; for if the one action, as assise of fresh force, be in the franchise, which is there abated by jointenancy, and the other assise of novel disseisin is brought in the guildable before the justices of assise, this cannot be

See (A). 6 Rep. 10. b. in SPENCER'S case, cites S. C. and 18 E. 2. Estoppel, 263.

Br. Jorues  
Accounts,  
pl. 201.  
cites S. C.

be by journeys accounts; for the *first record is not there*. Br. Jour-  
nes, &c. pl. 20. cites 8 Aff. 8.

2. In formedon, where writ is abated by jointenancy pleaded and  
confessed by the demandant, and he purchases another bearing teste  
or date mesne between the first day and the fourth day of the return of  
the first writ, this is good, and shall not be intended purchased pend-  
ing the first; for the tenant may appear at the first day, and receive  
judgment immediately, and then the writ is not pending till the  
fourth day. Br. Brief, pl. 201. cites 24 E. 3. 28.

3. A writ of *quare impedit* was abated, and another writ was  
brought a year after. Br. Journes, &c. pl. 25. cites Fitzh. Quare  
Impedit, 32.

But where  
the action  
was  
brought by  
journeys  
accounts  
about a year

4. Where in debt the defendant was outlawed, and after the out-  
lawry was reversed, the plaintiff ought to bring his writ of journeys  
accounts immediately after the reversal of the judgment in the out-  
lawry, if he will take advantage of it. Winch. 82. Pasch. 22 Jac.  
C. B. Anon.

after the outlawry was declared void, and discharged by plea, yet judgment in C. B. was affirmed  
upon error brought in B. R. Cro. C. 294. Hill. 8 Car. B. R. Finch v. Lamb.

See Join-  
tenants  
(C. b) pl. 1.  
7-9

### (D) Pleadings in a second Writ.

1. **I**N all cases where the writ is abated by plea of the tenant ex  
officio Curiae writ shall lie by journeys accounts. Br. Jour-  
nes, &c. pl. 6. cites 46 E. 3. 14.

2. *Præcipe quod reddat* abated by jointenancy, that the baron held  
with the feme not named in the writ, and the demandant brought  
another by journeys accounts, and the baron and feme would have  
pleaded *non-tenure*, and could not; per Thorp. Br. Journes, &c.  
pl. 11. cites 38 E. 3. 13.

S. P. Per  
Newton  
and Port.  
Ibid. pl.  
16. cites  
2 H. 6. 54.  
Br. Estop-  
pel, pl. 29.  
cites 41 E.  
3-4

3. *Præcipe quod reddat* is brought against A. who abated the writ  
by jointenancy pleaded with K. and he brought a new writ by jour-  
neys accounts freshly against both; they may plead *jointenancy again*  
*with W.* For K. shall not be estopped; because he was not party  
to the first writ, nor by consequence A. For they ought to join  
in plea; by which the demandant replied and said, that the day of  
the first writ purchased, A. and K. were tenants, absque hoc that the  
third, in whom the tenancy is alledged, any thing bad; and per tot.  
Cur. this is a good plea, as well against K. who was not party,  
to the first writ, as against A. who was party; quod nota; other-  
wise it would be if this second writ had not been purchased by jour-  
neys accounts. Br. Journes, &c. pl. 4. cites 41 E. 3. 4.

• The te-  
nant shall not  
plead non-te-  
nure, but  
shall be es-  
topped by  
the ley  
gager; per  
Prisot and

4. *Præcipe quod reddat*; the tenant alledged *non-tenure*; the de-  
mandant said, that at another time he brought such another writ  
against the tenant, which was abated by ley gager of *non-summone*,  
and this writ brought by journeys accounts; judgment if he shall  
plead \* *non-tenure*, &c. And there it is agreed, that writ lies by  
journeys accounts; and after the tenant was compelled to take  
issue, that he was not tenant the day of the first writ purchased, and  
the



the clerks would have added these words, *nec unquam postea*, and this addition was ousted by the justices, &c. Br. Journes, &c. pl. 6. cites 46 E. 3. 14. Danby clearly. Br. Journes, &c. pl. 3. cites 22 H. 6. 34.

5. Debt was brought as against executor, which was abated, because the defendant said, that he was administrator, and by journeys accounts the plaintiff brought a new writ against him as administrator; and the defendant said, that fully administred the day of the writ purchased; and per Wych, he shall say, fully administred the day of the first writ purchased, by reason of the journeys accounts, which several agreed; and after the issue was taken, that fully administred, Prist; and the others e contra. Br. Journes, &c. pl. 7. cites 48 E. 3. 21. S. P. Resolved 6 Rep. 10. b. Spencer's case.—And cites 22 H. 6. 9. 13 H. 4. tit. Execution, 112. 9 E. 4. 5. b.

6. In debt against an executor, the defendant pleaded fully administred, and the plaintiff said, that at another time he brought such another writ against the defendant, and it was abated, and did not shew the cause, and that he had assets the day of the first writ purchased; and the defendant was compelled to answer to it, though the first writ abated by the proper default of the plaintiff or not; quod nota; and yet in this case the plaintiff cannot have journeys accounts, as it seems. Br. Journes, &c. pl. 8. cites 2 H. 4. 21.

7. Where tenant in tail has issue two sons and dies, and A. abates; the eldest son dies, and the youngest son brings formedon, and makes himself heir to his brother after feoffment made by the abator to the use of the abator, the writ shall abate. Br. Journes, &c. pl. 12. cites 7 H. 6. 16. per Newton. Contra where he makes himself heir to his father; per Newton, Br. Journes, &c. pl. 12. cites 7 H. 6. 16.

8. *Præcipe* quod reddat; the tenant pleaded non-tenure; the plaintiff replied, that he brought *præcipe* against this tenant and A. and at the grand cape A. made default, and this tenant appeared, and said, that he was tenant of the whole, and tendered to wage his law of non-summions; and the defendant maintained the writ; and at the day of the ven. fac. the demandant confessed that the tenant was tenant of the whole, and prayed leave to purchase a better writ, by which the writ abated, and this writ is purchased by journeys accounts; judgment, &c. and the writ awarded good upon this matter, and the tenant compelled to answer over. Br. Journes, pl. 16. cites 22 H. 6. 54.

9. And in ancient times if the tenant pleaded jointenancy, and the writ abated by issue tried of this, he should have new writ by journeys accounts, as well as if he had confessed the exception, and taken a new writ by journeys accounts; per Brown. And so it seems that at this day a man shall not have another writ by journeys accounts, but where he confesses the exception. Br. Journes, &c. pl. 16. cites 22 H. 6. 54.

10. If it does not appear whether the second writ was by journeys accounts, yet per Billing justice, the plaintiff may averr it well enough. Br. Journes, &c. pl. 18. cites 9 E. 4. 5.

11. The tenant cannot vouch without cause after the first writ. Resolved,

Resolved. 6 Rep. 10. b. Hili. 45 Eliz. C. B. Spencer's case.—  
And after by assent the tenant pleaded in bar. Ibid.

Croke J. conceived, that as this outlawry was not reversed by error, but avoided by plea, the first original was not determined; but that A. might have proceeded thereupon; and that to begin a new original, and in another county, is neither within the words or intent of the 21 Jac. 16. But

12. A. brought *case* by writ original against B. in C. B. and counted upon *assumpsit* made 18 Jac. The original was brought the 19 Jac. and was to the damage of 500l. The *action* was laid in L. and defendant was outlawed. The outlawry was reversed in C. B. for not returning the exigent; and a year after reversal, A. brought new *action* there, and laid it in Suffolk, by order of the court, to the damage of 600l. and he recovered upon non assumpsit pleaded 300l. B. assigned error, that the second writ was brought after the time limited by the statute of limitations of 21 Jac. cap. 16. A. replied, that the second *action* was brought within a year after the outlawry reversed, and averred that it was for the same promise. B. demurred; it was agreed, that if *action* be brought within the time, and \* the defendant be outlawed, and the time lapses, and then the outlawry is reversed in C. B. for default in the exigent, a new writ brought within a year after is good by the statute. Secondly, it was resolved, that notwithstanding there is a variance between the first and second *action*, the first being in L. and the second in S. and the damages in the first being 500l. and in the second 600l. yet because it was averred, that it was for the same *assumpsit*, and this confessed by the demurrer, it was good, and the first judgment was affirmed. Jo. 312. Hill, 8 Car. B. R. Lambe v. Finch.

the other three justices held these variances not material to the *action*, being *transitory*, and averred to be for the same cause; and tho' the outlawry is not reversed by error, but avoided by plea, it is all one within the intent of the statute; for the statute is not where the outlawry is reversed by error, but where the outlawry is reversed, so that it be by any means; and thereupon judgment was affirmed. Cro. C. 294. Finch v. Lambe.—S. P. as to the increase of damages was much debated, and Roll. Ch. J. at first thought it could not be, but afterwards changed his opinion, and said, it appears to be one and the same party, and we must maintain *actions* against the statute of limitations, because by that statute the benefit of the law is taken away in part, and therefore affirmed the judgment. Sty. 440. Hill. 1655. Boyle v. Scarborough.—Lutw. 287. GIFFORD v. YOUNG. Same points, but the judges differing in opinion as to the second *action*'s being brought in time, it being more than a year after the abatement of the first writ, no judgment or further proceeding was had in the cause.

\*[565]

### (E) Judgment. And what shall be recovered.

1. **I**N *formedon* it was agreed, that a man shall have a new writ by journeys accounts, after the first is *abated* by *ley gager* of non-summons, and shall avoid *mesne feoffments* by which feoffments the tenant would have vouched in delay of the demandant. Br. Journes, &c. pl. 21. cites 11 H. 6. 34.

• S. P. 6 Rep. 10. b. SPENCER'S case, cites the book of entries,

2. *Affise* by two; the one dies, by which the writ abates; the other brings another *affise* by journeys accounts, and recovers, he shall have the \* costs of the first suit. Br. Journes, &c. pl. 18. cites 9 E. 4. 5.

382. b.—If writ of *cofinage* be brought against one who pleads *jointenancy* with a stranger, and after the plaintiff brings a new writ by journeys accounts against both and recovers against them; now the question is, whether he should recover costs for his suit in the first writ? and it was argued that he should, because tho' at first he did not bring his writ well, viz. against both, yet the law gives him such advantage, that he shall have a new writ by journeys, &c. For such feoffments may be made so privately, and to so many men, that a man, by common presumption, cannot have cognizance

recognizance who are tenants, and therefore he shall have the advantage by journeys accounts. And then it follows well, that he shall have the costs of the first writ; for by journey's accounts he shall have the same advantage as he should have in the first writ. And so in this case, the costs shall be severed in such manner, viz. that he shall recover the costs of the first writ against him who alleged the jointenancy, and the costs of the second writ against them both; and so because the law adjudges in him no default to such intent that he shall have the advantage of journeys accounts, it seems he shall have the same advantage as he ought to have had in the first writ. But of the other part it was said, that it is not reasonable, that he shall have the costs of the first writ; because the writ commenced to be ill on the part of the demandant; and to cause the tenant to recompence him such writ, which he himself had ill brought, is not reasonable; but otherwise it is where the writ is abated by the death of one of the defendants; for in this case the default is not in the plaintiff, and therefore in this case he shall have costs in the second writ. And if a writ be brought by two, and the one will not sue, so that he that would sue has a writ of summons ad sequend' simul, and after the other is summoned, and the one sues forth and recovers, he shall not have costs for the suit between the two plaintiffs, because no default was in the tenant for this suit, and so in the case here, because the writ was ill brought by the act of the plaintiff, it is no reason that the tenant should be charged, and it is not against reason tho' he shall have advantage to some intent by journeys accounts, and to other intent not, &c. Kelw. 127. b. pl. 92. Anon.

**(A) Ipso Facto.**

[ 566 ]

See Enfant.  
—Estate.—  
Pluralities.  
—and other  
proper ti-  
tles.

6 Rep. 29.

b. Green's case. S. C. — Yelv. 7. Grendit v. Baker, — S. C. but not S. P.

1. 13 Eliz. 12. makes the church void, for *not reading the articles*; adjudged, that there needs no deprivation, but it becomes void presently by not reading the articles. Cro. E. 679. Trin. 41 Eliz. B. R. Baker v. Brent and Robinson.

2. Upon an indictment for *speaking against the book of common prayer*, Fenner J. doubted, whether the justices of oyer and terminer may give judgment of deprivation, tho' the statute says, that the offender shall be deprived ipso facto, no more than the statute 5 E. 6. 4. Also it does not appear, whether the defendant be *curate of the parish where he refused to say divine service*; and if he be not, then he is not punishable by the statute. Goldsb. 162. pl. 95. Hill. 43 Eliz. Home's case.

3. In case of a deprivation ipso facto, there ought to be a *sentence declaratory* of the deprivation, to give notice to our law; per Popham Ch. J. Goldsb. 166. Hill. 43 Eliz.

5 E. 6. 4.  
says, that he  
that strikes  
in a church-

yard shall be *excommunicated ipso facto*, yet that is to be intended after a sentence declaratory, or conviction; otherwise there can be no absolution. Cro. E. 919. Hill. 45 Eliz. B. R. Sonham v. Trundle. — S. P. Arg. Cro. E. 680. cites D. 18 Eliz. 275. — He does not stand excommunicated until he be thereof convicted at law, and this transmitted to the ordinary, tho' it takes away the necessity of any sentence of excommunication. Vent. 146. Trin. 23 Car. 2. B. R. Dyer v. East.

4. Where a judgment in an inferior court shall not be ipso facto void, though declared by a private act of parliament, that it shall be void. See Trespass (G. a) Prigg v. Adams.

5. Where acts of parliament relate either to matter of record or specialties entered into with some ceremony, tho' the statutes make them void, yet it must be understood in a proper manner; and acts of parliament do always suppose necessary incidents; but where they

10 Mod.  
65. Arg.  
S. P.

they relate to matters *en pais* as (in the principal case it did) to an election into a corporation, it is very different; per Eyre J. 10 Mod. 180. Trin. 12 Ann. B. R. the Queen v. Buckingham Corporation.

## Ireland.

### (A) How far bound by the Statutes here.

*Acts of parliament made in England since the acts of the 10 H. 7. do*

1. **BY** an act of parliament (called *Poyning's law*) holden in Ireland in 10 H. 7. it was enacted, that *all statutes made in England before that time should be of force and be put in ure in the realm of Ireland.* Co. Lit. 141. b.

*not bind them in Ireland; but all acts made in England before 10 H. 7. do bind them in Ireland by the said act made in Ireland.* 10 H. 7. cap. 22. 12 Rep. 111. Hill. 10 Jac.

2 Inst. 2. says, that by this law [but there cites it as made 11 H. 7.] Magna charta extends into Ireland.——4 Inst. 351. recites the statute more fully, and says, that *acts of parliament made in England since that time, wherein Ireland is not particularly named or generally included, extend not thereunto; \* for though it be governed by the same law, yet it is a distinct realm or kingdom, and hath parliaments there.*——S. P. Arg. Cart. 180. 198. cites And. 262. Orork's case.——2 Vent. 4. & 5.——7 Rep. 23. in Calvin's case.——Jenk. 164. pl. 14.——In acts of parliament, Ireland shall not be bound without *express words, though the nature and reason of the act extends to Ireland.* Skin. 519. Trin. 6 W. & M. B. R. in case of Phillips v. Bury.——Though Ireland has its own parliament, yet it is not absolute, & sui juris; for if it were, England has no power over it, and it would be as free after conquest and subjection by England, as before. And that it is a *conquered kingdom* is not doubted, but admitted in CALVIN'S CASE several times, &c. Vaugh. 292. Hill. 21 & 22 Car. 2. C. B. per Vaughan Ch. J. in case of Craw v. Ramsey.——And ibid. 300. he says, it is a *dominion belonging to the crown of England.* And Ibid. 301. That its having a parliament is *gratia regis*, subject to the parliament of England.——It is to be considered as a *provincial government, subordinate to, but not part of the realm of England.*——Mich. 11 Geo. 2. in case of Otway v. Ramsey.——And by statute 6 Geo. 3. cap. 5. §. 1. *the kingdom of Ireland ought to be subordinate unto and dependant upon the imperial crown of Great Britain, as being inseparably united thereto. And the King's Majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.*

\*[567]  
Jenk. 164.  
pl. 14.

2. Lands in *Ireland* are not bound by a statute in England, but their persons are. Cart. 186. Arg. Pasch. 19 Car. 2. C. B. cites 7 Rep. 22. Calvin's case.——and Mo. 796.

3. Ireland is beyond sea as to the *statute of limitations.* Arg. Hill. 2 W. & M. Show. 197. says it was ruled so.

See Inter-  
est. (1).

4. Bond executed in England for a debt in Ireland shall carry but *English interest.* Mich. 1700. 2 Vern. 395. Lord Ranelagh v. Sir John Champante.

### (B) Writs. What *Writs* may go into Ireland.

1. **A** writ of error was brought upon a judgment given in Ireland. It was held, that a day ought to be given by rule of court to the plaintiff, to assign his errors, or else to nonsuit him; for

for the defendant could have no *sci. fa.* into Ireland. Vent. 53. Hill. 21 and 22 Car. 2. B. R. Anon.

2. In error of a judgment in B. R. in Ireland, it was suggested that the plaintiff was in execution on the judgment in Ireland. The court seemed to be of opinion, that a *habeas corpus* might be sent thither to remove him, as *writs mandatory* had been awarded to *Calais*, and now to *Jersey, Guernsey, &c.* Vent. 357. Mich. 33 Car. 2. B. R. Anon.

3. If a writ of *error* be brought of a judgment in Ireland, and judgment affirmed in B. R. here, no *capias* can be in any county of England; because the cause of action arises in Ireland, and there the venue is laid; and therefore the original *capias* ought to issue in Ireland, but no *capias* could issue out of B. R. in Ireland, and therefore not here; neither an original nor *testatum*. But the method is to sue out a writ, reciting all the proceedings here, directed to the Ch. Justice of B. R. in Ireland, and there execution shall be sued out for all; for though the judgment be affirmed here, yet the law supposes the party commorant in Ireland; for the costs are but accessory to the judgment, and such mandatory writ determines the writ of error here, and restores the cause in Ireland; per Holt Ch. J. 12 Mod. 225. Mich. 10 W. 3. Coot v. Lynch.

### (C) Power of English Courts over the Lands in Ireland.

1. A demurrer, because the lands lie in Ireland and there to be determined, over-ruled. Toth. 138, 139. cites 8 Car. Leake v. ....

2. Exchange lies of land in England for land in Ireland. Jenk. [568] 41. pl. 78. Cart. 187. Arg. S. P.

3. Upon a suit in England, voucher does not lie in Ireland. Jenk. 41. pl. 78.

4. Customs of Ireland, as for the widow of one dying without issue to have a moiety, is not allowable here. Tr. 1670. 3 Ch. Rep. 53 Moor v. Morgan.

5. As to the profits of lands in Ireland, a bill here is good, the person being in England; for they are in the personalty. But as to \* partition of lands, which is in the realty, he cannot proceed here; for a commission cannot be awarded into Ireland: and a bill for partition is in nature of a writ of partition at the common law, which lieth not in England for lands in Ireland. Hill. 27 & 28 Car. 2. Per Ld. Chanc. 2 Chan. Cases 214. Cartwright v. Pettus. \* Fin. R. 242. Carteret, v. Petty, S. C. —S. P. Nor can they give possession of lands there. 2 Chan. Cases 189. 189. Mich. 2 Jac. 2. Lord Kildare v. Sir Maurice Eustace. —But an account of profits was decreed. Vern. 421. cites Petit's case.

6. Chancery in England cannot award a sequestration against lands in Ireland. Arg. Mich. 1682. Vern. 76. Earl of Arglais v. Muschamp. See Sequestration. —2. Chan. Cases 189.

Mich. 2 Jac. 2. S. P. in case of Ld. Kildare v. Sir Maurice Eustace. —The Master of the Rolls thought a sequestration cannot be granted here of lands in Ireland for a contempt of this court; for that the process of this court cannot affect any lands in Ireland, the practice in such cases being

to make *affidavit*, that the person standing in contempt is here in England, and being afterwards taken upon process, the court will oblige him to give bail to abide and perform the decree. Hill. 11 Geo. 9 Mod. 124. Fryer v. Vernon.

S. P. And that the obliging him, if found here, to give security, is a plain proof that he is not amenable to this court; for if he was, that precaution would be unnecessary; and so a *particular sequestration* was denied, but a general one granted of course. Sel. Ch. Cases in Ld. King's time. 5. 6. Hill. 11 Geo. 1. S. C.

### (D) Power of English Courts *over the Persons of Irish Men.*

7 Rep. 13.  
S. C. cited  
in Calvin's  
case. —  
Cart. 187.  
Arg. S. P.

1. **A** *Fine levied here* shall not bind a man in Ireland; for he is within the words of the statute, which provides for persons out of the land. Pl. C. 375. Mich. 4 & 5 Eliz. Stowell's case.

2. A man in Ireland cannot be *vouched*. 2 Vent. 4 Hill. 21 & 22 Car. 2. C. B.

See Vern.  
406.

3. Chancery in England will relieve against *fraudulent conveyances gained of lands in Ireland*, when the defendant is in England. Mich. 1682. Vern. 75. Earl of Arglais v. Muschamp.

4. Bill as to land in Ireland, the title whereof was under the act of settlement there, was exhibited against the defendant here on his coming to England, and a *ne exeat regno* granted, and he was put to answer a *contract* made for those lands in Ireland, and when he *departed* to Ireland without answering, he was sent for over by a special order from the King, and made to answer the contempt, and to abide the justice of this court. Per Finch C. Mich. 1682. Vern. 77. cited in the case of Earl of ARGLASS v. MUSCHAMP, as the case of Archer v. Preston.

2 Chan.  
Cases 188.  
S. C.

5. Bill lies here for relief as to a *trust of lands* in Ireland, defendant being in England; per Jefferies C. Vern. 405. Mich. 1686. Earl of Kildare v. Sir Maurice Eustace.

But if he  
will not ap-  
pear we  
can proceed  
no further,  
nor take attachment upon it. Ibid. 420.

6. A *subpœna* may issue out of the *chancery in England* returnable in the chancery in Ireland; per Jefferies C. Vern. 406. Mich. 1686, in the case of the Earl of Kildare v. Sir Maurice Eustace.

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S. C. cited  
8 Mod. 321.  
Mich. 11.  
Geo. 1. in  
the case of Walrond v. Van-moles.

7. *Trover* will lie in England against tenant by the curtesy of lands in Ireland, for a conversion of timber in Ireland; because 'tis a transitory action; but otherwise of local actions. 1. Salk. 290. Trin. 7 Ann. B. R. Brown v. Hedges

2 Vent.  
314. Lun-  
dy's case.

8. A. man may be *sent over* to Ireland to be tried for a crime there committed, notwithstanding the clause in the *habeas corpus act*. Gib. 111. Mich. 3 Geo. 2. B. R. the King. v. Kimberly.



(E) *Judgments in Courts there. How far liable to Courts Here,* See Vaugh. 292. &c. per tot. Cur. as to Ireland.

1. **B. R.** in England may reverse judgment given in **B. R.** in Ireland. *Br. Jurisdiction*, pl. 109. cites 34 Aff. 7. The parliament of Ireland cannot

*change the law* of having judgments there reversed for error in England; per Vaughan Ch. J. Vaugh. 292. Hill. 21 & 22 Car. 2. C. B. in case of *Craw v. Ramsey*.

And by the Statute of 6 Geo. 1. cap. 5. s. 2. *the House of Lords in Ireland have not any jurisdiction to affirm or reverse any judgment or decree made in any court within the said kingdom; and all proceedings before the said House of Lords, upon any judgment or decree, are void.*

2. **A. writ of error** in **B. R.** here, of a judgment given in **B. R.** in Ireland, is a *superfedeas* to stay execution there. Cro. J. 534. Pasch. 17 Jac. **B. R.** the Bishop of Osserie's case.

3. A writ of error was brought to reverse a judgment given in Ireland, and an error in fact was assigned, and tried in the county next to Ireland. The Court ruled the *venire* to be well awarded. Vent. 59. Hill. 21 & 22 Car. 2. **B. R.** See Trial. (L. a.), l. 8.

4. Judges in England are proper *expofitors of the Irish laws*. Per Jefferies C. assisted with Judges. Vern. 422. Mich. 1686. *Earl of Kildare v. Sir Maurice Eustace*.

5. An action of *debt* was brought in the court of **C. B.** in Ireland, against an administratrix, upon a judgment in the court of **B. R.** in England. The defendant pleaded in bar a judgment had against the intestate, in an action of debt upon bond in the court of exchequer in Ireland; and upon demurrer, there was judgment for defendant in **C. B.** and affirmed in **B. R.** Upon a writ of error in the court of **B. R.** in England, the principal question was, whether debt lies in Ireland upon a judgment obtained in **B. R.** in England; and all the court inclined strongly that it does not lie; that Ireland is to be considered as a provincial government, subordinate to, but not part of, the realm of England; that acts of parliament made here, extend not to Ireland, unless particularly named, much less judgments obtained in the courts here; nor is it possible they should, because we have no officers to carry them into execution there; for though mandatory writs issue thither, yet writs of ordinary remedy do not, as appears in Vaugh. 290. Besides debt on a judgment is a *local action*, and must be brought in the same county where the judgment was obtained; a fortiori, not in a different kingdom. Accordingly the court were of opinion to affirm the judgment; but the cause stood over for another argument. Mich. 11 Geo. 2. *Otway v. Ramsey*.—In Easter term following, the plaintiff in error declining to speak to it again, judgment was affirmed, nisi &c.

[ See Error, Trial, and other proper titles. ]

## Issue.

See Heir  
(G. 3) (O).

(A) *Where the Words (Issue) or (Heirs of the Body) give Estate by Purchase, or Descent by Will.*

1. **A.** Seised in fee of Black Acre, Green Acre, and White Acre, has *issue a son and two daughters*, and *devises* Black Acre to the son and his heirs, Green Acre to the eldest daughter and her heirs, and White Acre to the youngest daughter and her heirs, and *if any of his children die without issue* of his or her body, then the other *surviving shall have totam illam partem, &c.* between them equally to be divided. A. dies. The *eldest daughter dies leaving issue*, and then the *son dies without issue*. The words *totam illam partem* give only an estate for life. And per Gawdy J. though it was objected, that such estate for life in the surviving youngest sister is *drowned by descent of the fee*, so as now the estate limited by the will is void; it may be answered, that though now upon the matter it be void, yet *ab initio* it was not so; for it became void by matter of later time, viz. by the descent of the fee simple. For if one of the daughters had died without issue in the life of the son, so as her land had come to the son and the other sister, there is no coparcenary; for the son has all the fee, and the moiety of the same is executed, and the other moiety expectant, and the sister has a moiety for life, and then the devise not void. And per Shute J. If *both daughters had survived the son*, they should have fee in Black Acre, but not by the will, but by descent in coparcenary. 2 Le. 129. Mich. 29 Eliz. B. R. Hawkins's case. — Als. Pettywood v. Cook.

2. Devise of a *term to A. for life*, and *after to the issue of A. and for want of issue of A. to B.* was adjudged a good remainder to B. in B. R. lately, but reversed in Cam. Scacc. and a difference taken between such limitation *to children*, and *to the issue*; per Ld Keeper. 2 Chan. Cases 210. Mich. 27 Car. 2. in case of WARMAN v. SEYMOUR, cited as the case of Peers v. Reeves.

3. A. *devises a term to his wife for life*, and *after her decease to the heirs of her body*, and *for default to J. S.* The executor assents to the legacy; the wife dies without issue; per Finch C. A. meant an intail to the wife which cannot be, because then there should be a perpetuity of a term, and though there be difference in words when land of freehold is devised to one for life, remainder afterwards to his heirs mediately or immediately, and where a term is so devised, the difference is in words, the testator's meaning is the same, and now estates jointures and settlements are of long terms, and a similitude is between them, &c. Mich. 29 Car. 2. 2 Chan. Cases 236. Bray v. Buffield.

4. And

4. And after their 'decease to their children, are words of purchase, because they work by way of remainder, and carry but an estate for life; for in law the word issue or child imports no more. Fin. R. 280. in the case of Warman v. Seyman & al. —cites it as adjudged so. 6 Rep. 16. Wild's case.

But had it been to *their issue*, it would have been construed a word of

limitation and not of purchase, and so per Rainsford J. it was said to have been adjudged lately in Cam. Scacc. and a judgment in B. R. given to the contrary, reversed upon the authority of Wild's case. Fin. R. 282. and by Ld. Chanc. to the same purpose. Hill. 29 Car. 2. 283. ut ante.

5. Issue in a will is as much as heirs of his body, yet sometimes it is a word of purchase; as if a *devise* be to a man *for life and after to his issue, and to the heirs of such issue*, in such case issue is a word of purchase; the same law of heir. Skin. 559. Mich. 6 W. & M. B. R. In case of Moor v. Parker.

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6. A. devised lands to his second son and his heirs for ever, and for want of such heirs then to the right heirs of A.—A. died, the second son died without issue, living the eldest son; adjudged that the second son had estate tail and no more, because the words (and for want of such heirs) are void in point of limitation, and import no more than want of issue; because the second son could never die without heirs so long as his brothers or any heirs of his father, were living. Therefore the heir at law in this case shall take by descent, and not by the will. 1 Salk. 233. Trin. 12 W. 3. B. R. Nottingham v. Jenner.

S. C. cited 9 Mod. 71.

7. Devise of lands to A. and B. in trust for C. for life with power to make leases, and after C.'s decease in trust for the heirs male of the body of C.—Cowper C. decreed only an estate for life to be conveyed to C. and to his first, &c. sons in tail male. But Harcourt K. reversed that decree and decreed an estate tail; though he admitted that on marriage articles founded on the agreement of parties, the husband in such case might be only tenant for life, but in a will you must take the words as you find them. Pasch. 1711. 2 Vern. 670. Baile v. Coleman.

Wms's Rep. 142. S. C.—Cro. E. 313. Clerk v. Day.

(B) Where the Words Issue, or Heirs of the Body, give Estate by Purchase, or Descent by Deed.

See Heir (G. 3).—Remainder (H).

1. WHERE the heir takes any thing which might have vested in the ancestor, he shall be in by descent. Arg. 1 Rep. 98. Pasch. 21 Eliz. in Shelly's case.

2. The word heir does not serve for a name of purchase if he be not legal heir, nor the word issues. The word son or daughter will; or reputed. So in case of feoffment and will, though they are bastards. Jenk. 203. pl. 27.

3. An use of a term for years in trust to husband and wife, and after to their issue, they then having none, is all one, as if limited to them and the heirs of their bodies, and the issue takes nothing as a purchaser;

2 Chan. Cases, 114. S. C.—86. Ibid. §.

C. And it was in trust that the husband should receive the profits during his life, and afterwards that the wife should, and after that the issue of their bodies should receive the profits, so long as any issue of their bodies should continue.

Remainder to B. after a limitation to the issue of A. is a void limitation of a term; for if it be taken as a remainder to B. then B. cannot take it till after all the issue of A. and their issues be also spent. Issue includes all, and is not men collectivum; by Ld. Keeper. 2 Ch. Cases, 210. Mich. 27 Car. 2. Warman v. Seaman.

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In this case Ld. Chancellor said, that he would not be bound by the precedent of PEACOCK v. SPOONER, if he could find any difference in the cases.

Ch. Prec. 96. Dafforn v. Bolt. — Wms's Rep. 371, 372. cites S. C. and says it was decreed, that this was a good description of the person.

purchaser; per Ld. Keeper. Chan. Cases 226. Mich. 27 Car. 2. Bullock v. Knight.

4. A. possessed of a term for 2000 years, in consideration of marriage, &c. with M. demised to trustees for 1700 years part of the 2000 years, out of which 1700 years, a term of 99 years was particularly limited to A. for life and the remaining part of the 1700 years was declared to be for a provision of A. and M. and their children, if A. and M. or any of their issue should so long live, remainder to the heirs of the body of A. on M. They both died, leaving issue three daughters, B. C. and D. — C. and D. got an assignment of the whole term, and took administration to A. — B. brought her bill. And the question was, if she should have a third part with C. and D. And though it was insisted for them, that the trust of the whole term vested in A. and was executed in him, and that the daughters, though heirs of his body, could not take in this case; yet the Master of the Rolls conceived, that in regard, a particular term of 99 years was taken out of the 1700, and particularly limited to A. that the trust of the whole term, as to the 1700 years was not executed to A. and cited the case of OAKES v. CHAFORD, and of TRAHERNE v. COMPTON, and the case of WARMAN v. SEYMOUR, where, by advice of judges, an alienation being to one for life, and then to her issue, it was held, that the issue took by purchase, and issue was not taken to be a word of limitation to vest the whole term in the mother. And yet in legal understanding, issue is a word of limitation, and not of purchase; and therefore conceived that though in the principal case, the word (heirs) is not properly a word of purchase, yet there being a particular estate for life during a particular term limited to A. the limitation to the heirs of his body afterwards on that marriage, would carry it to all the children equally; and the rather, because it was declared in the deed, that after A.'s death, the trustees should execute estates to the person, and persons respectively, that should be interested according to their respective shares therein; which shewed that the children should all take their several shares, 2 Vern. 23. Pasch. 1687. Ward v. Bradley.

5. A. possessed of a term for years settles it in trust on marriage for himself for life, remainder to his wife for life, remainder to the heirs of the body of the wife by the husband; A. dies, leaving B. a son; per Somers C. The case of PEACOCK v. SPOONER, settled in Dom. Proc. November 1689, must govern this case. There the like limitation was adjudged as words of purchase and not of limitation, and that on view of that precedent, his lordship had lately decreed accordingly in a like case, and said, it would be in vain to make a decree to be reversed on an appeal, and therefore dismissed the bill. Trin. 1699. 2 Vern. R. 362. Dafforn v. Goodman and Bolt,

6. At

6. At common law *issue* is not a word of *limitation in deeds*, 2 Inst. 334. the same law in case of *an use*; for if a feoffment is made to the use of J. S. and his issue male, this doth not pass an estate tail. But *in wills* it is sometimes a word of limitation, and sometimes a word of *purchase*, according as the *testator's intention appears* in the will. 8 Mod. 383. Pasch. 1 Geo. 2. Shaw v. Weigh. Gibb. 12. S. C.

(C) *Where the Words Issue, or Heirs of the Body, are only a Designatio Personæ.* See Heir (G. 3)

1. **I**N marriage articles, there was a limitation to *A. for life without impeachment of waste*, and then to the use of the heirs male of the body of *A.* to be begotten, and of the heirs male of the body of such heir male. The first words (heirs male) are only a description of the persons who are to take, viz. the first and other sons; and the subsequent words denote what estate they were to take, viz. to the heirs male of their bodies. MS. Tab. cites 5 Feb. 1719. Trevor v. Trevor. Wms's Rep. 631. Pasch. 1720. S. C.

2. *A.* on the marriage of *J. S.* with *M.* his niece, *articled, that for the better advancement of J. S. and his intended wife, and the issue of the marriage, he would at the time of his death leave, devise, or otherwise convey lands, &c. of 30 l. a year to the heirs of the body of M. his niece by her said husband, and to their heirs, provided, that if there should be more than one child, A. might dispose thereof to such of the children as he should think fit.* *A.* died, living *J. S.* and *M.* who had seven children, and demanded the 30 l. a year with the arrears from *A.*'s death. It was objected, that this 30 l. a year being to be left to the heirs of the body of *M.* by *J. S.* it could not commence until *M.*'s death; (for *nemo est hæres viventis*) and that then all her children might be dead, or otherwise it was uncertain which would then be heir of her body. But *Ld. C. King* said, that the court of equity has a greater latitude in construction of articles than of limitations of estates. And that here the words (heirs of the body of the niece, by the husband) shall be construed, (*children*) and the rather, because it is said just afterwards *and to their heirs*, whereas if there be a son of the marriage, it must be his heirs alone that must take; and though in case of daughters only, the words (their heirs) had been proper, yet here are sons, and it cannot be intended that the provision was for daughters only, when not so expressed; and the proviso for preference of any of the children, shews that all the children were to take, unless *A.* should make an appointment to any one; and the preamble being, that the issue should be advanced as well as the husband and wife, all the issue born at *A.*'s death ought to take, and are intitled to the arrears from that time. Hill. 1725. 2 Wms's Rep. 341. Thomas v. Bennet.

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## Judges.

See Trial  
(H) pl. 3.  
—Fines (C)

(A) *In what Cases they may be Judges. [In their own Cause.]*

Br. Patents,  
pl. 15. cites  
S. C. per  
Martin.

[ 1. ] **I** F a fine be levied to a justice of bank, he himself cannot take the consance; for he cannot be his own judge. 8 H. 6. 21.]

[ 2. If a fine be levied by a justice in bank, his name shall not be in the fine. 11 H. 6. 49. b. ]

[ 3. So, if a fine be levied to a justice of bank, his name shall not be in the fine; because he shall not be judge in his own cause. 11 H. 6. 49. b. ]

Fol. 93.

[ 4. So, if a justice of bank be sued in bank, he cannot record it, but it shall be recorded by the other justices. 11 H. 6. 49. b. ]

[ 5. So, if a justice of bank sues there, he cannot record it, but it shall be recorded by the other justices. 11 H. 6. 49. b. ]

S. P. Br.  
Judges, pl.  
6 cites S. C.  
per Martin.

[ 6. If the Chief Justice of bank be to sue a writ there; the writ shall not be in his name, but in the name of the secondary. 8 H. 6. 19. b. ]

—S. P. per Babington. Br. Judgment, pl. 116. cites S. C. —Br. Consance, pl. 27. cites S. C. per Babb. —If the Chief Justice of C. B. bring an action in C. B. as it is his privilege to do; yet there he must not be named in the whole proceedings but as plaintiff, and not so much as the placita shall be said to be before him; for then it would be error; and the placita shall be *ex am* Ed. Nevill, Joanne Powell & Joanne Blincow, [the other justices] and if he take out the writ, it must not be so much as tested in his own name, but in the name of the next senior judge; per Holt Ch. J. 12 Mod. 988. Hill. 13 W. 3. In case of the City of London v. Wood. —S. P. Per Holt Ch. J. 2 Salk. 607. in Foxham Tithing's case.

Br. Patents,  
pl. 15. cites  
S. C. per  
Rolf, but

[ 7. If an action be sued in bank against all the judges there; in such case for necessity they shall be their own judges. 8 H. 6. 19. b. ]

Babington contra. —S. P. Br. Judges, pl. 6. cites S. C. per Rolf. But Babb. Ch. J. contra. —S. P. Per Powell J. 11 Mod. 164. If a real action be sued against all the judges in C. B.

Arg.  
Bridgm. 11,  
12. —

[ 8. None may be judge in his own cause. 8 H. 6. 19. b. vide Herodii directa. lib. 2. fol. 1440. ]

For it is a manifest contradiction \* that a man can be agent and patient in the same thing, and what my Id. Coke says in Dr. BONHAM'S CASE, is far from any extravagancy; for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or as is the same thing, judge in his own cause, it would be a void act of parliament, per Holt Ch. J. 12 Mod. 687. in case of the City of London v. Wood.

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[ 9. This is a ground in the feudal law also, as appears in the Prelections of Wefenbech, cap. 17. fol. 401. ]

S. P. Per  
Martin. Br.  
Judgment,  
pl. 116. cites 8 H. 6. 19.

[ 10. If a fine be levied to a justice of bank, if he himself takes the consance the fine is void. 8 H. 6. 21. ]

[ 11. If



[11. If the Lord Chancellor makes a decree between two strangers in a thing which concerns himself in interest, and for himself, it is void; because he cannot be a judge in his own cause. H. 11 Ja. in chancery, between Sir John Egerton, and the Ld. Darby, and Kelly, resolved by the Ld. Chancellor, Coke and Doderidge.]

[12. If one of the justices of B. or B. R. brings action in his own court, and there recovers, this is a good judgment, though the judgment is given by the court and so by himself, but not by him alone. H. 4 Ja. B. R. Per Curiam, in the Baylies of Newcastle's case.]

[13. So, if one of the coroners brings his action, and after the coroners give judgment upon the outlawry, it is not erroneous. H. 4 Ja. B. R. in the said case, per Curiam.]

[14. If a man brings action before the mayor, bailies, and steward of a vill, and after the mayor is removed, and the plaintiff is made mayor, and after he there recovers, this judgment is not erroneous; \* for the judgment is given by the court, and not by him alone. H. 4 Ja. B. R. Per Curiam, the Bailies of Newcastle's case.]

This case is law, but not for the reason here given. 1 Salk. 398. Wood v.

the Mayor, &c. of London.—It is plain this reason is a senseless one, but the true reason is to be seen in 2 H. 4. 40. If A. sue in the court of mayor and bailiffs, A. is made mayor, and it is not said in the record, that he was made mayor, or it do not appear in the record that he was made mayor, there, if the defendant do not come to the court below, and plead this error in fact, he shall never after assign it for error; but if he had pleaded this error in fact, and had been over-ruled in it, he might have a writ of error; per Holt Ch. J. 12 Mod. 689. Hill. 13 W. 3. in case of City of London v. Wood.—\* S. P. Because he was not sole judge; for the court was held before the plaintiff, who was the mayor, and two bailiffs, and the recorder, and so their act; per Barksdale lecturer, D. 220. Marg. pl. 14. cites Hill. 4 H. 4. Rot. 39. Wilchfor l v. Wiggan.—Action cannot be brought by mayor and commonalty in a court held before the mayor and alderman; for though the mayor be not sole plaintiff nor sole judge, yet is he essentially plaintiff and judge; per Hatsell J. 12 Mod. 672. in case of City of London v. Wood.

Error out of C. B. The Mayor of London brought action on the case on a by law in the sheriff's court in London, and had judgment; the defendant brings error in the hustings according to the custom of London, and was bound in a bond to the mayor to prosecute it with effect. The mayor brought debt in C. B. and writ of error now in B. R. and the question was, whether the defendant was obliged to prosecute the writ of error in the hustings, the mayor being judge of the court, and so judge and party; Holt Ch. J. held the bond void. But Powell contra; he agreed, that regularly a man cannot be judge and party; but in cases of necessity he may. As if a real action be brought against all the judges of C. B. But this case differs from that; for the hustings may be held before 6 aldermen without the mayor, and then it shall be intended that the mayor was absent, because it does not appear of record. If the plaintiff in his replication had replied that the mayor gave the judgment, I should have been of another opinion; and it does not appear that the mayor is a necessary part of the court. Powis and Gould were of the same opinion, that the writ of error was well brought, and so the bond good; and the judgment given thereon in C. B. affirmed. 11 Mod. 164. the Mayor of London v. Mackreith.

15. Præcipe quod reddat against the abbot of B. who demanded conusance of the plea and had it, notwithstanding he was party, and there he prayed aid of the king, by which the demandant sued re- summons for failure of right; for the king will not send a proce- dendo, but to his own justices. Wilby said, those of the franchise are the king's justices in this case, and so he may write to them, by which the abbot demanded conusance again, and the parol was remanded into the franchise. Br. Conusance, pl. 24. cites 21 E. 3. 38.

16. Where the mayor and commonalty of D. have conusance of pleas and assise, yet in assise against the mayor and commonalty and J. S. they shall not have conusance; because the mayor and common-  
alty

Br. Conu-  
sance, pl.  
47. cites S.  
C.

alty is party, quod nota, per Birton J. Br. Patents, pl. 106. cites 31 Aff. 19.

17. *Trespas by the dean and chapter of D. against J. K. mayor of D. and others, and the bailiffs and citizens of D. came and demanded conusance by grant of king H. and the opinion of the court was, that they shall not have conusance, because the mayor is party, and shall be his own judge; quod nota. Br. Conusance, pl. 22. cites 38 E. 3. 15.*

Br. Judgment, pl. 116. cites S. C.—  
Jenk. 40. pl. 76. cites S. C.

18. *In affise by two before two justices, and pending the affise one justice died, and one of the plaintiffs was associated to the other justice; and it was awarded, that he cannot be judge and party, and one judge cannot take the affise without a companion; by which the judge would have been nonsuited, so that his companion might have proceeded in the affise for the moiety; & non allocatur; because he himself cannot record his own nonsuit, nor the other judge cannot do it without his companion; wherefore it was advised, that one who is plaintiff and judge cannot hold this plea. And that an especial affise ought to be awarded before other justices. Br. Affise, pl. 372. cites 45 Aff. 3.*

Br. Cause, pl. 11. cites S. C.—  
Br. Error, pl. 32. cites S. C.—  
This is no error, unless B. had excepted to it in the court; and if it was disallowed there, then it had been error; but if he admits him to be his own judge it is not error. Cro. El. 320. Pasch. 36 Eliz. B. R. in case of Walth v. Collinger.—\* Orig. quar favit.

19. *Parol was removed by writ of the chancery out of Lincoln, because one of the bailiffs, who was judge, was plaintiff, and this matter was shewn to the court. Thirning said, they are judges of record in Lincoln, and therefore they ought not to surcease by supposal \* quia favet, as in a base court, and if they err, writ of error lies; and if the defendant at Lincoln takes exception, that the plaintiff is one of the bailiffs, the plea shall stay till this court has determined it; and if they will not allow the exception, this is error; by which, by the assent of all the justices of C. B. the parol was remanded. Br. Parol ou ple. pl. 2. cites 2 H. 4. 4.*

Br. Amercement, pl. 19. cites S. C.—S. P.  
Br. Court Baron, pl. 4. cites 17 H. 4. 8. but it should be 12 H. 4. 8. pl. 15.

20. *In trespass it was said, that by the law a man shall not be amerced in court or leet of the lord for a trespass to the lord; yet by custom this may be good, and especially where the trespassor pays the amerciamment. Br. Customs, pl. 16. cites 12 H. 4. 8.*

Br. Conusance, pl. 27. cites S. C.—Br. Jurisdiction, pl. 39. cites S. C.  
\* Where the king grants to J. conusance all pleas he held by his bailiff fuerit, this is ad

21. *Trespas of goods carried away against T. C. who said, that he is Chancellor of Oxon, and that king R. 2. had granted to J. K. Chancellor of Oxford, and his successors, that they should have conusance of all pleas moved in the king's court, whereof the one party was clerk of the university and abiding there, and said that he is a clerk, viz. doctor of divinity, and abiding there, and prayed the conusance; and by the opinion of the court he shall not have it, because he is party, and cannot be an indifferent judge in his own cause; and per Martin and others, the grant is not good unless it were \* licet idem cancellarius fuerit pars, and if it had those words, yet it is not a good grant, unless the grant extends, that then he may depute or constitute another man to be judge; for he himself cannot be judge and party by these words, licet fuerit pars; and the other*

other justices were in the same opinion. Br. Patents, pl. 15. cites grant; per tot Cur. B H. 6. 19.

it was to be held *before himself*; for a man by justice cannot be his own judge. Br. Patents, pl. 71. cites 21 E. 4. 47.—Where *consuance of pleas* is granted, if the grantee be party, they shall not have consuance without express words, *quod licet fuerit pars*. Ketw. 90. b. pl. 14. H. 22 H. 7. in the case of the Cinque Ports.—If consuance of pleas is granted, and the *defendant himself is bailiff and holds the plea*, it is error. Br. Error, pl. 129. cites 35 H. 6. 54.—Consuance of pleas granted to be held before the *steward of the grantee*, though the grantee was party. Vent. 3. cites Hob. 87. (and adds) *sed vide ibid. in pede*; that even an act of parliament to make a man judge in his own case, would be void. Vent. 3. Mich. 20 Car. 2. B. R.

22. In debt against the mayor of the staple for suffering J. N. condemned in 100 L. to escape; the defendant demanded judgment if the court would take consuance; because by statute the mayor of the staple shall have consuance of all pleas touching the staple; & non allocatur; for it is of an offence done by himself, and does not touch the staple. Br. Jurisdiction, pl. 1. cites 9 H. 6. 19.

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23. The lord of a court baron may have action of debt in his own court, because the suitors are judges there, and not the lord himself nor his steward. Br. Jurisdiction, pl. 117. cites Fitzh. Det. 177.

24. A prescription, that if any cattle are upon the demesnes of the manor doing damage, the lord may distrein them, and retain the same till fine made at his will, this is void; for none shall be judge in his own case. Co. Litt. f. 212.

25. The chamberlain of Chester, being sole judge of equity, cannot decree any thing wherein himself is party; for he cannot be judge in propria causa; but in such case the suit shall be heard here in chancery, coram domino rege. 12 Rep. 113. Hill 11 Jac. Earl of Derby's case.

26. Trespass for taking of a bag of pepper; the defendant justified as servant of the mayor and commonalty of London for wharfage due to them by the custom of London, and that the plaintiff refused to pay it. The plaintiff said, that the custom does not extend to him, because he is a freeman of the city, and ought not to pay wharfage; to which the defendant replied, that the custom extends to him as well as to strangers; and upon this issue was taken; and the question was, if writ shall issue to the mayor and aldermen to certify the custom by the mouth of the recorder, as is usual, or that it should be tried per pais. And upon long debate and argument, it was resolved, that the trial should not be by the mouth of the recorder; because he was to certify what the mayor and aldermen required him, and they are parties, and the cause is their own; wherefore the trial shall be per pais. Resolved also that the venire facias shall not issue to the sheriffs of London nor Middlesex; because the trials there are by the freemen; but it shall be to the county adjoining, (viz.) to the sheriff of Surry. Mo, 871. Trin. 12 Jac. \* Day v. Savage.

Ibid. cites 40 Eliz. B. R. Dr. Ovensdale's case.

Where the parties being at issue upon a way in Canterbury, the ven. fac. did not issue to the officers of the city, though they have the trials of things arising within the city, but it issued to the sheriff

of the county of Kent.—\* S. C. cited 2 Sid. 120. per Glin. in case of Player v. Archer.—Sav. 51. pl. 108. S. P.

27. The admiral, in his patent, has granted to him *bona piratarum*; resolved by all the judges, that the goods of pirates pass by this grant; and not piratical goods. In this case the admiral ought to sue

sue at common law, and not in the Admiralty Court. Jenk. 325. pl. 40.

28. Judgment given by a judge, who is *party in the suit with another*, and so entered of accord, is error, although several other judges sit there and give judgment for the judge who is party. Jenk. 90. pl. 74.

The steward of a court, who has a deputy, can-

not sue in the court before his deputy; and a deputy acts, and of right *ought to act in the name of his principal*. 12 Mod. 690. Hill. 13 W. 3. In case of City of London v. Wood.

The mayor of Hereford was *laid by the heels* for sitting in judgment in a cause where himself was lessor of the plaintiff in ejectment; though by the charter he was sole judge of the court. Per Holt Ch. J. 1 Salk. 396. Mich. 10 W. 3. B. R. Anon. — Farr. 1. S. P. Anon.

And to say that one who is free of the corporation should not be judge,

because he is *to have share of the penalty*, is as ridiculous as groundless: and since this objection has had so little regard with us in B. R. I wonder it should be so much insisted on now, especially since it has been also rejected in C. B. Per Holt Ch. J. 12 Mod. 686. in case of City of London v. Wood. — And he agreed, where the city of London *claims any freedom or franchise* to itself, there none of London \* shall be judge or jury; for there they claim an interest to themselves against the rest of mankind. Per Holt Ch. J. 12 Mod. 687. Hill. 13 W. 3. in case of City of London v. Wood.

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31. In several cases the parties may *try their own jurisdiction*, as in the case of the Chancellor of Cambridge, &c. Cumb. 68. Mich. 3 Jac. 2. B. R.

S. P. But if it had been held before the bishop himself, it had been ill.

Vent. 3. Lincoln (Bp.) v. Smith.

Jenk. 40. \* S. C. cited 3 Mod. 303. — Information lies in the court of al-

dermen, though an alderman be grieved; otherwise of the mayor; for he is an integral part, without which the court cannot be held; but the other may be *severed* and he must not sit. 2 Salk. 426. Trin. 2 Annæ, B. R. in case of Queen v. Rogers.

33. Mayor and commonalty of London may limit penalties of by-laws to themselves, but they cannot be sued for in the mayor's court, unless the mayor *could be severed*, and the court held before the aldermen. 1 Salk. 397. 2 March, 1701. \* Wood v. Mayor of London, &c.

34. A *justice of peace* was surveyor of the highway, and a matter concerning his office coming in question at the sessions, he *joined in making the order*, and his name was put to the caption. Per Holt Ch. J. it ought not to be. 2 Salk. 607. Hill. 3 Annæ, B. R. Foxham Tithing's case,

(B) Their

## (B) Their Demeanour.

[1. 1. H. 4. Rot. Parliamenti, numero 97. *The commons pray that the lords spiritual and temporal, nor the justices, be not received hereafter for their excuse to say, that they dare not do nor say the law, nor their intent, for doubt of death, or that they are not free of themselves; because they are more bound of reason to keep their oath, than to doubt death, or any forfeiture.*]

of (B) but the same are left here as found in the original; and what is added here belongs to the said letters of (B) (C) and (D).

The adding the two letters of (C) and (D) seems a mistake, the pleas under those letters belonging all to this title

## (C) Answer.

[1. The king holds all his lords and justices for good, sufficient, and loyal; and that they will not give other counsel nor advice, but what is honest, and just, and profitable for him and the realm; and if any \* will complain in especial time to come of the contrary, the king will cause to reform and amend.]

\* Orig. (Nullay se voet complendre.)

[2. 2 H. 4. numero 37. John Holt, and William de Burgh, so excused themselves.]

[3. 1 H. 4. Rot. Parliamenti, numero 99. The commons pray, that the chancellor, treasurer, clerk of the privy seal, justices of the benches, barons &c. shall not take brokage, presents, nor gifts whatsoever, but shall be content of that which they have of the king.]

## (D) Answer.

[1. If they take dishonestly they shall be punished.]

takes bribes, he shall be indicted for it; and if he be convicted, he shall lose his office, and be fined and imprisoned. Jenk. 162. pl. 7. cites 27 E. 3. F. N. B. 243.

Fol. 94.

If a judge of record

2. By 2 E. 3. cap. 8. no command shall be made under the great or little seal, to disturb or delay common right; and the justices shall proceed to do right notwithstanding such commands.

[578]

The king may send

his letter to stay his own suit, but not the suit of another person, and that by reason of this statute. Br. Prerogative, pl. 15. cites 11 H. 4. 37. — 5 Rep. 40. b. — But notwithstanding this statute the king may, where he himself is party, direct a writ to the justices to continue the suit, and so he did; but the contrary is said to be in plea between two common persons. Br. Prerogative, pl. 117. — And if the party thinketh in his conscience that such command will be made, he may sue forth a writ upon this statute, commanding them to proceed notwithstanding such command. And this is called a writ de procedendo ad judicium, F. N. B. 240. (D).

3. By 18 E. 3. stat. 4. the oath to be given to justices, when they take their places, is to this effect, viz. to serve the king in their offices, to warn him of any damage, do justice, take no bribe, give no counsel where he is a party, maintain no suit, nor deny right (though by command from the king) to procure the king's profit, and

to

*to be answerable to the king in body, lands, and goods, if found in default.*

4. 20 E. 3. cap. 1. enacts that the king's justices shall do right to all without respect of persons, notwithstanding the king's letters or commands to the contrary; and if any such be, they shall acquaint the king and his council therewith; they shall take no fee but of the king, nor give counsel where he is a party; and if they do amiss, they shall be at the king's will in body, lands, and goods.

5. By 20 E. 3. cap. 2. the like is commanded to the barons of the exchequer, and to dispatch business before them without delay.

6. 20 E. 3. cap. 3. enacts that justices assigned by commission, and of assise and gaol delivery, and their associates, shall make such oath as shall be enjoined them by the king's council, or the chancery, before their commissions be delivered unto them.

7. The justices have such pre-eminence, that they ought not to give nor express their opinions before-hand, but only when it comes before them by due original in due form of law; quod nota. Br. Judgment, pl. 157. cites 1 H. 7. 26.

8. The court will not give a judgment which they know would be against the law, although the plaintiff and defendant do agree to have such a judgment given; for the judges are to do equal justice according to their best skill, and not to err wilfully, and against their knowledge, to please the parties. 2 L. P. R. 98. cites Trin. 23 Car. B. R.

### (E) *What Things are too High for the Judges to determine.*

1. 31 H. 6. When it was in question, whether Thorpe, the speaker of the house of commons of parliament, being taken in execution between two sessions, ought to be delivered, of which complaint was made by the commons to the lords, who demanded of the judges, whether in this case the Speaker ought to be delivered by privilege of parliament, the judges answered, that they ought not to determine the privilege of the said high court of parliament. ]

[ 2. 25 E. 3. cap. 2. And because that many other cases of like treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded that if any other case supposed treason which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason 'till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason or felony. ]

[ 579 ]

[ 3. 21 R. 2. cap. 12. The Lord William Thirning, Chief Justice of the common bench, being demanded whether certain things done by the parliament were treason, answered, that the declaration of treason not declared belongs to the parliament. And so said Richil and Clopton. ]



[4. 11 R. 2. cap. 3. In fine it is said, and though that divers points be declared for treason in this parliament, other then were declared by statute before, that no justice have power to give judgment of other cases of treason, nor in other manner then they had before the beginning of this parliament.]

5. 1 H. 4. cap. 10. Where in the parliament of 21 R. 2. diverse pains of treason were ordained by statute, inasmuch as that there was no man which did know how he ought to behave himself to do, speak, or say, for doubt of such pains; it is accorded and assented by the king, the lords and commons, that in no time to come any treason be judged otherwise than it was ordained per le statute de Ed. 3.

6. In the time of H. 1. the justices of gaol-delivery would not proceed in case of the death of a man without the king's writ. 2 Inst. 43. and says, that in the record (which he had there before recited) it appears that W. R. indictatus de morte W. E. non tulit breve regis de bono & malo, ideo retornatur gaolæ, &c.

### (F) Punishable for what.

1. **I** T was presented, that where commission issued to J. N. and another, that J. N. sat alone without the other, and laid fines on people; and because it sounds in error, and to be reversed by writ of error for the error in judgment, therefore it was held that the indictment was void. Br. Indictment, pl. 17. cites 27 Aff. 23.

2. Thorp, judge of B. R. was at the will of the king, for his body, lands and goods, because he had done a thing contrary to his oath 2 L. P. R. 90. cites 40 E. 3.

3. A justice cannot raise a record nor imbesel it, nor file an indictment which is not found, not give judgment of death where the law does not give it; but if he does this, it is misprision and he shall lose his office, and shall make fine for misprision; but it is not felony. Br. Judges, pl. 33. cites 2 R. 3. 9.

Br. Corone, pl. 173. cites 2 R. 3. 9. 10. S. C. and P. and that he shall be indicted

and arraigned.——Judge Ingham was in misericordia regis for causing a record to be raised, and making an amercement of a poor man set at 6 s. 8 d. to be but 2 s. 4 d. 2 L. P. R. 90. cites a Rep. 39.

Where a bill of indictment of felony was found ignoramus, a judge of record procured it to be raised, and to be indorsed, billa vera; this offence is not punishable by the law; for that would tend to falsify and avoid a record. Jenk. 162. pl. 7.

4. No action on the case will lie against a judge for what he does as a judge. Arg. 2 Roll R. 199. cites 26 Eliz. & 27 Aff. 73.

1 Salk. 397, S. P.——6 Mod. 46. per Gold J. Arg.

5. A judge ignorantly condemns a man to death for felony, when it is not felony, in a manor court, which has the franchise of infangthief; for this offence the judge shall be fined and imprisoned, and lose his office; and the Lord shall lose his franchise. These points were resolved in the Star-Chamber, upon an assembly of all the judges there, by the command of king Ric. 3. Jenk. 162. pl. 7.

6. Where judges are limited to the subject matter of their jurisdiction, and they exceed the limits of their jurisdiction, action lies against them;

them; per Powel J. 2 Lutw. 1565. Mich. 4 W. & M. cites Hard. 480. Terry v. Huntington.

[580]

7. If *plea to the jurisdiction* of an inferior court be offered as it ought to be *before imparlance, and upon oath*, all proceedings after shall be void, and the judge and officer shall be liable to *actions*. Per Powell J. 2 Lutw. 1567. cites stat. W. 1. 35.

8. Judge is not answerable to the king, or the party, for mistakes or *errors of his judgment*, in a matter of which he has jurisdiction. 1 Salk. 397. Trin. 12 W. 3. B. R. Greenvelt v. Burwell.

9. All *misdemeanors* of judicial officers are a contempt of the court of B. R. 1 Salk. 201. Pasch. 1 Annæ, B. R. Anon.

10. Among the laws of King Edgar is this, viz. *judex, qui injustum judicium judicabit alicui, det regi CXX's, nisi jurare audeat, quod rectius judicare nescivit*. Decem scriptores Anglicani 872. l. 3.—The same among the laws of Canute. Ibid. 924. l. 2. adds, that—*Et dignitatem suæ legalitatis semper amittat, si non eam redimat erga regem, sicut ei permittetur*. In *Denelaga LAHSTITHES* reus sit, si non juret, quod melius nescivit. Chronicon Johannis Bromton.

### (G) *What a Judge may do Extrajudicially.*

The consent of the parties cannot give a jurisdiction to that

1. **A** Judge may fairly mediate an accommodation, but not put terms on pronouncing sentences, or giving judgments; per Ld. Wright, Pasch. 1705. Vern. 479. in case of Attorney General ad relationem Cossart and Dutry v. Sothon.

court which they had not before. Arg. Sti. 439. Hill. 1654. B. R. in case of Cooks v. Chambers.

See Imprisonment (F).

### (H) *Who shall be said to have Judicial Power.*

None of them are judges of this matter but the chancellor, treasurer and lord privy seal, by those words, for the others are but assistants, and yet if they are not

1. By 3 H. 7. cap. 1. *the lord chancellor, treasurer, or privy seal, or any two of them, calling to them a bishop, a lord of the council, and the two ch. justices, (or two other justices in their absence) upon bill of information put to the chancellor for the king or any other, for maintenance, retainers, embraceries, untrue demeanings of sheriffs, taking money by juries, great riots, or unlawful assemblies, have authority to call before them by writ, or privy seal, the said misdoers, and them and others to examine, and to punish them according to the statutes in that behalf made, in like manner as if they were convicted by due order of law.*

called it is error, because the statute appoints them to be called to it. By all the justices. Br. Judgment, pl. 125. cites 8 H. 7. 13.—So of the \* statute which wills, *that the chancellor and treasurer calling to them two judges, shall reverse error in the exchequer*, there the chancellor and treasurer are judges, and the others are but assistants; by all the justices. Br. Judgment, pl. 125. cites 8 H. 7. 13.—\* 31 E. 3. 12.

(Hr 2)

(H. 2) *Judge or Officer.* In what Cases other Persons, than Judges of the Courts at Westminster, as *Bishop, Sheriff, &c.* shall be said to act as Judges, or only as Ministers.

1. **T**H E *sheriff* in writ of enquiry of waste is † judge and officer, and challenge shall be taken, and if he denys it, error lies, and attaint lies of the verdict. Br. Office and Officers, pl. 4. cites 2 H. 4. 2.

Br. Wast, pl. 58. cites S. C.—  
† Br. Office and Officers,

pl. 9. cites 11 H. 4. 82. S. P.—Br. Return de Brief, pl. 38. cites 11 H. 4. 82. S. P.—S. P. and if the land be \* in a franchise the sheriff cannot make *mandavi ballivo*, &c. For he cannot grant over his judicial power, but ought to enter the franchise and serve the writ, and if he does otherwise it is error; for there he is a judge of the record. Br. Office and Off. pl. 34. cites 11 H. 4. 6. and 11 H. 4. 94. accordingly.—So where *nativo habendo* issues to the sheriff to hold plea of the matter, there he is judge and officer, but where the *nativo habendo* is directed to him returnable in bank, there the sheriff is officer and not judge, note the diversity. Br. Office and Off. pl. 36. cites 11 H. 4. 48.

\*[581]

2. The same law in \* *redisseisin*, and so he shall make the pannel, and yet shall judge it to be quashed if cause be; *quare if the array be challenged for partiality* in the sheriff himself. Ibid.

\* S. P. Br. Office and Off. pl. 34. cites 11 H.

4. 6. and 11 H. 4. 94. accordingly.—S. P. and if he misdoes in it, the party shall not have challenge to the return of the jury, &c. but he shall have writ of error thereof. Br. Office and Off. pl. 37. cites 8 H. 6. 21.—In this case, and in writ of enquiry of waste, the sheriff is judge and officer of record, and therefore if he returns, that he came to the land, the other cannot assign for error, that he did not come to the land according to his return; for he cannot contradict the record. Br. Office and Off. pl. 42. cites 7 H. 7. 4.

3. Where it is written to the bishop to certify bastardy or mulherty, or matrimony, &c. he is only a minister or officer. Br. Office and Off. pl. 1. cites 34 H. 6. 38, 39.

But in jura patronatus, where a church is

litigious, he is judge, note the difference. Ibid.—Br. Quare Impedit, pl. 12. cites S. C.—Br. Costs, pl. 2. cites S. C.

4. In *supplicavit of the peace*, the sheriff may make precept to take the body; for it is not like to *redisseisin*, where the sheriff is judge and officer, but when the *bailiff* has taken the body he shall not take surety, but the sheriff himself shall do it; per Choke; for it is a judicial power given the sheriff by the writ of *supplicavit*, which cannot be assigned over; for the power of a judge cannot be given over. Br. Office and Off. pl. 39. cites 9 E. 4. 31.

5. In examination of a clerk presented the bishop is judge and not officer. Br. Quare Impedit, pl. 91. cites 15 H. 7. 7, 8.

## (I) Judges of Record. Who, and their Power.

See Justices (D)

1. Marlb. 52 H. 3. cap. 1. **A**L L persons (high and low) shall receive justice in the king's court.

Coke, 2 Inst. 103. says that

these words are of great importance; for all causes ought to be heard, ordered and determined before the judges of the king's court, openly in the king's courts, whither all persons may resort; and

and in no chambers, or other private places; for the judges are not judges of chambers but of courts, and therefore *orders, rules, awards and judgments* ought to be made and given in open court, where the parties counsel and attorneys attend, and not in chambers or other private places, where a man may lose his cause, or receive great prejudice, or delay in his absence for want of defence.

The judges of the common law have no ordinary jurisdiction to *examine witnesses in their chambers*; but by *consent of parties* and rule of court they may, upon interrogatories exhibited in writing, take their depositions thereunto in writing; and if occasion be, there may be cross examinations upon interrogatories exhibited, and there may be cross examinations of the party. But some things which a judge of this court doth act in his chamber, as a judge of this court, are accounted as done in court; for it is in order to the proceedings in court. 2 L. P. R. 90, 91. cites Trin. 24 Car. 1. B. R.

2. Justices have power to adjudge, if a man be *within age, or of full age by inspection* of the person; and so they did in debt, where one upon ley gager was challenged for nonage; quod nota. Br. Judges, pl. 5. cites 8 H. 6. 15.

3. *Justices of the bank* may adjudge a thing done before themselves without trial by jury. Br. Judges, pl. 21. cites 34 H. 6. 53.

4. Admission and allowance of the justices ought to be *holden for law*. 2 Inst. 399.

[ 582 ] 5. Wherever a statute gives power to fine and imprison, the persons to whom such power is given, are judges of record, and their court is a court of record; per Holt Ch. J. Carth. 494. Pasch. 11 W. 3. B. R. in case of Dr. Groenvelt v. Dr. Burnell.

## (I. 2) Constituted or discharged. How.

2 L. P. R. 90. cites S. C.—S. P. Br. Judgment, pl. 158. cites I. 5 E. 4. 111.—Br. Brief, pl. 336. cites S. C.—The judges of B. R. and C. B. and the barons of the exchequer are made by patent, in which the word *confirmamus* is used. But the Ch. J. of B. R. is constituted only by writ. Jenk. 123. pl. 49.

I. A Man can not be made a justice by writ, but by patent and commission; but a justice may be discharged by writ sub magno sigillo; by all the justices in the Exchequer Chamber. Br. Judges, pl. 19. cites 5 E. 4. 137.

## (K) Certificate by Judge of what and how.

The court allowed this warrant; for they knew the hand writing of the judge who attested the warrant. By all the judges. Jenk. 174. pl. 45. cites S. C.

I. A Justice of record took a warrant of attorney in the country, and died before certificate of it, and the court received it by the hands of his clerk, by credit without writ; & sic vide discretionem curiæ. Br. Judges, pl. 34. cites 2 H. 7. 10.

2. A justice removed, and having a new patent, or not having one, may certify a warrant of attorney taken by him being a justice, and this is well. Jenk. 69. pl. 31.

## (L) Fees, &amp;c. to Judges.

See Fees.  
(C) pl. 5.

1. *In* special assise the justices are not bound to sit, but by wages of the party. And they may demand more than the party is able to give. And therefore if one refuses the other may sit, but in a general assise, they sit at the wages of the king. Br. Assise, pl. 401. cites 32 H. 6. 10.

\* Br. Fees, pl. 1. cites 34 H. 6. 38 S. P. per Littleton. Nor the chancellor

of England is not bound to make writs, &c. without his fee for the writing, &c.—Br. Cofts, pl. 2. cites S. C.—And yet it is said there by some, that it is no plea for the sheriff to say that he did not serve the writ, because the party did not give him his fee or costs, and so see a diversity between a judge and officer. Ibid.—And that where it is written to the bishop, to certify bastardy; matrimony; or the like, he is only an officer or minister, and he shall do it at his own costs; contra where the church is litigious and he awards inquiry de jure patronatus; for there he is judge; note the diversity. Ibid.—Br. Quare Impedit, pl. 12. cites S. C.

2. By the statute of 18 H. 6. the fees of the judges were to be paid out of the first money which the customers of the customs should receive; and this payment was to be made at a certain day. If the customers die before the day, their executors were liable for so much as they had received. If the king granted to any merchant, to retain so much of the customs in his hands, as should be due by him; the judges in this case might sue the customer or the merchants for their fees; and the king would allow them as much as they had paid; to the one upon account; to the other upon petition. Jenk. 167. pl. 24. cites 1 H. 7. 5. 9.

But at this day the fee of the judges are paid out of the exchequer.

Jenk. 168. pl. 24.—And Philip Basset made justiciar of England, received his pension of

1000 marks a year, out of the exchequer, as did Hugh Bigod his predecessor. Dugd. Orig. Jurid. 20. cap. 7.

## \* Judgment.

[ 583 ]

(A) Judgment. Where a Man may pray and have Judgment against himself.

\* Judicium is quasi juris dictum, the very voice of the law and right, and therefore judicium semper pro veritate accipitur. Co. Lit. f. 48. 39. So long as it stands in force, and cannot be contradicted. Co. Litt. f. 248.

[ 1. ] In action upon the case, upon a promise to pay several sums at several days, if the action be brought for default of payment at the first day, and before any other day of payment incurs and the defendant pleads non assumpsit, and it is found against him, scilicet, that he assumpsit modo and forma. But then the plaintiff would not enter the judgment for fear that he should be barred to have new action upon the same promise, if default be in the other payments, yet the defendant may enter judgment according to the verdict if he will. Mich. 3 Car. B. R. between Shapeland v. Curtis. ]

168.—It is the signing of the judgment, and taxing of the costs by the judge or secondary, that makes the judgment. 2 L. P. R. 104. cites 2 July, Trin. 1650. B. S. because the costs are so mentioned in

in the judgment.——Ibid. 114. says, that *though* a judgment be signed by a judge or by the secondary, yet if it be never entered it is no judgment; for till it is recorded it is no judgment, and the signing of it is but the warrant of the judge or secondary for the attorney to enter the judgment.

† It was ruled, that the defendant might enter the judgment or enforce the plaintiff to be nonsuited. But in the *non-suit* it was entered disjunctively, either to pay costs or *commence de novo*. Lat. 2:6. S. C. by name of Stokeland's case.

Between  
FORTES-  
CUE ET  
AL. V.  
MAYNARD  
ET AL. But

[ 2. If a *verdict* be found for the defendant, though the defendant will not pray judgment, yet judgment shall be given for the defendant at the prayer of the plaintiff, because then he may have his *attaint* against the jury. D. 3 Eliz. 194. f. 34. ]

this reason is not mentioned there.—S. C. cited 2 Saund. 253. And by advice it was ruled accordingly; for otherwise the plaintiff should be deprived of his remedy by writ of error to redress his grievance, admitting that it was erroneous. Mich. 22 Car. 2. Green v. Cole.

L. P. R. 97.  
S. P. cites  
Trin. 22  
Car. B. R.  
For the  
plaintiff  
ought to be  
content  
with what  
the law  
gives him.

3. In an action upon the *case* for undermining the plaintiff's house, whereby a great part of it fell in and spoiled his goods, upon not guilty pleaded, there was a *verdict* for the plaintiff and damages. But plaintiff not being content with his damages, would not enter up the judgment upon the verdict, but brought another action. But the court upon motion, gave leave to defendant to enter up judgment, so as he might plead it to a new action. Hard. 219. Mich. 13 Car. 2. in Scacc. Andrews v. . . .

In an *ejec-*  
*ment* the  
court was  
divided, yet  
upon the  
motion of  
the plain-  
tiff, against  
the will of  
the defen-  
dant, (who  
was in pos-  
session, and  
did not de-  
sire any  
judgment  
at all should  
be given)  
they gave  
judgment  
for the de-  
fendant,

4. A mandamus was granted to admit Mr. Kynaston to the office of alderman, and issue being joined upon the return, at the assizes the defendant challenged the array, to which the plaintiff demurred, and the judge reserved the demurrer to be argued in court; this was accordingly done, but the court not being clear in their opinion, took time to consider of it. In the mean time, the plaintiff being desirous to have the issue tried, and not wait the judgment on the demurrer, moved the court, that upon his prayer the array might be quashed, which the defendant would not consent to (though he had challenged the array at the assizes). The court agreed that the array might be quashed without defendant's consent, but desired it might be by consent, least it might be thought they had allowed of the challenge upon the merits. But afterwards, the defendants not agreeing \* to it, they quashed the array at the instance of the plaintiff without the defendant's consent. Hill. 11 Geo. 2. B. R. Kynaston v. Mayor, &c. of Shrewsbury.

In order that plaintiff might have an opportunity to bring a writ of error. Hill. 11 Geo. 2. B. R. cited in the case of Kynaston v. Mayor, &c. of Shrewsbury, as the case of Thoruby v. Fleetwood.

\*[584]

(B) Where a Man may pray and have Judgment,  
Where Part is found against him.

[ 1. ] In trespass, supposed in two closes, the defendant to the one pleads not guilty, and for the other justifies, upon which pleas they are at issue, and the issue of the not guilty is found for the plaintiff, and damages for this assessed, and the other issue is found for the defendant.



defendant. The defendant upon his prayer shall have judgment against the plaintiff as to the issue found for him, though the plaintiff doth not pray judgment of his issue against the defendant. Dy. 3 El. 194. 34. ]

2. If formedon is brought *against two*, and the *one pleads ne donec pas*, and it is found against him, and after the other pleads that the demandant is a bastard, and it is found for him, the demandant shall recover the moiety; per Nele, which Littleton denied, for the demandant shall be barred against both by the *bastardy* which goes to all; for he has surceased his time, but at the commencement if he had prayed his judgment of the moiety, he might have had it, which none denied. Br. Judgment, pl. 38. cites 15 E. 4. 25, 26.

3. In replevin, the defendant *avowed for rent*. The plaintiff pleaded payment of part, and other issue was for the residue. The first issue was found for the plaintiff, and damages and costs taxed by the jury; but the other issue was found for the avowant. And it was moved that the finding costs, &c. for the plaintiff is void; for when part is found for the avowant, he shall have return and damages and costs, and the defendant shall have return where any part is found for him; and adjudged accordingly. Cro. J. 473. Pasch. 16 Jac. B. R. Dent v. Parlo.

### (C) For whom Judgment shall be given.

[ 1. ] **I**N trespass for entry into his close, and taking of certain boards of timber, the defendant pleaded that he has a close adjoining contiguous to the close of the plaintiff, where the trespass is supposed, and that the tree grew between the said two closes, and that the plaintiff cut it and carried it away into his close where the trespass was, &c. and made it into boards, by which he entered and retook them, &c. To which the plaintiff replied, that the tree grew more in his land than in the land of the defendant; upon which the defendant demurred. Admitting in this case, that they are tenants in common of the tree, and then by consequence that the defendant could not enter into the close of the plaintiff to re-take it, though he might re-take it in another place, so that the defendant is not guilty of the trespass supposed in the taking of the boards, but is guilty for entry into the close of the plaintiff, yet in as much as the plea in bar is intire, and the replication also, and the demurrer upon the whole judgment shall be given for all against the plaintiff. Mich. 18 Jac. B. R. between Masters and Polley. Adjudged upon demurrer against the opinion of Montague. (But quere of this.) ]

[ 585 ]

[ 2. If the plaintiff makes a good declaration in an action of trespass for the taking of goods, and the defendant pleads a prescription for toll in a vill by way of justification, and plaintiff takes issue upon the prescription, and tries it against the defendant by jury, though the prescription is not good, so that the plaintiff cannot have judgment upon the verdict, yet he shall have judgment upon the plea in bar; because this is not good, the plaintiff having a good declaration.

Mich. 13 Car. B. R. between Biss and Stockton, adjudged in a writ of error upon such judgment, and the first judgment affirmed accordingly. Intratur Mich. 12 Car. Rot. 989.]

Cro. C. 420.  
S. C.

[ 3. If an action of *debt* be brought by *five executors, whereof two will not prosecute*, upon which they are *summoned and severed*, and afterwards the other three prosecute the action, being upon an obligation, and the *defendant pleads non est factum*, and this is *found against him*; the judgment may be for the three executors only, who prosecute, without naming the other two who are summoned and severed; for though they continue executors notwithstanding the summons and severance, yet they *are out of court by the severance*. Mich. 11 Car. B. R. between Apprice and Parkhurst, adjudged in a writ of error upon judgment in Bank, and the judgment affirmed accordingly. Intratur Hill. 10 Car. Rot. 716. And when the judgment was affirmed, there was read the certificate of two of the prothonotaries of Bank, that it was the practice in Bank to give judgment in the manner as this is done.]

Fol. 99.

(D) In what Cases after a Verdict Judgment shall not be given upon the Verdict, but upon the Declaration, Plea, or other Part of the Record.

5 Mod. 227.

[ 1. ] N action upon the *case for slanderous words*, there is a *plea in bar*, and a *replication*, and *issue joined*, and a *verdict for the plaintiff*, yet if the defendant had *confessed the action in his plea in bar*, and his plea *insufficient in law*, and *issue upon the replication void in law*, the plaintiff shall have his judgment upon the declaration. Hill. 33 El. Rot. 27. between Lacy and Reynolds, in action upon the case for these words, he is a false knave, and as arrant a thief as any is in Warwick gaol; and after issue and verdict for the plaintiff intratur in hæc verba, et quia videtur curiæ dicti domini regis hic quod prædictus quærens super placitum prædicti defendantis modo & forma prædictis placitatum damna sua occasione præmissorum recuperare debeat et quod prædictus defendens in placito suo prædicto, prout superius placitatum existit, cognovit materias in narratione prædicta superius allegatas & nullam sufficientem materiam in lege in barram sive præclusionem prædicti quærentis ab actione sua prædicta habenda placitavit, ideo consideratum est, quod placitum prædicti querentis superius replicando placitatum & exitus superinde inter eisdem quærentem & defendentem junctus ac processus super eundem exitum superinde factus nec non veredictum prædictum in forma prædicta redditum penitus evacuentur & pro nullo habeantur & quod super cognitione dicti defendantis in placito suo prædicto ac materiis in narratione prædicta superius versus eundem defendentem per ipsum querentem allegatis prædictus querens recuperet damna sua; and writ of damages awarded, et judicium inde pro quærente. Note, a copy of this record was shewn to me by Master Hoddesdon.]

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[ 2. In

[ 2. In debt upon obligation, if the defendant acknowledges the sealing and delivery of the obligation, but that he delivered it to J. S. to be kept till certain conditions performed, and that J. S. delivered it before the conditions performed, and so not his deed; upon which issue is joined, and a verdict that it is his deed; yet the plaintiff shall not have judgment upon the verdict; because it is no good issue, in as much as he could not conclude, and so not his deed against his own confession. But the plaintiff shall have judgment upon the confession of the defendant in his plea in bar, where he has confessed the deed. 9 H. 6. 37. b. per Cur. See 6 H. 7. 11. where it is cited and said, that he might relinquish the issue, and pray judgment, and he shall have it if he will. ]

Br. Judgment, pl. 5. S. C.—Br. Non est Factum, pl. 4. S. C. Jenk. 102. pl. 99. The issue is, deed or no deed, and whether the condition is performed or not, is not

material in this case upon this issue.——When issue is joined on an ill plea, and a verdict for the plaintiff, yet he shall have judgment; for the defendant shall not take advantage after a verdict of his ill pleading. 5 Mod. 227. Trin. 8 W. 3. Jones v. Bedingham.

[ 3. In dower, if defendant by his plea confesses that the baron was seised, that dower, &c. and issue taken upon an immaterial thing, and this is found for the plaintiff, and judgment given accordingly; yet in writ of error the court will take the judgment to be given upon the confession, and not upon the verdict. 22 E. 4. 46. b. per Curiam. ]

Verdict for the plaintiff set aside, and judgment entered by confession on the matter of the

plea. 1 Salk. 173. Trin. 8 W. 3. B. R. Jones v. Bodinham.——After a frivolous plea judgment may be entered as by confession; otherwise if only mispleaded. 1 Salk. 173. Trin. 2 Ann. B. R. Staple v. Heydon.——6 Mod. 1. S. C.

4. If assise gives verdict at large, and concludes upon the seisin and disseisin, yet the court shall adjudge upon the matter, and not upon the conclusion; per Fish. Quod non negatur. Br. Assise, pl. 411. cites Pasch. 32 E. 3. and Fitzh. Assise, 99.

5. In trespass, the plaintiff counted to the damage of 10 l. and the jury found damages 42 l. The plaintiff could not have judgment but of 10 l. as he counted. Br. Judgment, pl. 142. cites 42 E. 3. 3. 7.

6. In assise, if the jury gives a verdict which is dubious, by which the justices adjourn them to Westminster such a day, and there the parties are demanded (as they ought to be) and the plaintiff is nonsuited, there judgment shall be given upon the non-suit, and not upon the verdict, for then it is error. Br. Judgment, pl. 141. cites 47 E. 3. 2.

Br. Error, pl. 26. S. P. cites 47 E. 3. 1.—Br. Assise, pl. 32. cites S. C.—Br. Non-suit, pl. 6. cites S. C.

7. Trespass by A. against B. and C. of taking five boxes with charters, &c. B. pleaded not guilty, and C. made title to himself by gift, and the plaintiff traversed the gift; and so to issue. B. was found guilty; and the issue was found for C.—A. shall not have judgment against B. though the issue was found against him. For between A. the plaintiff, and C. it is found that A. had no title, and the court ex officio ought to give judgment against the plaintiff; per Montague Ch. J. Pl. C. 66. b. in case of DIVE v. MANNINGHAM, cites 7 E. 4. 31. and Fitzh. tit. Judgment, pl. 50. . . . v. Tilly and Woddy.

S. C. cited D. 119 b. pl. 6. Mich. 2 & 3 P. & M. in case of Thrower v. Whetstone — S. C. cited Hob. 14. in case of Norton v. Simmes.

When by the replication it appears, that the plaintiff had no cause of action, there the plaintiff never shall have judgment, though the bar be insufficient.

8. In trespass by lessee for years of beasts taken the defendant said, that the lessor held of him by the services, &c. and for so much arrears he took the beasts, and the plaintiff replied, *riens arriere*, &c. and so to issue, and it was found for the plaintiff. And the opinion of all the justices was, that notwithstanding the defendant had accepted the writ good, yet the plaintiff should not have judgment, but the court would abate the writ; for it appears to the court, that defendant was lord, against whom \* trespass does not lie. For the statute is *non ideo puniatur dominus*, &c. Per Mountague. Ch. J. Pl. C. 66. b. cites 10 E. 4. 7.

As in debt upon obligation with condition to perform covenants in an indenture, the defendant pleads performance of all the covenants generally, where it appears to the court, that divers of them are in the negative or disjunctive, and so the plea in the general affirmative insufficient; yet if the plaintiff replies, and shews a breach of one of the covenants, which of his own shewing is not any breach, upon which defendant demurs, judgment shall be given against the plaintiff; because upon the whole record it appears that he has no cause of action. For the bond is conditioned to perform covenants, and he has shewn no breach to give cause of action, which the law presumes he would have done had there been any. But when the bar of the defendant is insufficient in substance, and the plaintiff replies, and shews the truth of his case, but shews no matter against himself, but matter explanatory, or perhaps not material, there the court shall adjudge upon the whole record, and the count being good, judgment shall be given for the plaintiff for the insufficiency of the bar, without any regard to the replication. As if a man pleads grant by letters patents in bar, which are not sufficient; the plaintiff by replication shews another clause in the said letters patents, which is not material, and the defendant demurs in law; in this case judgment shall be given against the defendant. Et sic in similibus. 8 Rep. 133. Pasch. 8 Jac. C. B. Turnor's case. — als. Turnor v. Lawrence. — And see 8 Rep. 120. b. in Dr. Bonham's case.

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9. In debt upon a bond, they are at issue, and at another day the defendant confessed the deed when the inquest appeared, by which they were charged upon the damages only, and after they came back to give verdict of damages; the plaintiff there shall not be demanded, nor shall he be non-suited; for the judgment shall be now upon the confession, and not upon the verdict; for they were not charged upon the issue, but only of damages as an inquest to inquire of damages, not an inquest upon issue; nota. Br. Non-suit, pl. 61. cites 16 E. 4. 1.

10. In debt upon obligation which was void by the statute 23 H. 6. 10. the defendant concluded his plea with judgment *si attie*, whereas he ought to have said, and so never was his deed, so that the conclusion was ill. Yet Mountague Ch. J. said, that it appearing to them that, upon the matter in law, it was a void deed, the court ex officio ought to give judgment against the plaintiff, though the defendant cannot take advantage; for it \* appears to them that the plaintiff had no cause of action, and therefore they ought to give judgment against him. And adjudged accordingly. Pl. C. 60. b. Mich. 4 E. 6. Dyve v. Manningham,

\* Though in such case the party, defendant, &c. be estopped

by the admission or verdict, yet the court shall not proceed to judgment for the plaintiff; admitted D. 119. b. pl. 6. in case of Thrower v. Whetstone.

11. Defendant avowed 12 Jac. for 20 l. rent, supposing that M. U. was seised of the place where in fee, and granted such rent 28 Eliz. And upon non concessit, the jury found a special verdict, that W. U. was seised in fee, and let that land 23 Eliz. to M. U. for 21 years,

years, and he so possessed, granted that rent, et si, &c. Though the issue be found quod concessit, and so it is for the avowant, yet because it appears that the estate out of which the rent is granted was determined long before the distress taken, so that he had not any title to avow, it was held, that judgment should be for the plaintiff, though the issue was found against him. Cro. J. 442. Mich. 15 Jac. B. R. Harrison v. Metcalf.

12. Where the declaration is good, and the defendant's plea is ill; though the plaintiff joins issue thereupon, and it is found false; yet the declaration being good, the plaintiff shall have judgment. And adjudged accordingly. Cro. C. 25. Mich. 1 Car. C. B. Knight v. Harvy.

13. In an action of trespass, whereto defendant pleaded a bad justification, plaintiff took issue, and defendant obtained a verdict. Plaintiff moved in arrest of judgment, and the court heard counsel on both sides several times, and took time to consider, and in Easter term last made a rule to stay the entry of the judgment on defendant's verdict; and that plaintiff should have leave to sign judgment, the trespass being confessed by the plea. Pending the consideration of the court, defendant died, and last term plaintiff obtained a rule for defendant's executor to shew cause why he should not enter judgment, nunc pro tunc, which rule was made absolute. It was urged for defendant's executor, that plaintiff hath delayed himself. He was to blame in joining an immaterial issue; but per Cur. the party must not suffer by the court's taking time to consider. Notes in C. B. 184, 185. Mich. 11 Geo. CRAVEN v. HANLEY.— cites BAILER v. DELANDER, Trin. 1 Geo. in B. R. TAYLOR v. MATTHEWS. Hill. 2 Geo. in B. R.

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### (E) What Thing will binder a Judgment after Verdict. Intire Damages.

[ 1. ] IF a man brings action upon the case against another upon a custom for not grinding at his mill, whereof he is lessee for years, and alleges that the defendant ground his grain expended in his house, diversis diebus & vicibus between December, 12 Ja. and 4 April, 20 Ja. at other mills, and not at the \* mill of the plaintiff, against the custom, and it appears that the lease of the plaintiff was made long time after the 12 Ja. And upon not guilty pleaded, the jury found for the plaintiff, and gave entire damages. In this case, the plaintiff cannot have judgment; for it shall be intended that the damages are given not according to the law, but according to the allegation of the plaintiff, who laid his damages for the whole. Hobart's Reports 256. adjudged between Harbin and Green. ]

2. Trespass of oyer and terminer of ravishment of ward, battery of servant, and carrying away his goods; it was assigned for error, because the damages were not apportioned by the inquest, nor by the court; sed non allocatur; but the first judgment affirmed. Br. Damages, pl. 109. cites 27 Aff. 35;

Mo. 887.  
S. C.—  
Hob. 189.  
S. C.—  
Cited 2 Lev.  
27.  
2 Saund. 116.  
2 Salk. 663.  
Carth. 387.

\* Fo. 100.

3. Trespass



3. *Trespass* upon the case was brought by three against two, who counted that the *plaintiffs* were *seised* of 14 acres of land in B. and of three acres of meadow there, and that the plaintiffs and those whose estate they have, &c. have had, and ought to have, a way over three acres of the defendants to the said meadow, and that the defendants have disturbed them, to the damage of 40 s. And the defendants took the trespass severally, and traversed the prescription, and so to issue. And found for the plaintiffs to the damage of a mark; and Thirwit pleaded in arrest of judgment, that the trespass of the one is not the trespass of the other, where the defendants took the trespass severally, and the damages are assessed intire, where they ought to be severed. Per Thirne. this is not much to the purpose; but see, whether the manure which a man makes in his own soil, as here, be trespass or not, to have action upon the case. And after, by assent of all the justices, the writ was abated by award. Br. Action sur le Case, pl. 29. cites 2 H. 4. 11.

And it is so in waste upon a writ to enquire of damages. And yet entire damages may be given in waste, when the waste is confessed or not denied to be in all the places, assigned wasted, or when the recovery in waste is upon the grand distress. But it is otherwise, when the waste is charged in several places, and it is so found by the verdict; for in this case several damages ought to be given. Yet if waste be alledged in *locis parvis* or *rescentibus*, intire damages may be given. Jenk. 112. pl. 19.

† S. P. Br. Damages, pl. 6. cites 3 H. 6. 43. And the inquest gave a sum in gross in damages, and by the opinion of the court, they ought to sever the damages.

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5. Forcible entry found for the plaintiff to the damage of 10 l. and costs 5 l. Per Straunge, if the damages are not severed in every action, where a man recovers damages, the justices ought not to give judgment, and if they do, it is error; which was denied, per tot. Cur. Brook says, it seems, that his intent is, that the damages shall be severed from the costs. Br. Damages, pl. 88. cites 14 H. 6. 13.

6. *Trespass* of trees cut in two places, and found for the plaintiff to the damage of 40 s. the plaintiff prayed that he might sever the damages, and so he did; and good per Cur. for fear of error. Br. Damages, pl. 149. cites 22 H. 6. 7.

7. In *trespass* of goods taken against baron and feme the baron pleaded not guilty, and he and the feme pleaded another plea for the feme in justification, and the first issue tried in the county where the writ is brought,

Br. Repleader, pl. 34. cites S. C.



brought, and the other in a foreign county, and both found for the plaintiff, and damages entirely given, where the issue in the foreign county is jeofail; the baron shall have advantage of the jeofail, by reason of the entirety of the damages; contra, if the plaintiff had severed the damages. Br. Damages, pl. 118. cites 5 E. 4. 107.

8. Debt for damages recovered in ancient demesne; the defendant said, that part of the land was frank-fee before by recovery had here in bank; and by some it is a good plea to all, because the damages shall be intire; contra, if they had been severed. Br. Damages, pl. 123. cites 8 E. 4. 6.

9. Assise of land and rent, damages are taxed entirely for both; and per Cur. therefore judgment shall not be given of the damages. Br. Damages, pl. 201. cites 1 H. 7. 23.

10. In covenant; the breach assigned was in two covenants, and it appeared, that for the one he had no cause of action, and for the other he had good cause, and issue was joined upon both, and both found for the plaintiff, and damages intirely assessed. The plaintiff could not have judgment. Cro. E. 685. Trin. 41 Eliz. C. B. Anon.

11. Slander was in these words, thou art a thief, murderer, villain, bloodsucker, bankrupt; the plaintiff had a verdict for him, and intire damages assessed; he had judgment and affirmed in error; for it is all one slander, and not at different times. It is sufficient in this case, if one of the words will maintain an action; as in an avowry for two rents, and one is arrear; so where a writ is brought for two things, and it does not hold for one of them. Jenk. 301. cites 11 Rep. 42. Godfrey's case.——And Trin. 8 Jac. B. R. Lucker's case.

12. In trespass for battery of the feme against three; the defendants pleaded several pleas, and three issues being joined, one jury found all three issues for the plaintiff, and assessed damages intirely to 40 l. and judgment given accordingly in B. R. and upon error assigned, because of the intire damages upon the several issues, judgment was affirmed in the Exchequer Chamber. Cro. J. 384. Mich. 13 Jac. B. R. Matthews v. Cole, Doughty, &c.

13. For damages intirely given the difference is, where a thing is insufficiently laid, for which action may lie, there no judgment shall be given; but where action is brought for two things, for one whereof no action at all will lie, there judgment shall be given; and per Doderidge, where a man can have no action in futuro, intire damage shall be no flaw; secus where he may for the same thing; per Jones J. Palm. 538. Pasch. 4 Car. B. R. Jones v. Powell.

14. A. and B. make mutual assumpsits the 30 Nov. 29 Eliz. to stand to the award of C. of all controversies between them; a judgment among other things was put into the award; an award is made of two things, that A. shall pay 15 l. to B. at a certain day in satisfaction of the said judgment, and that A. shall make a release of all demands to B. until the first of February ensuing the said 30th of Nov.—B. brings an action upon this assumpsit against A. and the plaintiff declares of the said two points broken, and it is found with him,

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him, and intire damages are given. Resolved, that the count was good, although the breach be assigned in two points; for it is not as a penal obligation to perform several things; for in such case the plaintiff in his replication shall assign one breach only; for that is sufficient to forfeit the obligation. But in this case only damages are recoverable; and they are relative to every breach, as in case of many covenants contained in one deed. It was resolved, that the intire damages were ill given, and made the judgment erroneous, because the *release is of more than was submitted* to the award. These damages shall be understood to be given for these two breaches. Understand this case, that *there was no averment* taken by the defendant, *that the other controversies were between the said 30 Nov. and 1 of February.* Jenk. 264. pl. 67. cites MOOR v. BEDLE, 10 Rep. 130 [131. a. &c.] in Osborn's case.

15. *Case, &c.* against a parson, wherein the plaintiff declared, that whereas the sacrament of the Lord's supper was to be administered to the parishioners on such a Sunday, the defendant licet sapius requisit' *refused to admit* the plaintiff; and declared also, that he *refused to admit him on another Sunday, but laid no request on the second refusal*; after a verdict for the plaintiff, and intire damages for both, this was moved in arrest of judgment, and it was arrested accordingly, but no opinion was given, whether the action would lie or not. Sid. 34. Pasch. 13 Car. 2. C. B. Clovell v. Cardinal.

16. In *trespass*; plaintiff declared of *assault, battery, and wounding*; defendant *pleaded as to the force not guilty, and as to the assault and battery, that he was doing such work and plaintiff interrupted him, by which molliter manus, &c. and so to issue.* The jury found defendant guilty *de injuria sua propria*, and so recited the whole declaration of assault, battery, and wounding, (whereas the wounding was not in issue) *et assident damna occasione transgressionis illius ad 20l.* After several debates, it was held by all the court, except Windham J. that it shall be *intended*, that they have given damages *for all that is in the declaration*, as well the wounding, which was not in issue, as for the rest, and so error; for plaintiff might have demurred upon his plea. Sid. 96. Mich. 14 Car. 2. B. R. Calvert v. Arnold.

17. *Want of mentioning particularly a consideration of a second promise*, and intire damages given, will hinder the plaintiff from having judgment. Vent. 27. Pasch. 21 Car. 2. B. R. Moor v. Lewis.

18. Per Cur. where a *continuando in trespass* is impossible, and intire damages, court will intend that nothing was given for the continuando; because impossible. 12 Mod. 24. Pasch. 4 W. & M. Anon.

Action was brought for entering the close of A. and taking the corn of A. and B. and judgment was arrested. 8 Mod.

19. In *trespass for breaking and entering the house of A. B. and taking the goods of C. D. ad damnum ipsorum*; a verdict was given for the plaintiff, and intire damages. It was moved in arrest of judgment, that this action could not be maintained, especially since the jury gave intire damages; for how could the plaintiff, who *had no right to the house, (for that was in A. B.)* recover damages for the unlawful entry, or [how can A. B. recover] damages for the tak-  
ing

ing the goods in which he had no property; for the property of the goods was in C. D. and judgment was arrested. 8 Mod. 370. Pasch. 11 Geo. 1726. Maddox v. Taylor. 370. cites 3 Cro. but no page or case.

(E. 2) Judgment *refused to be given* by the Judges; [ 591 ]  
In what Cases.

1. **A**SSISE was taken in pais, and adjourned into bank, and because the justices saw error in the taking of the assise, therefore they would not give judgment. Quod nota. Br. Error, pl. 113. cites 16 Ass. 6.

2. *Præcipe quod reddat* against a poor man and his feme, who rendered the action, and for the suspicions the court examined them; and it was found upon this, that the demandant had brought the like action against T. E. who vouched an infant, and the parol demurred, and that the tenant had no title nor estate, but after Mich. ultimo, and this was in termino Sancti Mich. and for these suspicions, &c. for it may be that the poor man rendered it by covin between the demandant and him, to defeat T. E. of the land; therefore they respited judgment, and commanded the demandant to sue to the counsel, and as they would, so the court would do; for the justices have been commanded in parliament to be well advised upon such cases. Quod nota. Br. Judgment, pl. 48. cites 39 E. 3. 35.

3. Where a verdict is imperfect, no judgment can be given upon it; but the court will grant a *new ven fac.* to summon another jury to try the cause. L. P. R. tit. Judgment, 98. cites Mich. 23 Car. B. R.—for the parties shall not be compelled to go farther back in their proceedings, than where the error was made; and that was by the jury in finding an imperfect verdict. Ibid.

(F) *Release.* What collateral Act will hinder a Judgment, viz. Release to one of the Defendants. See in Titles Error, Release, &c. [Several Defendants plead several Pleas, &c.]

[ 1. ] **I**F a man in action of trespass against two, and upon several pleas pleaded, and several issues, has a verdict against one of the defendants, he may take judgment against him; and after this judgment he may relinquish his suit against the other; for when he has his judgment against the one, the relinquishing the judgment against the other cannot abate the writ. 14 E. 4. 6. 15 E. 4. 26. 27. Hill. 11 Ja. B. R. Rot. 1355. between \* Parker plaintiff, and Sir John Lawrence and others defendants; after verdict upon not guilty against Lawrence, he took his judgment against the others, and left the demurrer upon justification of the others, and adjudged good in

See (F. 2) —\* Hob. 70. S. C.—One pleads an issuable plea, and the other demurs to the declaration; plaintiff has judgment on the demurrer; in he may re-

inquit a-  
gainst one,  
and have  
judgment and execution against the other. Mo. 624. Trin. 42 Eliz. *Countess of Warwick v. Atwood and Davis*.

[ 2. In *trespass against diverse*, if the defendants plead *several issues*, and *one issue is found against one* of them, if he releases his suit against the others before he has judgment against him who is found guilty, he shall be barred against him also; because a release to the others is a satisfaction of the trespass. 14 E. 4. 6. Trin 15 Ja. between \* Evelie and Sloly, in writ of error at Serjeant's Inn; agreed per curiam (R. but 14 E. 4. 6. is, that the writ shall abate) but it is clearly a bar for the cause aforesaid. 7 H. 6. 21. b. 15 E. 4. 26. b. 27. b. adjudged. ]

\* Cro. J.  
439. S. C.

[ 592 ]

[ 3. The same law in a *writ of disceit against diverse*. 9 H. 4. 3. ]

[ 4. So in a writ of *disceit against diverse*, if he releases to one, who makes default, he shall barr himself of his action against the others. Contra 9 H. 4. 3. ]

Cro. C. 243.  
S. C.

[ 5. In trespass of *battery against two*; the one pleads not guilty, and the other *de son assault demesne, &c.*; and the jury finds against both, and assesses 20 l. damages against one, and 40 l. damages against the other, and costs intire against both; and the plaintiff after comes, and *fatetur se ulterius nolle prosecute against the one*, and takes his judgment for the 40 l. against the other, and all the costs assessed. This is not erroneous, though the costs are intire. Hill. 7 Car. B. R. between Welch and Bishop. Adjudged per Curiam though the nolle prosecute be before judgment; for it is not any release, especially in this case, where none of the pleas go to the whole. Intra- tur Hill. 6 Car. Rot. 954. And then were shewn these precedents Mich. 4. H. 8. Rot. 545. The bishop of Oxford brought action upon the statute of W. 1. *de malefactoribus in parcis against two*, one pleaded a licence, and the other not guilty, and both found for the plaintiff, & a nolle prosecute against one, and judgment against the other. Tr. 3 Car. B. Rot. 1948. Lanman v. Stileman, \* and three others; in *trespass*, the three pleaded a special plea, whereupon special issue was joined, and the other pleaded not guilty, and verdict for the plaintiff, and damages 6 d. and costs 12 d. and plaintiff relinquished his suit against the one, and had judgment against the others for damages and costs. ]

\* Fol. 101.

[ 6. New entries, fol. 303. False Imprisonment, fol. 187. Error, fol. 650. 676. Trespass. ]

And in tres-  
pass against  
two, who  
plead not  
guilty, and  
the one is  
found guilty

7. In trespass against *baron and feme*, the plaintiff cannot relin- quish the suit against the feme, and take judgment against the baron; for as the baron shall be charged by the plea of the feme, so he shall have advantage of the *jeofail* of the feme. Br. Repleder pl. 34. cites 5 E. 4. 108.

and nothing is mentioned of the other, he who is found guilty shall have advantage of it. Ibid. — And in trespass against two, who plead severally, there the first inquest shall give the damages, and there if the first issue be *jeofail*, and after the other defendant is convicted, he shall have advantage of the *jeofail* of the other; because the damages are taxed upon him by the first inquest, and there the first inquest shall not release his judgment against the first, who was party to the *jeofail*. Ibid.

8. In action of *trespass and false imprisonment, &c.* against 3, viz. B. C. and D.—*B. confessed the action, C. and D. pleaded not guilty, but the jury found them guilty jointly, and assessed several damages, viz. 1000 l. as to C. and 50 l. as to D. and likewise 50 l. as to B. And then the plaintiff entered a nolle prosequi as to D. and B. and took his judgment against C. for the 1000 l. The question was, if this nolle prosequi against D. and B. before judgment was in nature of a release, and so a discharge to all. But it was adjudged for the plaintiff in B. R. and affirmed in error in the Exchequer Chamber; and afterwards, in 1 W. & M. the judgment was affirmed in parliament. Carth. 19. Mich. 3 Jac. B. R. Rodney v. Strode & al.*

2 Show. 469. S. C. by name of Rodney v. Strode.—3 Mod. 101. —So in a like action against three, where two pleaded not guilty, and the other justified, &c. Upon the

trial the jury found them all guilty, and assessed damages severally, viz. 20 l. as to him that justified, and 200 l. as to the other two; and the plaintiff entered a nolle prosequi as to him who justified, and took judgment against the other two for 200 l. And the plaintiff had judgment in B. R. which was affirmed in error; for it was held, that the entry of the nolle prosequi had cured the defect of that verdict. Cited Carth. 21. in the case above, as then lately adjudged in the case of Trebarefoot v. Greenway.

(G) Where a *Release, or Nolle Prosequi of Part of* [ 593 ]  
the Thing demanded, will be a Release of all.

[ 1. ] N trespass of *battery and imprisonment, &c.* If defendant pleads not guilty to part, and a justification for the residue, upon which a demurrer is joined, the plaintiff may take judgment for the demurrer by award of the court, in which the law is for him, and enter a nolle prosequi as to the issue. Tr. 15 Ja. in the Exchequer Chamber, in writ of error upon judgment in B. R. per Curiam. ]

[ 2. Old Entries, fol. 654. tit. Trespas. pl. 13. a nolle prosequi for part, and judgment for the residue. Tr. 35 El. B. Rot. 1004. between Linacre and Lydeot, and others, in trespass accordingly. Tr. 9 Ja. B. R. 3301. Lawrence's case in replevin accordingly. ]

3. A. brought *trespass against B. C. and D.*—*B. pleaded not guilty, and so to issue. C. and D. justified.* Plaintiff replied, and demurrer was joined. Pending the demurrer, the issue was tried against B. and damages and judgment against him. After judgment the plaintiff entered a nolle prosequi against C. and D. Defendants brought error, and alleged for error, that the nolle prosequi discharged all the defendants. The court agreed that if the nolle prosequi had been before judgment, it had discharged the whole action, and so it had if the judgment had been against them all, and then the plaintiff had entered the nolle prosequi against the two; for nonsuit, or release, or other discharge of one, discharges the rest. But because here the action was at an end against B. and no judgment had against C. and D. so as they are divided from B. and are not subject to damages found against him, it was adjudged, that he was not discharged, and so no error. Hob. 70. Hill. 11 Jac. in Cam. Scacc. Parker v. Sir John Lawrence, Nevil, and Wood.

Jenk. 309. pl. 87. S. C. and says, that if the nolle prosequi had been entered before judgment against any of them, it had not amounted to a release to them all, but only to a waiver of suit. And where a joint judgment is given against two or three, in

trespass or debt, a release of execution against one takes away the whole execution; for the execution ought to be joint, as the judgment is.

4. Where

4. Where there are several issues, a judgment may be entered as to one, and a *nolle prosequi* as to the other. L. P. R. 114.

See Error,  
(R. b) (S. b)  
(T. b) (U. b)  
(X. b)

(G. 2) Aided by Release of Damages, or what else would make Error.

1. **I**N assise, the tenant pleads a release in a foreign county, by which the assise is sent into bank, to be tried, and the release is found against the tenant; now if the plaintiff will release his damages, he shall have judgment to recover the land immediately, and if not, the assise shall be remanded to inquire of damages. Br. Judgment, pl. 109. cites 6 Aff. 4.

2. *Trespass of trees cut ad valentiam 50 l. and goods carried away ad valentiam, &c. ad damnum, in all to 200 l. and the defendant was acquitted of the trees, and attainted of the goods taken ad damnum 28 l. The plaintiff prayed judgment of all the damages, & non allocatur, in as much as the defendant is acquitted of the trees, and therefore the damages shall be abridged, viz. according to 50 l. out of the 200 l. by which the plaintiff released accordingly and had judgment of the residue.* Br. Abridgment, pl. 27. cites 38 E. 3. 25.

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3. *Debt of 100 l. to the damage of 20 l. the defendant waged his law and failed to perform it; by which the plaintiff had judgment to recover the debt, but not damages as he counted; wherefore he released 10 l. and then he had judgment to recover the debt and damages to 10 l. &c. But it is usual at this day to give judgment of all, if it was in case where the damages are principal, and because the plaintiff had released 10 l. therefore fiat executio but of 10 l. residue only.* Br. Damages, pl. 23. cites 42 E. 3. 11.

\* It should  
be 11 H. 4.  
10. a. pl. 21.

4. *In replevin damages of 10 l. was found for the taking; the party prayed judgment; per Cur. you shall not have it unless you will release part; for as well as we may increase damages, so we may abridge the damages, by which the plaintiff released all except 5 l. But Brooke says, it seems that this is not properly abridging; and it was upon issue tried.* Br. Abridgment, pl. 34. cites \* 31 H. 4. 10.

5. *In detinue of a chest with charters the defendant would have confessed, &c. if the plaintiff would release his damages, and the plaintiff would have released his damages, and could not before judgment, by which the defendant confessed, &c. and the court gave judgment and 20 l. damages, and then the plaintiff released his damages; quod nota, and could not before.* Br. Damages, pl. 138. cites 11 H. 6. 29.

6. *In debt if a man confesses part and denies the rest, the plaintiff shall have judgment of the part and of the damages immediately; but cesset executio; for the costs are entire, and cannot be discussed till the other issue be tried; but if they will relinquish the other issue, he shall have judgment and execution immediately of the part confessed, but shall not have damages nor costs; nota, and so he had there.* Br. Costs, pl. 17. cites 36 H. 6. 13.

7. Where



7. Where two issues are in trespass, and one goes to all, and both found for the plaintiff, there the plaintiff, to be sure, may release his damages for part and have judgment for the rest; for in trespass where diverse pleas are pleaded, and found for the plaintiff, and the damages are severed, the plaintiff may release part and pray judgment of the rest. Br. Trespas, pl. 292. cites 5 E. 4. 124.

8. In debt for arrears of rent the plaintiff declared of more than was due, and for a longer time than upon his own shewing appeared to be due to him; the defendant perceiving this pleaded *nil detinet*, but concluded his plea with *hoc paratus est verificare*, and not to the country, as he ought to do, on purpose that the plaintiff might demur, which plaintiff accordingly did, and had judgment against the defendant for the ill conclusion of his plea; but the plaintiff afterwards finding his mistake entered a remittitur for so much in the declaration as was more than due to him, and took his judgment for the rest; the defendant thereupon brought error in the Exchequer Chamber, and this very exception was taken to the declaration, and many cases cited to prove that the plaintiff might release the surplusage before judgment, which if he had neglected, yet the Court ought to give judgment for so much as was well demanded in the declaration; and that this seemed agreeable to the rule in GODFREY's case, that if a man brings an action for several things, and upon his own shewing it appears, that he cannot have action for one thing, the writ shall not abate for the whole, but he shall recover for what the action will lie, and be barred for the rest. 5 Mod. 214. Arg. cites it as the case of Duppa v. Baskerville.

Saund. 282.  
Trin. 21  
Car. B. R.  
Duppa executor of  
Baskerville  
v. Mayo.—  
Nell. Abr.  
tit. Judgment (C)  
pl. 16. says  
it was adjudged, and  
cites 1  
Saund. 282.  
But Saunders reports  
that the  
Court, and  
Hale Ch. B.  
in particular was  
strongly  
inclined to  
reverse the  
judgment

for another exception, and that upon a proposal by the court for referring the matter to the compromise of the counsel of both sides, the same was assented to by the parties, and so the matter was determined without any judgment. Saund. 287. ——— In TWAITE's case, 5 Mod. 212. Pasch. 8 W. 3. where debt was brought for rent, and the demand was of an intire sum certain, which appeared to be of more than was due, the court was of opinion that plaintiff may recover for the residue.

9. If judgment be given for more than plaintiff demands, the judgment is erroneous; but plaintiff, in entering up his judgment, may enter a remissit damna for part. L. P. R. tit. Judgment 96. cites Pasch. 23 Car. B. R. for to give one more than his due is equally unjust as to deny to give what is his due; and it shall be presumed, the plaintiff best knows what his due is, and will demand it to the full; or if he should not, yet it suffices if he will be content to demand less.

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10. In replevin, &c. the defendant avowed the taking, &c. for so much rent due in money and also for so many hens; and after issue joined, and a verdict for the avowant, it was moved in arrest of judgment for that upon the face of this avowry it appeared, that the hens were not due at the time of the distress taken, and here the damages and costs were intire; but the plaintiff offered to release the damages and also rent for the hens, and take judgment only for the rent in money, which was opposed, unless the plaintiff would likewise release the costs; to which it was answered, that there was no necessity of releasing the costs, and to prove it BYNNS v. NEWTON, Trin. 28 Car. 2. B. R. Rot. 728. was cited, and a copy of the record was produced,

produced, where in the like case the rent was not due, and all the damages were released, and the avowant had judgment for the residue, and also for all the costs, and the court was of that opinion in the principal case, wherefore the avowant entered a remittitur of all the hens and the damages, and took judgment for the rent in money. Carth. 437. Hill. 9 W. 3. B. R. Morrice v. Golder.

(H) *How.* In what Cases it shall be *Conditional.*

[ 1. ] *I N right of ward*, if the ward be *within age* the judgment shall not be conditional to recover the value of the marriage if he be married, but *only to recover the ward and damages*; but if the ward be married in the mean time, he shall have *scire facias* to recover the value found. 45 E. 3. 16. b. ]

Br. Detinue  
de Biens,  
pl. 4. cites  
S. C.

[ 2. In *detinue* the judgment shall be conditional, that is to say, to recover all the things and damages, and if any thing be lost, then, that he shall recover the value of it. 3 H. 6. 43. ]

[ 3. So in *detinue of charters* the judgment shall be conditional. 3 H. 6. 43. 7 H. 6. 31. M. 21 Jac. B. R. Intratur 21 Ja. Rot. 862. between Haywood and Peters in a detinue for an obligation, judgment given to recover the obligation, or so much in damages, and not to recover the obligation with damages if it may be bad, and if not, all in damages, as it ought; and therefore it was reversed in writ of error, because upon this judgment the sheriff may give to him the obligation, or so much in damages at his pleasure. ]

The judg-  
ment

should be to  
recover the

ward, and if he be married, then such damages. Br. Judgment, pl. 52. cites 36 H. 6. 2. 3. per Littleton; but Prisot Ch. J. expressly denied it; for he should recover the less damages and the body, and therefore shall have execution and if the sheriff returns that he is married, then he should have *sci. fa. of greater damages*, and thereupon he should have another judgment and execution, &c. Ibid.

Littleton  
said that the  
judgment  
in detinue  
is to reco-  
ver the  
thing de-  
manded,  
and if lost,  
the value,  
which Pri-

[ 5. In a *detinue*, if judgment be given upon a *nihil dicit, non sum informatus, or by default*, or such like, the judgment may be, *quod recuperet the thing demanded or the damages*, and it is good, though it be not to recover the thing, *si haberi poterit, & si non* the damages because it may be made certain by the writ of enquiry of it, and the first is but an award and the judgment not final till the second judgment. Mich. 21 Ja. B. R. agreed per Curiam between Peeters and Hayward. ]

Prisot Ch. J. denied expressly, and said, that in *detinue, or in debt against executors*, he shall have judgment of the thing demanded, and shall have execution, and if the sheriff returns that the thing is *lost, or destroyed, or alienavit* against the executor, there the plaintiff shall have *sci. fa.* in the case of the value, and in the other to have execution against the executors de bonis propriis. Br. Judgment, pl. 52. cites 36 H. 6. 2. 3.

\* [596]

Cro. J. 681.

\* Fol. 102.

[ 6. In a *detinue*, if judgment be given upon *verdict quod querens recuperet the thing demanded, or the damages found* for the value with

with the damages found for the detinue, and the award of execution is so also, though the writ of distringas be well, scilicet, *si haberi poterit & si non, &c.* yet it is not good but is erroneous. Mich. 21 Ja. B. R. between Peeters and Hayward, adjudged in a writ of error and the judgment so given reversed. The which intratur Trin. 21 Jac. Rot. 862. ]

7. In forger of deeds in *D.* in the county of *K.* to the disturbance of his possession in the county of *K.* and in the county of *E.* and they were at several issues, and the jury of the one county found for the plaintiff and taxed the damages severally, as they ought, for the one land, and the other conditionally, that if the other issue in the other county be found for the plaintiff; and after the plaintiff had judgment to recover upon the verdict conditionally, but that execution should cease till the issue was tried in the other county, and judgment given upon it, by which at another day the plaintiff said that he would not further sue this issue in the other county, by which he had execution in the first county of the damages and costs found there, and not of those damages and costs which were given conditionally in the other county, which is not yet tried; quod nota inde bene. Br. Judgment, pl. 35. cites 21 H. 6. 51.

Br. Executions, pl. 53. cites S. C.

(H. 2) How. Of Affets Quando acciderint.

See Executor (B. 2)

1. *D E B T* against an heir who pleaded that he had nothing but a reversion expectant on an estate for life, the plaintiff joined with him and took judgment upon the confession, and to have execution when the reversion falls in possession; per Holt Ch. J. in delivering the opinion of the court. 7 Mod. 43. Trin. 1 Annæ, B. R. in the case of Smith v. Angell.—Cites Herne's Pleader, 307.

So if he pleads *rien per descent*, the plaintiff may have judgment presently and

*sci. fa.* when affets descend. 8 Rep. 134. in Mary Shipley's case.—And a special writ shall issue to extend the whole land; and it seems that this was the law before the statute of W. 2. 18.

(H. 3) Given of one Thing by the Name of another.

1. *I N* affise, the judgment was that the plaintiff recover the tenements put in view, where the affise was of rent; and yet good; and the writ of attainr was formed accordingly, and well by award. Br. Judgment, pl. 71. cites 30 Aff. 24.

(I) How it shall be given. In what Cases Nil Capiat per Breve.

[1. *I F* upon a bar pleaded it be found for the tenant, the judgment shall be, quod plaintiff nihil capiat per breve. 3 H. 4. 3.]

Br. Judgment, pl. 14. S. C.

—When judgment is given against the plaintiff either in bar of his action, or in abatement of his writ, &c. the judgment is all one, viz. nihil capiat per breve, and it appears by the record, whether the plea did go in bar or to the writ. Co, Litt. 362. a.

Br. Judgment, pl.  
14 S. C.

[ 2. So it shall be if the writ abate for false Latin. 3 H. 4. 3.]

[ 3. So it shall be if writ abate for want of the year, day, or place in the count. 3 H. 4. 3. ]

4. Where a special plea is to a declaration and a demurrer to that plea, and judgment for defendant, the judgment must not be that the plea is good in law, because that would be a perpetual bar to the plaintiff; but it must be quod querens nil capiat per billam; and then he may amend his declaration and bring action de novo. L. P. R. tit. Judgment, 113.

5. The defendant in error pleaded a release of errors and upon a demurrer it was doubted what judgment should be given; for the first judgment being erroneous the Court could not affirm it. But per Cur. a nil capiat per breve shall be entred. 3 Salk. 214. Trin. 1 W. 3. B. R. Kirte v. Clifton.

6. In debt upon bond if the defendant pleads auterfoits acquit in an action upon the same bond, and the judgment was, that the defendant should recover damages, et eat inde sine die, this is naught, without saying further quod querens nil capiat per billam; because *dismission* is no judgment in a court of law. Holt's Rep. 397. cites 3 Salk. 213. per Holt Ch. J. Hill. 6 W. 3. B. R. in Banbury's case.

See Abatement.

(I. 2) How. Against the Plaintiff. *That the Writ shall abate, or that Demandant shall be barred.*

1. **E**NTREY in the quibus of disseisin done to himself against two, the one appears at the grand cape, and the other makes default after default, and he who appears at the grand cape pleads jointenancy with a stranger, and tenders his ley gager of non-summons; the plaintiff maintains his writ, that the two disseised him and took the profits, and his action is brought within the year, and the other said that he did not disseise him, which is found against the plaintiff, judgment shall be that the writ shall abate, and not that the demandant shall be barred, and yet the disseisin in bar had been a good plea; but as here it comes upon the plea in maintenance of the writ; nota the diversity. Br. Brief, pl. 236. (bis) cites 14 H. 6. 3.

(K) How it shall be given. [And in what Cases two Judgments shall be given in the same Action.]

[ 1. ] N an information by a common informer upon the statute of recusancy, though the sum to be recovered is to be divided into three parts, yet one entire judgment shall be given for the whole. M. 13 Jac. B. per Curiam between Saint John and Grevill.]

2. Debt against three by several præcipes upon one obligation in which all were bound & quilibet in toto; they confessed the action by attorney,

attorney, and the plaintiff had judgment to recover all in common, quod nota, and not severally. Br. Dette; pl. 30. cites 41 E. 3. 9.

3. Where the jury appears and have day till the next day, or where a judgment is to be given, and the justices said, that if the defendant casts protection the next day, the judgment shall be entered this day, but where no protection, nor such act comes, it shall be entered the day after; and so see that judgment may be given *nunc pro tunc*, or *tunc pro nunc*, and well. Br. Judgment, pl. 85. cites 7 E. 4. 27.

4. In diverse actions a man shall have two judgments; as in dower, the tenant says that he has been all times ready to render dower; the demandant shall recover dower immediately, and the issue shall be of the damages, and another judgment thereof after. Br. Judgment, pl. 122. cites 13 E. 4. 7. per tot. Cur. except Brian.

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And in writ of *mesne* the defendant says that nient dis-  
traine

in his default; the plaintiff shall recover his acquittal immediately, and issue shall be of the damages, and another judgment of it after; per tot. Cur. except Brian. Br. Judgment, pl. 122. cites 13 E. 4. 7. ——— And in *quare impedit* the defendant pleads that ne disturba pas, the plaintiff shall have writ to the bishop immediately, and writ to enquire of damages, and judgment thereof after; per tot. Cur. except Brian. Br. Judgment, pl. 122. cites 13 E. 4. 7.

5. Every judgment must not only be compleat, but also formal; and therefore if a *quo warranto* be brought against the defendant for usurping royal franchises, and the courts should give judgment, that he has no title, yet unless they go on and say *quod abinde excludetur* it is ill; per Holt Ch. J. 3 Salk. 213. Hill. 6 W. 3 B. R. in Banbury's case.

6. If *trespass* is brought of trespass done in lands belonging to such an house, though it appears at the trial that the plaintiff has no title to the house, yet the court cannot give judgment to turn him out; because it was not judicially before them; per Holt Ch. J. 3 Salk. 213. Hill. 6 W. 3. B. R. in Banbury's case.

(L) At what Time it shall be given. [Where presently for the Debt, &c. on Plea, but not for the Damages till the other Plea tried.]

[ 1. ] N *assise*; if upon adjournment in B. the one party makes default; before the court shall give judgment of the principal they shall award the assise for damages; because all shall be one record, and the judgment shall not be rendered by parcels. 17 E. 3. 21. b. ]

[ 2. In action of *wast* if defendant demurs upon the count and this is adjudged against him, yet he shall not have judgment for the land till the treble damages are found; for they are the principal. 34 H. 6. 8. ]

[ 3. In *trespass* against several, if one pleads and is found guilty by inquest, plaintiff may have judgment against him immediately, and execution shall cease till the others are attaint. 44 E. 3. 3. 7. b. adjudged. Contra 10 H. 6. 10. ]

S. P. and have pro-  
cess against  
the other  
Br. Tref-  
pass, pl. 44.

cites 44 E. 3. 3. ——— Br. Judgment, pl. 89. cites S. C. ——— Br. Executions, pl. 117. cites 22 E. 3. 2. and 44 E. 3. 7. and \* 15 E. 4. 25, 26, and 21 E. 4. 59. 82. ——— \* Br. Judgment, pl. 38. cites S. C.

—Br. Damages, pl. 78. cites S. C.—S. P. Br. Judgment, pl. 82. cites 20 E. 4. 1.—Br. Brief, pl. 385. cites S. C.

See Presentation  
(A. d) pl. 3.

[ 4. In *quare impedit* against the ordinary and others, and the ordinary pleads that he claims nothing but as ordinary; judgment may be presently against him, that plaintiff should have writ to the bishop before the plea in bar of the others tried. 8 H. 4. 22. b. ]

S. P. for the inquest is intire. Br. Judgment, pl. 144. cites 10 H. 6. 9. 10.—Br. Damages, pl. 135. cites S. C.

[ 5. In *cosinage* by coparceners, if the release of one be pleaded in bar, and she pleads *non est factum*, and the other goes to issue upon the title, and it is found for her, and damages assessed, yet she shall not have judgment till the other issue tried; for if it be found for the other demandants, they shall recover in common, otherwise but a moiety. 10 H. 6. 10. adjudged. ]

In debt upon a joint-bond against two, and one confesses the action and the other pleads to the writ, the plaintiff recovered the writ of the debt immediately against him who confessed the action, and so see debt severed. Br. Judgment, pl. 87. cites 4 E. 2. 87.

[ 6. When a thing intire is severed by plea, judgment may be given immediately of that which is so severed. 44 E. 3. 18. ]

\*[599]

[ 7. As in *scire facias* to execute a judgment of annuity, if the parties are at issue for part of the arrearages, and it is to be adjudged against the defendant upon demurrer for other part, judgment may be of it immediately. 44 E. 3. 18. ]

Fol. 103.

[ 8. But such judgment can not be in writ of account. 44 E. 3. 18. ]

Holt said, the cases in 2 Roll. 103. about damages are not law; for you may sever the damages for several causes; as for

[ 9. In *scire facias* by the king to repeal letters patents of a market, if they are at demurrer for one day of the market, and at issue for the other no judgment shall be upon demurrer before the issue tried; because the jury shall give damages for the whole. 11 H. 4. 5. b. ]

[ 10. The same law in writ of entry for cause of the damages. 11 H. 4. 5. b. ]

[ 11. The same law in a trespass for cause of damages. 11 H. 4. 75. b. 38 E. 3. 10. b. ]

two trespasses. So, where there is a demurrer for part, and issue for part. *Quia conveniens est quod fiat unica taxatio damnorum*, it is to be understood, that it must be done by the same jury, whether it be joint or several damages. Comb. 353. Hill. 8 W. 3. B. R. in case of Lord Gerard v. Lady Gerard.

Br. Judgment, pl. 4. S. C.—As in debt of 40 l. and declared of

[ 12. In debt upon contract and obligation, if defendant confesses the action for the obligation, and wages his law for the contract, judgment shall be given immediately to recover the debt upon the obligation. 3 H. 6. 37. b. ]

30 l. by obligation, and 10 l. by contract, the defendant confessed the obligation, and tendered his law of the 30 l. and the plaintiff prayed his judgment of the debt and damages presently; per Marten, of the debt you may, but not of the damages till the law be done or failed; by which he demurred upon the law, and the court adjudged it against him, wherefore he had judgment immediately of the 30 l. and of the damages thereof; *quod nota, demurrer by policy*. Br. Damages, pl. 5. cites 3 H. 6. 37.—Br. Debt, pl. 202. cites S. C.—Br. Judgment, pl. 4. cites S. C.—So where the defendant confessed the obligation, and pleaded *nihil debet* to the rest. Br. Judgment, pl. 150. cites 42 E. 3. 25.—So in debt of 10 l. the defendant confessed all except 40 s. of which he staved acquittance, and the plaintiff prayed his judgment, by which it was awarded that he recover 8 l. and be barred of the



the 40<sup>th</sup> for he *durst not confess the acquittance*; for then the writ is abated in toto; per Cur. quod not. And it seems that he might have *demurred upon the acquittance*, and then had judgment of the rest also. Br. Dette, pl. 5. cites 3 H. 6. 48.

[ 13. But he shall not have judgment for the damages 'till the *issue* is *waged or determined*; because he may make default at the day of the *ley-gager*, and so he shall recover damages twice upon one and the same original, which is inconvenient. 3 H. 6. 37. b. 38. Curia. 18 H. 6. 26. ]

Br. Judgment, pl. 4. S. C.—  
Vid the note at pl. 12.

[ 14. In debt; if *defendant confesses parcel of the debt, and pleads to issue for the residue*, the plaintiff may have judgment for that which is confessed immediately, if he will release the damages. ]

Br. Judgment, pl. 4. cites 3 H. 6. 48.—

S. P. But he shall not have judgment of the damages 'till the issue be tried, though it be in case to have damages to be severed. Br. Judgment, pl. 105. cites 22 H. 6. 48.—Ibid. pl. 150. cites 42 E. 3. 25.

[ 15. So it seems he may have judgment for the principal immediately. 18 H. 6. 26. ]

16. In *nusance* it was said, that in *trespass against two*, if the one be *attainted* of the trespass before the other appears, the plaintiff shall not have judgment 'till the other be convicted also, unless he will *relinquish his suit against the other*. Br. Judgment, pl. 128. cites 50 E. 3. 11.

17. If an *ill bar be adjudged good*, and the *demandant reuerfes it* by writ of error, he is restored to his action. Vide elsewhere, whether in such case the court did not award that the demandant shall recover; Brook says, it seems so. Br. Error, pl. 7. cites 9 H. 6. 38, per Rolfe.

18. In writ of *mesne*, the defendant pleaded, that *not distrained in his default*; there the plaintiff shall recover by his acquittal immediately, and damages when the issue is tried. Br. Damages, pl. 196. cites 13 E. 4. 6. [ 600 ]

19. Note, there be some *pleas in bar*, upon which the plaintiff shall have present judgment, Heath's Max. 57.

As, where in covenant to perform

*divine service*, the defendant pleaded, that *the chapel was decayed*; so, in *curia claudenda*, if the defendant plead *sufficient inclosure*, or in *warrantia chartarum implede*; or in a writ of *mesne*, *non distr.* in his default; or upon the plea of *riens arrears in annuity*; or upon *ne surcarga pas in admessurament of pasture*; or *ne disturba pas in a quare impedit*, &c. Heath's Max. 57. cites 16 H. 7. 19.

## (L, 2) Given, at what Time in General, upon the Pleadings.

1. [ If plaintiff demurs to the defendant's plea, and defendant joins in demurrer; if plaintiff will not maintain the demurrer; judgment shall be given against him. L. P. R. tit. Judgment, 100. cites Trin 24 Car. B. R. for thereby it is implied, that he confesses defendant's plea to be good, and consequently that he has no cause of demurrer thereto.

See (L)  
(M.2)(M.  
3)—Ab-  
sence.—  
Appear-  
ance (E).

(M) At what Time. [*Immediately, upon what Plea of one of the Defendants.*]

In debt up-  
on a joint  
bond  
against  
two, one  
confessed

[ 1. ] **I**N *ravishment of ward against diverse, if one be found guilty to such damage, the plaintiff may have judgment against him, of all, relinquishing the suit against the other. 29 E. 3. 24. b. ]*

[ 2. If in an *action against two one confesses the action, yet if the other pleads a plea which goes in destruction of the whole action, demandant shall not have judgment against him who confessed it, 'till the other tried. 7 H. 6. 34. ]*

the action, and the other pleaded to the writ, the plaintiff recovered the moiety of the debt presently against him who confessed the action. Br. Judgment, pl. 87. cites 4 E. 2. 87.—Br. Det., pl. 375. cites 4 E. 2. and Fitzh. tit. Judgment. 229.

[ 3. In *debt against two, if one confesses the action and the other pleads a release, plaintiff shall not have judgment against him who confessed the action 'till the issue tried. 7 H. 6. 33. b. ]*

Br. Trial,  
pl. 37. cites  
7 H. 6. 33.  
—If one  
pleads a bar  
which goes

[ 4. In *dower against two, if one confesses the action, and the other pleads ne unques accouple in lawful matrimony, demandant shall not have judgment against him who confessed, 'till the issue tried, For it goes to the whole. 7 H. 6. 34. ]*

to the whole, and the other says, that he is and always has been ready, &c. to render dower, the demandant shall recover immediately against him, and not wait the trial of the other plea. Br. Trial, pl. 37. cites 7 H. 6. 33.

[ 5. So in *dower, if one confesses the action and the other pleads an assignment of rent out of the land, &c. in lieu of dower; this ought to be tried before judgment against the other for the moiety. For it goes to the whole. 7 H. 6. 34. ]*

Br. Trial,  
pl. 37. cites  
7 H. 6. 3.  
that he  
shall recover it immediately.

[ 6. In *formedon against two as heir, if the one confesses the action and the other pleads bastardy in the demandant, he shall not have judgment 'till it be tried. Contra, 7 H. 6. 34. ]*

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[ 7. In *assise of a rent against two, if the one pleads in bar, upon which it is demurred, and the other pleads that the plaintiff has purchased parcel of the land out of which it issues, though the demurrer be to be adjudged for the plaintiff, yet he shall not have judgment against him 'till the other matter enquired. 34 Aff. 15. adjudged. ]*

[ 8. In *præcipe quod reddat against two, if the one makes default, and the other confesses the action, yet demandant shall not have judgment for the moiety; because it may be, that he who makes default is tenant of the intiertry. 7 H. 6. 34. ]*

[ 9. In *præcipe quod reddat against two, if the one makes default after default, and the other pleads a plea which goes to all the action, the demandant shall not have judgment immediately for the moiety. Contra, 7 H. 6. 34. ]*

[ 10. 14

[ 10. In a trover and conversion, if the one pleads not guilty, and the other defendant pleads a special plea, upon which the plaintiff demurs, the court may give judgment upon the demurrer before the issue tried. Mich. 10 Ja. between Baldwin and Taylor adjudged, Tr. 14 Jac. B. R. adjudged Hedley's case. ]

11. In annuity, the defendant said, that he had been all times ready to pay, and yet is, and the plaintiff had his judgment to recover the annuity and the arrears due before the writ, and pending the writ, and his damages. Br. Judgment, pl. 91. cites 2 H. 4. 3.

12. In debt; for part they were at issue, and for the rest the defendant tendered it, and the plaintiff received it, and therefore he took nothing by his writ of this part and not of the whole. Br. Judgment, pl. 21. cites 11 H. 4. 55.—and cites 9 E. 3. per Herle, that judgment ought not to have been given 'till the issue had been tried, and then to have given judgment for the whole; because the defendant shall not be twice amerced. Ibid.

But he said, that in præcipe quadred-  
du, if they are at issue for part and confess the rest, the defendant shall reco-

ver his part immediately, and the action shall stand for the rest. Br. Judgment, pl. 21. cites 11 H. 4. 55. and 9 E. 3.

(M. 2.) Where a Verdict is given against one Defendant, In what Cases Judgment shall be given immediately, with Stay of Execution, till the Issue is tried against the others.

1. NUSANCE was against three, and two appeared; and the one pleaded one plea and the other another plea, and the third made default; and it was found for the plaintiff, and that the third, who made default had nothing in the franktenement; and the opinion of the court was, that the plaintiff should recover against the two, notwithstanding the default of the third. Br. Judgment, pl. 140. cites 46 E. 3. 24.

2. If in formedon against two, the one makes default after default and the other pleads release of all actions; the demandant shall have seisin of the land of the one moiety, yet the release goes to all; per Littleton, quod Choke concessit, contra in \* trespass against two, for in plea of land the land may be severed, but in trespass the damages shall not be severed. Br. Judgment, pl. 38. cites 15 E. 4. 25 & 26.

\* S. P. But if the plaintiff will release his suit against the other, he may have execution also. Quod nota. Br.

Damages, pl. 78. cites S. C.

3. Quare impedit against two; the plaintiff recovered against the one, and had writ to the bishop and damages for half a year, but cesset execution 'till it be tried between the plaintiff and the other; for otherwise the writ shall abate against the other. Br. Judgment, pl. 82. cites 20 E. 4. 1.

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Br. Brief, pl. 385. cites S. C.—  
Br. Quare impedit, pl.

137. cites S. C. for he cannot recover the presentation against the others, when he has the presentation by the first judgment.

(M. 3) *Cesset Executio.* Where there is *one Defendant only, who pleads several Pleas, and one is found against him, in what Cases the Plaintiff may have Judgment with Cesset Executio.*

Br. Dette, pl. 11. cites S. C.—S. P. Br. Damages, pl. 77. cites 22 H. 6. 48. and says, that it is the same of costs. — Br. Dette, pl. 100. cites 22 H. 6. 47. S. P. — So in *decisions of charters* where he confesses part and denies the rest; quod nota. Br. Damages, pl. 22. cites 42 E. 3. 8.

1. *DEBT* of 10 l. and counted upon two obligations, and the defendant acknowledged the one and denied the other, and of that which was acknowledged he had judgment to recover, and for the damages he shall stay 'till the other be tried: quod nota bene. Br. Judgment, pl. 139. cites 42 E. 3. 8.

2. Debt of 40 l. whereof 20 l. was upon a lease for years, and the rest by obligation; they were at issue, and the first issue found for the plaintiff, and pending this, he prayed judgment of his damages, and would respite the debt and the costs 'till the other issue be tried; but it is said, that first he ought to release his costs; nevertheless, quære if it be not mis-reported; for it seems that it should be, that he prayed judgment of the debt, and respited the damages and costs; quære, for it is said there, that unless he does so, he shall stay 'till the other issue be tried; quod nota bene inde. Br. Judgment, pl. 145. cites 32 H. 6. 4.

3. In debt, where the defendant says as to parcel, that he has been at all times ready, and yet is, to pay, and brings the money into court, and to the rest pleads in bar; the plaintiff may have judgment of the parcel confessed immediately, and of damages; for the court may tax them; but cesset executio till the other issue be tried; for the costs shall be entire which cannot be discussed till the other issue be tried; per Prisot, but per Danby he shall stay from judgment till the other issue be tried, by reason of the damages. Br. Judgment, pl. 53. cites 36 H. 6. 13.

4. Debt in bank of a contract made in London; the defendant pleaded nichil debet per patriam to part, and release of the rest made in Middlesex; upon which they were at issue, and the release found against the defendant, and the plaintiff prayed his judgment immediately, before the other issue tried, and had it, but cesset executio, 'till the other issue be tried, quod nota. Br. Judgment, pl. 39. cites 14 H. 7. 7.

(N) When a Plea is good for Part, and ill for other Part, How Judgment shall be given.

If a plea to the whole answers but part, it is demurrable; if a

[ 1. ] *N trespass cum averiis, scilicet, equis vaccis porcis & bidentibus, and pulling down a hedge if the defendant pleads quod all, and then justifies only with horses, and gives no answer to the trespass with the other beasts, and as to the pulling down the hedge he makes*

*makes a good justification, and plaintiff demurs, and the plea is not good, because he doth not make any answer to the trespass with the other beasts, judgment shall be given against the defendant for the whole, as well for trespass with the beasts as for pulling down the hedge. Pasch. 15 Car. B. R. between Blockley and Skinner; per Curiam adjudged. Intratur Hill. 14 Car. Rot. Quere this; for it was several pleas; it seems that the judgment ought not to be given against the defendant for pulling down the hedge.]*

*plea to part answers but part, the plaintiff must take judgment, for the rest. 1 Salk. 179. Weeks v. Peach.*

(N. 2) When a Plea, &c. is good for Part and ill for Part, *In what Cases Judgment shall be given for what is good,*

1. *[N. debt upon the statute 37 H. 8. of usury for lending 40 l. corruptive against the form of the statute; and that such a day he lent 20 l. &c. against the statute, but does not say corruptive; defendant pleaded non debet and found against him. It was moved, that plaintiff should not have judgment for either of those sums, for want of the word corruptive; but all the court held that it being good for part, he shall have judgment for that part; for being for several sums it is in nature of two several actions, and so though it be void for the one, it is good enough for the other; it being only a misprision in his writ or count. Cro. J. 104. Mich. 3 Jac. B. R. Woody v. . . . .]*

*But otherwise it is where one brings an action for two things and shews by his own confession that for the one he had not any cause of action, or is to bring another ac-*

*tion. Ibid. cites 10 H. 6. 5. 41 E. 3. 2. 9 H. 6. 10. 9 H. 7. 3. 21 H. 7. 34 D. 369.—And it was held that if in the principal case, the defendant had demurred upon the declaration, it had been good for the one and the plaintiff should have had judgment for that part. Cro. J. 104. Woody's case.—So in debt against an executor upon an obligation of testator and upon a simple contract, it is good for the obligation. Ibid. in Woody's case.*

2. Defendant *avowed for 5 l. rent due such a day, and for 80 l. nomine pœnæ for non-payment, but laid no actual demand of the rent, and concludes that for the same 85 l. he did distrain, &c. the court resolved, that this was insufficient for the pain, which could not be forfeited without actual demand of the rent; and yet the return was adjudged, because he had just cause to distrain for the rent, and they appeared to the court to be several. Hob. 133. Mich. 13 Jac. Howell v. Samback.*

3. In bill of debt against an attorney, the defendant counted upon three bonds of so much each: upon oyer of the condition it appeared that one of them was not payable till after the action brought; the jury found for the plaintiff and assessed intire damages and costs; and per Cur. he cannot have judgment in form as it is found; but upon release of damages and costs, judgment was given for the two first bonds only; for though the bill was of an intire sum, yet it appeared by the count that they were as several demands; so the whole suit is not falsified by the plaintiff himself; for it is as several demands and suits. Tamen quære if it had been so by original. Hob. 178. Andrews v. Delahay.

*Brownl. 68. 14 Jac. C. B. S. C.—S. C. cited Saund. 286. in case of Duppa v. Mayo.—5 Mod. 213. in Thwaites's case —7 Mod. 88. in case of Grips v. Ingledew.*

4. If there are three replications, and the last of them is superfluous by

by concluding to the country, and the defendant demurs to them generally, it was said by the court that the last being superfluous, and the other two being sufficient, the plaintiff shall have judgment upon those which are material, and the last is not to the purpose. Saund. 338. Mich. 21 Car. 2. in case Hancock v. Proud.

5. If an action of covenant be brought, and divers breaches assigned, some good and some ill, if the defendant demurs upon the intire declaration the plaintiff shall have judgment for those breaches which are well assigned, and shall be barred for the residue. Arg. and of such opinion was all the court without any difficulty. 2 Saund. 380. Trin. 23 Car. 2. in case of Pinkney v. the Inhabitants of East Hundred.

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6. In an action by a common carrier on the statute of hue and cry the count was of a robbery of 29 l. in money and of goods of the value of 39 l. but did not shew the particulars of the goods, nor that they were his own, the defendant demurred to the whole declaration, and the plaintiff's counsel admitted the declaration insufficient as to the goods, but as to the money judgment was given for the plaintiff, and he entered a remittit dampna for the goods. 2 Saund. 379. Trin. 23 Car. 2. Pinkney v. the Inhabitants of East Hundred.

See (F) pl.  
1.—Error  
(R. b.) &c.

(O) In what Cases a Judgment may be *hastened*.  
[ By releasing the Damages either to a sole Defendant, or to one where there are several. ]

[ 1. ] **I**N assise, if the tenant pleads a release in bar, and it is found false, if he will release the damages, he shall have judgment to recover the land immediately, and in the roll shall be entered, *quod petens petit quod non inquiratur de damnis*. 22 E. 3. 4. b. ]

[ 2. In assise against diverse, if judgment be to be given against one upon his plea, if the demandant release his damages he shall have judgment against him to recover the land at his peril, though it may be that another of the defendants is tenant; but this is at the peril of the demandant; for if another be tenant, and demandant enter upon him by force of this recovery, he is a disseisor. 43 Ass. 11. adjudged. 44 Ass. 33. adjudged. 44 E. 3. 23. ]

[ 3. In ravishment of ward against diverse, if the one be found guilty to a certain damage, the plaintiff may have judgment against him immediately, releasing his suit against the others. 29 E. 3. 24. b. ]

[ 4. In action of waste, if the defendant demurs upon the count, the plaintiff shall have judgment immediately for the land, if he release the damages, though the damages are the principal. 34 H. 6. 8. adjudged. ]

[ 5. In trespass against diverse, if the one pleads and be found guilty, the plaintiff may, upon his prayer, have judgment against him, releasing his suit against the others. 44 Ass. 33. 44 E. 3. 24. admitted, 22 Ass. 59. 29 E. 3. 24. b. accordingly in ravishment of ward. ]

So where  
one was  
found guilty  
and the  
others not,  
and the  
plaintiff

had judgment against him who was found guilty. But Prisot would not grant execution till the plaintiff had released his suit against the others, nor capias for a fine for the king was not suffered till a release. Br. Trespas, pl. 165. cites 15 E. 4. 25.

[ 6. In



[6. In trespass against diverse, if one pleads a special plea upon which it is demurred and the other pleads not guilty, and after judgment is given for the plaintiff upon the demurrer, and a writ to inquire of the damages served and the damages found, the plaintiff may have judgment against him for those damages and relinquish his action against him who pleaded not guilty. Tr. 14 Ja. B. R. adjudged between Hedley and Sir Anthony Mildmay.]

7. Trespass against two, who are at issue, and the issue is tried against the one before the other, by which the plaintiff prayed judgment against him, and released his suit against the other, wherefore it was awarded that he recover his damages against the first, & quod capiat. Br. Trespass, pl. 45. cites 44 E. 3. 7.

So in trespass against two, the one makes default, and the other confesses

the action, here the plaintiff may relinquish his suit against one, viz. him that made default, and proceed against the other which confessed or pleaded in bar; because this suit is only in point of damages; but it is otherwise in an assumpsit; for there a man may be tricked; per Doderidge J. 2 Bull. 53. Mich. 10 Jac. Anon.

8. *Decies tantum*; the plaintiff ought to sever his damages against each defendant, and for not doing it they were in the opinion to have awarded a new inquest, and therefore the plaintiff released his damages, and had judgment. Br. Damages, pl. 30. cites 44 E. 3. 36.

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9. Trespass against baron and feme, the baron pleaded not guilty, and the feme pleaded a foreign plea, triable in a foreign county, which is jeofail; yet the plaintiff cannot relinquish the plea of the feme and pray judgment against the baron upon the first plea; for he shall have advantage of the jeofail of his feme, because damages shall not be severed, but all shall run upon the baron; for the baron shall be charged by the verdict against his feme, if it be good, and so shall have advantage of jeofail if it be ill. Br. Judgment, pl. 77. cites 5 E. 4. 108.

So in trespass against two, who plead severally, the first jury shall give damages for both, and there if the one be jeofail and the other be perfect

issue, yet the plaintiff shall not relinquish the issue which is jeofail and take judgment against the other, and this by reason of the entierty of the damages. Br. Judgment, pl. 77. cites 5 E. 4. 108.

10. Trespass against two, who pleaded not guilty, and at the venire facias the one appeared, and the other made default and the other pleaded arbitrement after the last continuance, and the plaintiff imparled to it, and had the inquest against the other, and found for the plaintiff, and he prayed judgment against him, and would have relinquished his suit against the other, which could not be before judgment; for then he shall abate his own suit, but after judgment he may relinquish his suit against the other, which was ruled by all the justices; by which he had judgment against him who was found guilty, and relinquished his suit against the other. Br. Trespass, pl. 331. cites 14 E. 4. 6.

The plaintiff shall not have his judgment against one, and relinquish his suit against the others, unless they are severed in the suit, as by process pleading or

demurrer; but yet in those cases he shall not release to one before judgment, but after judgment he may. Br. Judgment, pl. 77. cites 5 E. 4. 108.—And in trespass against two who plead not guilty there he cannot sever his judgment, but after judgment he may sever his execution or release it. Br. Judgment, pl. 77. cites 5 E. 4. 108.

11. In trespass against three two pleaded gift of the plaintiff, and so to issue, and process against the jury, who appeared and the plaintiff also; the one of the two defendants made default, and the court

So if each pleads a release, and it is found recorded against one

to the damage, &c. per Brian. Br. Trespals, pl. 165. cites 15 E. 4. 25.

recorded the default, and the third in proper person came and pleaded a concord, &c. and the inquest was taken by default and passed for the plaintiff; and upon long argument the plaintiff had judgment to recover against those who are convicted, before the plea of the concord which goes to all was tried, and that execution cease till the other plea be tried; and immediately the plaintiff released his suit against the other, and had execution immediately; quod nota. Br. Judgment, pl. 38. cites 15 E. 4. 25, 26.

(O. 2.) Judgment against whom. Where two are sued and one acquitted.

1. **I**T was agreed that in debt upon an obligation against two, who plead *non est factum*, and it is found the deed of the one, and not the deed of the other, there the plaintiff shall recover against the one whose deed is found; quod nota. Br. Barre, pl. 10. cites 40 E. 3. 35.

2. In *præcipe quod reddat* against two, the one pleaded in bar for his part, and the other pleaded another plea in bar which goes to all, as bastardy in an action auncestrell, &c. yet if this be found for him, and the other against the other, there the other shall lose his part. Contra in action personal; for there the plea which goes to all shall be first tried, and shall serve both if it be found for him. Br. Barre, pl. 7. cites 9 H. 6. 46.

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And if the one in trespass pleads to issue a plea which

3. In trespass against two, the one confesses the action, and the other pleads arbitrement which is found for him, yet the plaintiff shall recover damages against him who confessed the action, and shall be barred against the other; per Jenney. Br. Trespals, pl. 165. cites 15 E. 4. 25.

goes to part, and a *venire facias* is awarded and returned, and the other pleads another plea after, which goes to all, if the first plea be found against that defendant, and the plea of the other is found for the other defendant, the plaintiff shall recover against the one, and shall be barred against the other; per Jenney. Br. Trespals, pl. 165. cites 15 E. 4. 25. — And in trespass against two, the one confesses the action, and the other pleads a release of all actions, the plaintiff may have judgment against him who confessed, and may release the suit against the other; per Littleton. Br. Trespals, pl. 165. cites 15 E. 4. 25. — S. P. for in trespass the damages cannot be severed; per Choke. Br. Judgment, pl. 38. cites 15 E. 4. 25, 26.

4. In a writ of entry in the quibus in nature of an assise brought against the mother and her son within age, she by attorney, and the son by guardian, pleaded *non disseisvit*, &c. and it was found that the mother disseised the demandant, but that the son did not; and the question was, if judgment should be given of the whole against the mother, or but of a moiety, and the demandant to be in misericordia as to the son? and it seemed by the opinion of the Court, that it should be given of the whole, and so it was done. D. 312. 2. pl. 85. Trin. 12 Eliz. Anon.

5. Covenant against B. and C. on a covenant in an indenture, artificially to erect an house, &c. judgment was against B. by default; C. pleaded that he and B. had artificially erected, &c. and so to issue, and found for C. A writ to inquire of damages was moved for against B. because the act to be done was to be done by both, and B. is condemned

demned of non-feasance by the judgment; but the court denied it, and held that B. should not be charged with any damages; for it appears that the covenant is performed, and C. shall have costs against the plaintiff. Sid. 76. Pasch. 14 Car. B. R. Boulter v. Ford.

6. If one bring *debt against two executors* and they plead *no assets*; but upon issue joined it is found that one had assets at the time of the action brought, but that the other had not, the plaintiff shall have judgment to recover the debt against that executor who was found to have assets, and a nil capiat per billam shall be entred against the plaintiff as to the other executor who was found to have no assets. L. P. R. tit. Judgment, 101. cites Mich. 23 Car. B. R. for the possession which one executor has of testator's goods is not the possession of the other, and so one may have assets and the other not.

(P) By Prayer.

For 105.

[ 1. ] *In a warrantia chartæ brought against an heir upon a warranty made by his ancestor, if the defendant pleads rians per discent the plaintiff may pray judgment immediately, to recover the warranty pro loco & tempore.* M. 5 Ja. B. ]

2. *Debt brought of 20 l. by obligation, and the rest for money lent, and to the obligation the defendant confessed, therefore the plaintiff had judgment immediately of it, and to the rest he pleaded to the country. The plaintiff prayed judgment of the damages of that which was confessed, and could not have it till the other be tried; and after at nisi prius of it the plaintiff was non-suited, and yet at the day in bank he shall have judgment of the damages of that which was confessed, and might have had it at first if he would have released the suit of the rest; and so he recovered debt and damages upon the same original upon which he was non-suited.* Br. Damages, pl. 25. cites 42 E. 3. 25.

3. *Debt; and counted part upon a lease in London, and part upon a lease of other tenements; as to the first they were at issue in London, and to the rest were at issue in a foreign county, and the first issue found for the plaintiff in London to the damage of 20 d. and costs 20 s. and the plaintiff came and relinquished the other issue, prayed judgment of the costs and damages and debt found in London, and had it by advice, and released the rest of the debt.* Br. Judgment, pl. 156. cites 16 H. 7. 17.

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4. *Indebitatus assumpsit; the defendant pleaded an attainder of high treason in disability: the plaintiff replied a pardon prout per exemplificationem inde, &c. (which was held good) et petit judicium & dampna sua; to which it was demurred, and held that there was a discontinuance by the misconclusion of the replication; for an ill prayer of judgment is as none.* 1 Salk. 177. Pasch. 2 W. & M. Bisse v. Harcourt.

See Bar. (P. 2) Judgment in one Action, where a Bar in other Action. *In General.*

*Contra if he does not sue execution; for then the first tenant remains tenant. Br. Ibid.*

1. **I**N replevin it was said for law, that if *several præcipes quod reddat* are brought against N. and the one recovers and *jues execution*, the other *præcipe quod reddat* is abated. Br. Brief, pl. 110. cites 7 H. 4. 27.

2. In debt against executors, who pleaded *plene administravit*, and found for them, the plaintiff shall be barred; and yet if goods come to him after by recovery, or otherwise, he shall have a new action, and the first judgment shall not be a bar. Br. Barre, pl. 23. cites 19 H. 6. 37.

*So in form—when the tenant pleaded warranty*

3. So of debt against the heir, who pleads *riens per descent*, and the plaintiff is barred, and after assets descend. Br. Barre, pl. 23. cites 19 H. 6. 37.

*with assets*, and it is found accordingly, by which he is barred; and after the assets is recovered from him by elder title; the heir shall have formodon again, and this matter is no bar to him; *contra* it seems if he alien the assets and dies, his heir shall be barred. Br. Barre, pl. 23. cites 19 H. 6. 37.

(P. 3) Judgment in one Action against one Obligee, &c. Where a Bar in another Action against another Obligee, &c.

Br. Dette, pl. 138. cites 4 H. 7. 8. S. C. —By the judgment against the one, it is

1. Where three are obliged & *quilibet in toto*, and the obligee impleads one and recovers, it is no bar as to another of them if he impleads another; but *e contra* if the plaintiff has execution against the first. And so see that recovery with execution against the one is a bar; *contra* of a recovery only; note a diversity. Br. Barre, pl. 71. cites 4 H. 7. 7.

become of record to him, but as to the others it remains a writing as it was before. 6 Rep. 40. h. Mich. 8 Jac. B. R. in Sir Anthony Mildmay's case. —And the nature of the obligation is not so changed by the recovery, but that the plaintiff may, upon the same obligation, have action against the others. Arg. 6 Rep. 45. in Higgins's case. —And Ibid. 46. a. This case was well agreed for the reason above, and notwithstanding the judgment, the others may plead *non est factum*.

2. In trespass against B. the count was that B. *simul cum J. S. vi & armis made assault, battery and imprisonment upon him* the 1 June. The defendant pleaded not guilty as to the *vi & armis*, and as to the assault, &c. he said, that the plaintiff brought the like action against the said J. S. for the same trespass, and had judgment of damages and execution of them, and because it appeared upon the pleading that it was the same action, he demanded judgment *fi actio*. The plaintiff demurred, and it was urged that the offence was several, and therefore plaintiff might have several actions, and was not barred by the judgment in the other action; but all the justices resolved, and adjudged the bar good, and that defendant shall not have

have two satisfactions for one and the same trespass. 2 Roll. R. 224. Hill. 18 Jac. B. R. Honey v. Rice.

\* (Q) *In what Actions Judgment being given, shall be Bar of others. [Actions of another Sort.]* See Bar.

[ 1. A recovery in assise is no bar of a formedon. 6 H. 4. 3.]

[ 2. If the gift be defeated in assise by judgment, it shall be a bar of the formedon. 6 H. 4. 3. Quere. ]

A recovery in assise is a bar in another assise,

but not in mortdancestor; nor is a recovery in mortdancestor a bar in a writ of right. 4 Rep. 43. Arg. cites 44 E. 3. 45. 9 H. 7. 23. as to the first point. 5 Aff. 1. as to the 2d. point, and F. N. B. 5. 30 Aff. 5. 11 E. 3. Entry 56. as to the last point. — And if a man be barred in formedon in descender, yet he may have formedon in reverter or remainder; because it is an action of a more high nature; for in this case fee simple is to be recovered. 6 Rep. 7. b. in Ferrers's case, and cites 5 Rep. 33. Robinson's case.

3. After the plaintiff in appeal of mayhem has recovered damages for the mayhem, he may bring writ of trespass of the battery, and recover damages for the battery. And so see recovery of damages in appeal of mayhem; for the mayhem is no plea in trespass for the battery; and so it seems that the appeal shall not meddle with the battery, but with the mayhem only. Br. Trespass, pl. 241. cites 22 Aff. 82.

A. brought appeal of mayhem against B. who pleaded in bar, that A. at another time brought

trespass of battery and recovered damages, and averred that the battery and trespass are the same mayhem, upon which the appeal is conceived; and adjudged upon argument, that the plea is good. Mo. 268. Mich. 30 & 31 Eliz. Hudson v. Lee. — Le. 51. S. C. but D. P. — Ibid. 318. S. C. and S. P. — It was objected, that though an action of equal nature will not lie after a former recovery, yet that mayhem is an action of a more high nature than trespass, and therefore not barred by it. As a bar in trespass of goods carried away, is no bar in appeal of robbery, which is more high, as is held 2 R. 3. 14. And this was moved, admitting the appeal was brought for the same thing as the trespass was. But it was further moved, that the appeal is brought for the mayhem only, which is said to be felony and cannot be applied to trespass; and the action of trespass for the battery and wounding does not touch the mayhem, and therefore it was agreed. 22 Aff. 82. that after the plaintiff in appeal has recovered for the mayhem, he may have trespass for the battery; by which it appears that the appeal meddles only with the mayhem. But the whole court resolved the bar good; for in all cases where plaintiff, for a tort or injury, is only to recover damages, he shall not be twice satisfied thereof for one and the same thing; but in both those actions of appeal and trespass, the plaintiff shall recover damages only. And as to the action of trespass for the battery and wounding, not touching the mayhem, they said, that wounding includes the mayhem and more. 4 Rep. 43. a. S. C. — And as to the appeal of robbery, Wray, Ch. J. held it good law, because there the plaintiff shall have judgment against defendant for his life, and not for any damages. Ibid. 43. b.

(Q. 2) Judgment given in one Court, where a Bar to an Action in another Court; And what Judgment.

1. JUDGMENT given in a court baron upon writ of right patent is no plea in assise, unless it be made to be sent into chancery, and there to be exemplified, and be shewn sub pede magni sigilli; for in assise he shall not have day to bring it in. Br. Judgment, pl. 112. cites 28 Aff. 14.

2. If in debt or other action, where the defendant pleads recovery in court of franchise, or that the plaintiff is barred in court of franchise, it is no plea in this court, because it is not of record here; per Finch. which the other justices denied, and said, that he *shall have advantage of the record*; and otherwise it shall be mischief. Br. Judgment, pl. 13. cites 46 E. 3. 17.

Per Cur.  
this does not  
go in bar,  
but to the  
jurisdiction  
of the court,  
because  
that Lon-  
don cannot  
try a fo-  
reign plea,  
Br. Judg-  
ment, pl.  
92. cites 3  
H. 4. 18.

\*[609]

3. Debt in London upon an obligation, and the defendant pleaded *duress at Windsor* and the plaintiff demurred upon it; judgment was given, that he sue at the common law, and that the defendant eat inde *sine die*, and in action brought in C. B. the defendant pleaded this judgment in bar, &c. Thirning said, the judgment goes but to the jurisdiction, therefore no plea; but Birton, Hill, Hank, and Culpeper, held that it goes in bar, because it was given upon a plea in bar; contra where it is given upon \*plea to the writ; for these words (eat inde sine die) shall have relation to the plea or demurrer, and the demurrer supposed was upon a bar; quod nota; but it was not adjudged. Br. Judgment, pl. 16. cites 3 H. 4. 11.—But it should be 12. b. pl. 13.

4. In case upon a promise by A. against B. he recovered 86 l. upon which W. R. and W. S. affirmed a plaint of debt in London, and attached the 86 l. in the hands of B. and had execution. A. brought *sci. fa.* against B.—B. pleaded the said execution upon the attachment; A. demurred; and the plea was adjudged ill; for a duty which accrues by matter of record, cannot be attached by the custom of London. And the law is clear, that judgments in the king's courts ought not, nor cannot, by such particular customs, be defeated and avoided. Le. 29. Trin. 27 Eliz. B. R. Floud v. Perrot. —And there it was said to be adjudged in a western case, that the custom of attachment cannot reach any thing of so high a nature as a record is. Ibid. 30.

5. In *sci. fa.* upon a recognizance in chancery, the defendant pleaded to issue, and was sent into B. R. to be tried, and judgment for him there. Plaintiff brought debt in C. B. upon this judgment, and had judgment. And after brought *sci. fa.* in B. R. to have execution there. Defendant pleaded in bar the recovery in C. B. But the whole Court held it no plea, because one judgment cannot determine another judgment, which is of equal nature; and the plaintiff had judgment. Cro. E. 817. Pasch. 43 Eliz. Preston v. Perton.

(Q. 3) Judgment or Recovery in one Action where a Bar in another, though brought in a different County, of the same Thing.

So assise in S.  
the tenant  
pleaded re-  
covery in an-  
other assise of  
the same

1. *A S S I S E* in the county of B. the tenant pleaded in bar a recovery by assise by him against the plaintiff of the same tenements in the county of O. and that this now plaintiff then tenant, pleaded in bar by release of the ancestor of the plaintiff with war-  
rant,



ranty which was voided by nonage, and this found for the plaintiff, by which he recovered against this plaintiff; *judgment if where he accepted the land to be in the county of O. he shall be now received to say that it lies in the county of B.* And by the opinion of Wilby and Stone if this land was then *put in view*, the plaintiff shall be bound by the recovery, though the lands lie in another county; but *quære*, for per Grene it *cannot be intended one and the same land*. Br. Judgment, pl. 62. cites 18 Aff. 16.——— and so it was said in C. B. anno 24 H. 8. Ibid.

tenements against the same plaintiff in D. and the same tenements put in view, and a good plea; per Cur. though they are in diverse vills;

quod nota. Br. Judgment, pl. 11. cites 44 E. 3. 45.——— S. P. ibid. pl. 115. cites 44 Aff. 19. but Brook says quod mirum, for the land in S. and the land in D. cannot be intended one and the same land; and in the time of H. 8. Shelly Justice was strong that it is not good.——— *Affise of land in N. the defendant said that at another time he himself brought affise of the same land in H. against the same plaintiff, and those lands put in view, and this now plaintiff took the tenancy upon him and pleaded in bar and said that H. and N. were one and the same vill, and known by the one name and by the other, and that A. brought formdon of those tenements, and pleaded certain, &c. and recovered by action tried, and the estate of the plaintiff mesne between the title of the said A. and his recovery, judgment if of such estate [he shall have] affise; to which the other said that each of the said H. and N. were vills of themselves, and so to issue, and it was found that they were several vills, and the seisin and disseisin, by which it was awarded that this tenant then plaintiff recover, and because he has recovered the same lands against the plaintiff himself in H. judgment if affise, and the justices held that this recovery of land in H. is \* no plea in affise of land in N. and therefore they awarded the affise, quod nota; and well as it seems to me, and so held Shelley justice strongly, 24 H. 8. but said here that the contrary is in 19 E. 3. but M. 10 E. 3. agrees with this. Br. Judgment, pl. 66. cites 23 Aff. 16.——— \* S. P. For recovery of land in H. cannot be extended to land in N. notwithstanding that H. be a hamlet of N. For preceipe shall be brought in the vill and not in the hamlet. Br. Judgment, pl. 6c. cites 14 Aff. 9.*

2. A recovery upon bailment in the county of D. is no bar of other [ 610 ] demand of the same chattel in the county of S. upon bailment there. Br. Barre, pl. 29. cites 21 H. 6. 35.

3. So in trespass in Middlesex it is no plea that the plaintiff has recovered for the same trespass in Surry; for it cannot be intended one and the same trespass, and the jury of one county cannot find the defendant guilty in another county upon pain of attain, and this is of battery which is local; but contrary it seems in trespass upon the case upon assumpsit and such like, which are not local; per all the justices and all others. Br. Trespas, pl. 269. cites 4 H. 7. 5.

(Q. 4) Judgment or Recovery in one Action where a Bar in another; being brought by the same or by different Persons.

1. [ N cui in vita, the tenant pleaded that N. brought affise against him pending this writ of a disseisin before the title of the demandant and he came and traversed the action, and found against him by verdict, and the demandant recovered, and so the tenant has lost the tenements pending this writ, judgment of the writ; and because he traversed the action, so no default in him, therefore the writ was abated; Brook says, he wonders that he did not allege that the plaintiff in the affise entred or sued execution, for otherwise it shall not abate the writ by the judgment only, as it seems. Br. Brief, pl. 154. cites 21 E. 3. 39.

So of a recovery by default, for those are the defaults of the tenant. Br.

2. Scire facias against baron and feme who made default; the feme was received and pleaded a recovery by a stranger to the writ by another action, who sued execution; and because the recovery was upon nient dedire and no title alleged, therefore no plea. Br. Brief, pl. 108. cites 7 H. 4. 15.

ibid.———Contra upon title tried, and execution sued. Br. ibid.———But where the one sues execution, and the first tenant remains tenant, there he shall be discharged of the damages where no default is in him; and upon this plea he shall conclude to the writ, and the reason seems to be because it amounts to a special nanture as it seems. Br. Ibid.

But if a declaration be faulty, and defendant takes no advantage of it

3. If a man mistakes his declaration, and defendant demurs, it was said by North Ch. J. that there is no question, but that the plaintiff may set it right in a second action. Mod. 207. Trin. 27 Car. 2. C. B. in case of Lepping v. Kedgewin.

but pleads a plea in bar, and the plaintiff takes issue, and the right of the matter is found for the defendant; in this case the plaintiff shall never bring his action about again; for he is estopped by the verdict; per North Ch. J. ibid.———Or if plaintiff demur to plea in bar, there by his demurrer he confesses the fact if well pleaded, and this estops him as much as a verdict would; but if the plea were not good, then there is no estoppel, and the court must take notice of the defendant's plea; for upon the matter as that falls out to be good, or not, the second action will be maintainable or not; per North, to which all the other justices agreed. Mod. 207. ibid.

4. An action was brought, and there was a fault in the declaration in the not signing of a good breach in a covenant; whereupon there was a demurrer, and judgment given quod querens nil capiat per billam, sed pro falso clamore suo sit inde in misericordia; afterwards the plaintiff brings another action for the same matter, and assigned the breach as it ought to be, whereupon the defendant pleads in bar the former action, and that it was barred by the judgment upon the demurrer; the plaintiff replied, that the judgment was not given upon the merits of the cause, but upon a mistake in the declaration, in not saying [and so set forth how it should have been] the defendant demurred, alleging, that the first judgment was a bar, but the court gave judgment for the plaintiff. 2 L. P. R. 107. cites Hill. 34 & 35 Car. 2. B. R. Rot. 847.

[ 611 ] (R) In what Cases a Judgment will bar a new Action. [In the Case of the King.]  
See Presentation.

[ 1. ] IF a quare impedit be abated by plea it will bar the king to have new action. 3 H. 4. 3. 11. b. ]

[ 2. In quare impedit by the king, if they are at issue upon plea in abatement and found against him, he shall not have new action. 3 H. 4. 11. b. ]

(R. 2) Pleadings. Bar. Judgment in one Action, *how to be pleaded in Bar of another Action; and without Execution or not.*

1. **I**N ward, the defendant pleaded that before this writ purchased *J. N. brought writ of ward against the defendant and recovered the ward by judgment pending this writ, judgment of the writ, and no plea, without saying that he had execution.* Br. Brief, pl. 39. cites 40 E. 3. 7.

2. In debt, if a man *pleads a recovery in plea real or personal*, it is no plea *without saying that he had execution*; for he who recovers and does not take execution upon it, may have a new original. Br. Barre, pl. 11. cites 43 E. 2. 2. and 20 H. 6. 12. accordingly. Br. Tresp. pass, pl. 20. cites 20 H. 6. 11. & 40 E. 3. 27. 39.

3. In *formedon* the tenant pleaded that pending this writ *J. N. had recovered the same land in demand against him by another writ in bank*, judgment of the writ, and admitted for good matter; but *quære if he shall not say that he who recovered had entred upon him?* it seems that he shall for without execution the writ is not abated. Br. Brief, pl. 85. cites 49 E. 3. 20.

4. Trespas the defendant pleaded a recovery in cessavit of the same land against a stranger, and the possession of the plaintiff mesne between the title of the cessavit and the recovery; per Cur. you ought to say, that the possession was mesne between the judgment and the execution. For where the action is founded by reason of the possession as in assise, and the defendant pleads recovery against a stranger, he shall say that the possession of the plaintiff was mesne between the judgment and the execution, but otherwise it is in *formedon*, and the like; for there upon recovery pleaded against a stranger he shall say, that the gift was mesne between the title, the recovery and the judgment; quod nota, by which he said accordingly. Br. Judgment, pl. 83. cites 21 E. 4. 52.

5. The plaintiff recovered, and had damages assessed, and afterwards he brought an action of debt for those damages; the defendant pleaded *that after the judgment the plaintiff had sued forth an elegit, which was served, but he did not mention, that it was returned*; and yet it was adjudged a good plea, because it appears on record, that he made his election, what execution to have. Nels. Abr. tit. Judgment, (D) pl. 1. cites D. 299. This case is D. 299. b. pl. 34. Pasch. 13 Eliz. and that the defendant pleaded in bar, as here, and that

the sheriff delivered the moiety of the land extended to the plaintiff without shewing the return thereof; and then says, *quære if it be bar, and that it seems it is*; for the plaintiff cannot vary in the suing out execution from that of which he has made his election of record, &c. ideo *quære.*

— In *scire fac.* upon a recovery of debt and damages, defendant *pleaded that at another time the plaintiff sued sci. fa. and the sheriff levied the monies, judgment, &c.* And there it is said that *sci. fa.* is not of record till the return of it. Br. Execution, pl. 6. cites 20 H. 6. 24, 25, and 26. — And the same law is said to be of *ca. fa.* anno 37 H. 8. and it is not adjudged in the principal case; but in 21 H. 6. 5. it was reheard again, and there the plaintiff was compelled to answer the defendant's plea, and therefore a good plea, and so it seems upon taking the body upon a *ca. fa.* where no writ is returned; but it was said in 21 H. 6. 5. that in 19 E. 3. it was adjudged no plea *Quæra.*

## (S) When full Judgment is given.

1. **I**F *damages are the principal thing to be recovered, then the full judgment is not given till they are returned; but in debt where a certain sum is demanded it is otherwise.* Le. 309. Pasch. 35 Eliz. C. B. Bighton v. Sawle.

## (T) In what Cases, one or several Judgments shall be given; and what shall be said one, and what several Judgments.

1. **T**R E S P A S S against two de parco fracto and chasing his deer, the one was found guilty at another day alone, without his companion, and the other was likewise found guilty at another day alone, the first not being with him, and so several trespasses, and yet the plaintiff had judgment to recover against each separately, and was amerced against them severally. Br. Judgment, pl. 90. cites 47 E. 3. 10.

2. In debt upon obligation by several præcipes there shall be several judgments, and several damages given, though but only one execution at the peril of the plaintiff. Br. Judgment, pl. 23. cites 14 H. 4. 22.

3. In *detinue* of deeds the plaintiff and the garnishee are at issue which passes for the plaintiff, judgment of the deed shall be against the defendant and of the damages against the garnishee. Br. Judgment, pl. 28. cites 7 H. 6. 45.

A. brings a  
quare im-  
pedit a-  
gainst B.  
and B.  
brings an  
assise of dar-  
rein pre-

4. In *quare impedit* the plaintiff may have writ to the bishop, and writ of inquiry of damages, and so shall have two judgments in one and the same action, so in dower, writ of mesne, and writ of ward; for after the damages inquired, the plaintiff shall have judgment of the damages. Br. Quare Impedit, pl. 132. cites 13 E.

4. 7.

sentment against A. both for one presentment, B. hath judgment in his suit, A. is nonsuit. B. shall have two judgments, both of writs to the bishop, and writs for damages. Hob. 154. in case of Winchcombe. v. Pulleton.

Trespass a-  
gainst two,  
and the  
trespass is  
found to be  
done at se-  
veral days,  
and several  
damages are  
given; the

5. Where an action is against two for a joint trespass of battery, though they sever in plea, yet when they are found guilty of one and the same battery, one judgment only ought to be given for the damages, and the plaintiff ought to make his election against whom he would take his judgment, and so a former judgment was reversed. Cro. J. 118. Pasch. 4 Jac. B. R. Crane and Hill v. Humbersone.

plaintiff shall have two judgments for the damages, and one for the costs, and the plaintiff shall not be amerced; for the day is not material in trespass, so that the action is brought after the trespass was committed. Jenk. 269. pl. 86.

6. A feme recovered in dower, and had judgment and writ to enquire of the damages, (the judgment being by default) and error brought, and pending the error, the tenant in the first action died; the judgment is affirmed, and execution of the lands and sci. fa. against the heir, to shew cause why the demandant should not have damages. And the doubt was, whether damages should be recovered, the tenant dying before they were ascertained. And after several arguments it was adjudged per Cur. that in this case no damages shall be recovered; for the judgment at the time of the tenant's death was wholly compleat as to the land, and not as to the damages. And the judgment to recover the land, and to recover the damages are two distinct judgments. And when the tenant died before judgment given as to the damages, this remained a judgment at common law. Sid. 188. Pasch. 16 Car. 2. B. R. Aleway v. Roberts. [ 613 ]-

(T. 2) In what Court Judgment shall be given. See (U)

1. **W** H E R E error is in C. B. and a writ of error is brought thereof in B. R. there if the judgment be affirmed, execution shall be sued in B. R. Br. Error, pl. 82. cites 15 E. 4. 18. per Catesby. But where error is in the Exchequer, and writ of error brought be-

fore the chancellor and treasurer there, when judgment is given by them, all shall be remanded before the barons, and there execution shall be made by express words of the statute, and there per Urswick Ch. Baron, the plaintiff in writ of error in such a matter was nonsuited. Br. Ibid.

2. If office be traversed in chancery, and they are at issue, and the record is sent into B. R. to be tried, (as it ought) and there it is found for the plaintiff, he shall have judgment there, and the record shall not be sent into chancery again to give judgment there; for the one and the other is coram rege. Br. Judgment, pl. 135. cites 21 H. 7. 35.

3. Scire facias was brought in the petty-bag in chancery, and as to part issue was joined and demurrer joined as to the other part. The record was sent into B. R. to try the issue which was done and verdict given; and then they argued the demurrer in B. R. and B. R. gave judgment upon both. It was objected that the sending the issue higher was, because chancery cannot try it, but that the judgment ought to be given, and the demurrer argued there. But it was, after argument, resolved that the judgment was well given in B. R. upon both, though chancery might have given judgment upon the demurrer, before it came higher. Lev, 283. Hill. 21 & 22 Car. 2. B. R. Jefferson v. Dawson. Mod, 29. S. C.—Sid. 436. S. C.

(T. 3) Given by several. Where one had no Authority.

So an inquisition was found before the coroner of the county, and the coroner of the verge,

1. **I**N redisseisin, error is brought; the error assigned is, that A. who sat with the coroners was not a coroner, and yet gave judgment. This is error. Where two join in judgment, when one of them has no jurisdiction it is error. By the justices of both benches. Nemo debet se immiscere rei alienæ. Jenk. 90. pl. 74. cites 32 H. 6. 27.

where the homicide was in the county; and it was so entered and so certified. This is error; for the record must be believed. Jenk. 90. pl. 74.—So if two persons submit themselves to the extremity of A. and B.—A. B. and C. make the award, it is void; for the judgment of C. might sway the others. Jenk. 90. pl. 74.—And so of a recognizance taken before one who has power, and another who has not power, it is worth nothing. Jenk. 90. pl. 74.

See Error (C. b) (D. b) —Execution (A) (L)

(U) New Judgment, in what Cases to be given, and where, and how.

1. **I**F judgment be reversed in B. R. for error, the party shall proceed there, and shall have execution there. Br. Jurisdiction, pl. 102. (bis) cites 21 E. 3. 46.—and by 9 Aff. 8. he may proceed there or have new original. Br. ibid.

As where the tenant in præcipe pleads an ill bar, and the Court awards that the demandant shall be barred, there in B. R. upon error thereof they shall adjudge that the demandant recover.

2. Writ of error is brought upon an ill issue, and the court seeing that the original was not good, (for it was ex assignatione, where it should be ex dimissione)\* therefore they relinquished the error which was assigned, and abated the writ, quod nota, and they shall give such judgment in B. R. upon the error, as ought to have been given in C. B. if the court there had not erred, be it upon demurrer or issue; for in C. B. the justices ought not to bar the demandant upon an ill original, but if they see it they ought to abate it, though the parties admit it, and ought to give such judgment as C. B. who erred, ought to have given. Br. Error, pl. 105. cites 38 H. 6. 30.

Br. ibid.—And so see that the judgment in writ of error, is not only to reverse the erroneous judgment, and to restore the party to that which he had lost; but to give such judgment as the court who erred ought to have given, quod fuit concessum per omnes, and so the opinion is, that the writ shall abate, though the party admits it, and though it was not assigned for error. Br. Ibid.

\*[614]

3. If a man be outlawed in an action personal, and brings a writ of error, by which the record is removed, and he obtains a pardon, and brings scire facias, the plaintiff may now declare in B. R. notwithstanding that the statute of \* is, that he shall render himself to the prison of the court where the exigent issued; per Fairfax, quod non negatur. Br. Error, pl. 133. cites 1 H. 7. 12.

\* 5 E. 3. 12.

2 Saund. 256. cites S. C. and says that B. R. shall

4. Where a writ in a real action is abated by judgment in C. B. and upon error brought in B. R. this judgment is reversed, and the writ is adjudged good, now B. R. shall proceed upon this writ, and



is not restrained by magna charta, ne curia domini regis deficeret in iustitia exhibenda. 4 Inst. 72.

5. Where a writ of *error* is brought returnable in parliament upon a judgment given in this court, and the judgment is affirmed or reversed in parliament, there comes then an *order from the House of Lords*, directed to this court, *signifying either the affirmation or reversal of the judgment, which affirmation or reversal is entered upon the record* from whence the writ of error was transcribed, so that this court may, if affirmed, award execution thereupon; if reversed, award a writ of sci. fa. for restitution thereupon, if the money be levied, or else *give such judgment thereupon as ought to have been given*. Hill. 23 Car. 1. B. R. For execution ought always to issue out of this court where the judgment was given, upon the affirming thereof; and the writ of error was only to try whether the judgment was good; and not to alter the way in making out of execution. 2 L. P. R. 115.

give such judgment as C. B. ought to have given if they had not abated the writ.

6. In case of an *indictment*, if the *error is only in the judgment*, the indictment shall stand, and new judgment shall be given and entered, and therefore the Court said, that if defendant will hear a new judgment he ought to come here, and they will give new judgment against him. Mich. 16 Car. 2. in B. R. Sid. 219. King v. Pym.

7. Judgment in waft was given in London for the plaintiff by direction of the deputy recorder, and afterwards arrested by the recorder. Upon which the plaintiff brought *error before commissioners, assigned at St. Martin's le Grand*. And among other things it was resolved, that the judges commissioners *ought not only to reverse the judgment in the hustings given for the defendant, by which the plaintiff was barred, and so restore the plaintiff to his action, but ought also to give such judgment, upon the record before them, as the court of hustings ought to have given; and accordingly they gave judgment for the plaintiff upon the first verdict*. 2 Saund. 256. Mich. 22 Car. 2. Green v. Coles.

And though in this case was cited the case in† Dyer, that where a writ of false judgment is brought upon a judgment on a plea of land in ancient demesne, where

the demandant is barred by it, yet the demandant shall only be restored to his action, if the judgment be erroneous, and shall not have judgment to recover possession of the land, because in such case, as the book says, a record shall be of lands of ancient demesne out of the court of ancient demesne, as was urged; yet it was answered by the judges, that the commission directed to them to examine errors, was adapted and accommodated for the city of London, commanding them to do plenam and celerem iustitiam to the parties, which they do not do unless they give judgment for the plaintiff, as well as reverse the judgment given against him; and as the case now is, if they do not give judgment for him, the court of hustings cannot, and so there shall be a failure of right. 2 Saund. 256.——Levinus says, the giving judgment for the plaintiff was by virtue of the words in the writ of error, viz. *et ulterius faciendi quod ad iustitiam pertinet secundum leges regni & consuetudinem civitatis predictæ*. And though no precedent was produced of such thing done before, yet the judges commissioners said, they would presume the customs of London to be according to the common law, if no precedent be shewn to the contrary. Lev. 310. Hill. 22 & 23 Car. 2. Cole v. Green.——† The case wherein this is, and which point seems to be a nota of the reporter, is D. 373. b. pl. 13. Mich. 22 & 23 Eliz. in an Anon. case.

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8. If a judgment be below for the plaintiff, and error is brought, and that judgment reversed, yet if the record will warrant it, the Court ought to give a new judgment for the plaintiff. 1 Salk. 401. Pasch. 1 Annæ, B. R. Anon.

But if the judgment be erroneous, and against the plaintiff on the merits 1 Salk. 401.

of the cause that ought to be reversed, and no new judgment given for the plaintiff. S. C.——If an erroneous judgment be given for defendant, and it is reversed, and the merits appear, for

for the plaintiff, he shall have judgment. Ibid.—But if the merits be against the plaintiff, the defendant shall have a new judgment. So it is in the Exchequer Chamber; for they are to reform as well as affirm or reverse it. 1 Salk. 401. S. C.

Skin. 516. S. C. says that the court declared they would not give a new judgment, upon which the plaintiff resorted to parliament, and there obtained a new judgment upon the record in parliament, the which they carried back thither, after having brought it out of the parliament, in order to lodge it in B. R. but it was never brought into the office; per Holt Ch. J.—Carth. 319. S. C.

9. Judgment in *ejectment* was given in B. R. for the defendant. The House of Lords reversed the judgment. The plaintiff applied to B. R. to enter up the judgment given by the Lords, and it was urged that a judgment must be given either by the Lords or B. R. and that the Lords cannot, because they have only a transcript of the record, and therefore B. R. must, least there be a defect of justice. Holt Ch. J. said, that the Lords have, in judgment of law, the very record before them; for the writ says *recordum & processum*, and not *transcriptum*. And the Court agreed that they cannot enter a new judgment for the plaintiff; because when they have given judgment on the original, they have executed their whole authority, and there is no precedent, that ever B. R. entered a new judgment where judgment given here was reversed in parliament. And afterwards the Lords upon application made to them, entered the new judgment, 1 Salk. 403. Trin. 6 Annæ, B. R. Phillips v. Berry.

S. P. 1 Salk. 262. Mich. 4 W. & M. B. R. Parker v. Harris.—And so was done in parliament on reversal of a judgment given in B. R. Carth. 320. \* S. C.

10. If judgment be given for the plaintiff, and that be reversed in error, the defendant is in statu quo thereby, and no new judgment need be given. But if the first judgment be given for the defendant, and that is reversed, a new judgment must be given to put the plaintiff in possession of what he demands, per Holt Ch. J. 1 Salk. 403. in case of \* Phillips v. Bury.

In ejectment in B. R. If judgment for the defendant be reversed on demurrer B. R. should enter the new judgment; because the Exchequer Chamber could not award a writ of inquiry of damages. But if the judgment was \* given on a special verdict, the Exchequer Chamber upon reversal there, shall give judgment and enter it. 1 Salk. 403. Trin. 6 Annæ, B. R. Phillips v. Bury.

11. As to new judgment in B. R. on reversal in parliament, Holt said, the Exchequer Chamber would be of the same nature of the lords house, being erected in imitation of that jurisdiction, and to supply a defect in intervals of parliament, as is said in the recital of the act; but as to a judgment being given de novo below, there would be a difference where judgment is given upon a demurrer, and where upon a special verdict; where it is upon a demurrer, the courts above ought to give a judgment for the plaintiff, (if they reverse that for the defendant) and then it is sent down, and a writ of enquiry goes, and upon that the court below give a final judgment; but where it is upon a verdict, there if they reverse a judgment they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the court below, and thereupon they ought to award execution; for it is not reasonable to expect the court below should give a judgment contrary to their first judgment. Skin. 514. 516. Philips v. Bury.

\*[616]

12. Where upon a *monstrans de droit* the judgment of the court is erroneous, if the remedy be proper the court ought to give a new judgment. Skin. 615, 616. In the Banker's case.

(W) Relation

## (W) Relation, to what Time.

1. **I**F a writ abates it shall have relation to the return of the same writ, and not to the entire term; so that writ purchased the same term, bearing teste after the same return is good. Br. Relation, pl. 38. cites 7 E. 3. 11. and Fitzh. Brief, 433.

2. In attain, the tenant pleaded, that her baron, party to the writ, died 27th September, judgment of the writ; the plaintiff said, that he is alive, and they had day in crastin. purific. and at the day, the plaintiff confessed that the baron was dead, by which the writ abated, and mesne between the day of the death of the baron, and crastin. purific. the plaintiff brought other attain against the feme sole, and she pleaded, that this was purchased pending the first writ, and because the judgment of the abatement of the first writ has relation to the day of the death, therefore the second writ good, which was purchased before the judgment; for the first was abated in law before. Br. Relation, pl. 9. cites 12 E. 3. 16. [But it should be (21 E. 3. 16.) and there is no such year in the book, as 12th.]

Br. Judgment, pl. 99. cites 21 E. 3. 16. — Br. Brief, pl. 149. cites S. C.

3. In præcipe quod reddat at the nisi prius, if the \* plaintiff is nonsuited and purchases a new writ, bearing teste mesne between the day of the nisi prius, and the day in bank, this is purchased pending the first writ, and therefore was abated, notwithstanding the judgment given at the day in bank; for it shall not have relation to the nisi prius, nota. Br. Judgment, pl. 44. cites 40 E. 3. 38.

\* Orig. (defendant)

4. Special sci. fa. is brought against executors upon recovery against them in writ of debt, and at the day of the writ of nisi prius returned after verdict the justices respite judgment, and writ of error is brought upon the judgment given in the writ of debt bearing teste the fourth day from the return of the writ of nisi prius in the sci. fa. yet this does not respite the judgment in the scire fa. For when it is given it shall have relation to the first day of the writ of nisi prius returned. Br. Relation, pl. 40. cites 10 H. 6. 6.

And where protection is given at a day certain, and the Court takes advantage, and pending this the protection expires, yet the protection shall be allowed; for the judgment shall have relation to the first day when it was allowable. Ibid.—And where default is recorded upon tenant for life, at the day, and after, at another day before judgment, be in reversion prays to be rescinded, he shall not be rescinded. Ibid.—And when a man vouches record, and fails at the day which is recorded, and before judgment he brings in the record, yet judgment shall be given upon the failure of the record; for these judgments shall have relation to the first day, when the court might lawfully have given judgment. Ibid.

5. If a judgment be on a plea in bar, then it shall have relation to the plea, and so be applied to that: but if the plea be to the writ, then the judgment shall be applied to the writ only and not in bar. So that the judgment shall always have relation to the plea. 8 Rep. 62. Mich. 6 Jac. Beecher's case.

6. A judgment shall relate to the + first day of the term viz. the essoign day; for in law it is the first day of the term, and all legal acts shall have relation thereunto: and so a statute acknowledged 22 January, which was mesne between the essoign day and the first day

Cro. C. 102. Stanford v. Cooper. — Hutt. 95. Stanford v. Cooper.—

But in B. R. it relates only to the first day of the \* term. L. P. R. tit. Judgment, 106. —† S. P. Unless there is a memorandum to the contrary, as where there is a continuance of the cause until another day in the same term; per Holt Ch. J. 3 Salk. 212.

\*[617]

7. A rule was made to enter up judgment upon an old warrant of attorney, upon the usual affidavit, that the party was alive two or three days before, and that the plaintiff believed him to be then living. In fact, the party who gave the warrant of attorney to confess the judgment, was dead about two hours before the motion was made for the rule. Upon which it was now moved to discharge the rule, as obtained irregularly, by a surprise and imposition upon the court, for that the warrant of attorney was absolutely determined by the party's death. But all the court were of opinion not to discharge the rule; for though they would not have granted it, had they been apprised of the party's death at the time of the motion, yet being granted, it falls under the maxim, *quod fieri non debuit, factum valet*; and the judgment is made good by relation; for the whole term is considered in law but as one day; and all proceedings in it have relation to that one day, which is the first day; therefore, as the party was alive the first day of the term, that is sufficient to support the rule; and the judgment is well entered up. Mich. 11 Geo. 2. B. R. Chancey v. Needham.

8. A bond was given for 400 l. The obligee died the 13th of March, having made the plaintiffs his executors, who demanded the money from the obligor; but he not being able to pay it immediately, upon the third of April gave a warrant of attorney to confess a judgment for the debt to the plaintiffs at their suit, as executors of, &c. as of the last Hillary term, the next Easter term, or any other subsequent term. Upon the seventh of April they entered up the judgment as of last Hillary term, during all which term the testator was alive. This appearing to the court upon a motion, they were strongly of opinion to set aside the judgment as being ill entered; for the warrant is to confess a judgment at the suit of the plaintiffs as executors, and they have entered it up of a term, when the testator was alive, at which time they were not in being as executors, and therefore could not be made plaintiffs by that description. And though judgment was actually entered in vacation-time, when there were such persons executors as are there described, yet it being a judgment of the preceding term, when there were not, nor could be any such persons in being, it is bad by the rule of relation. Mich. 13 Geo. 2. B. R. Gainsborough v. Folliot. —Note, afterwards the judgment and execution taken out upon it were set aside.

(W. 2) Reversed

(W. 2) *Reversed for Fraud* in obtaining it, and  
How it shall be.

1. DISCEIT upon a recovery by default in quare impedit; the sheriff returned the writ served, \* sc. that the one summoner was dead, and that he had warned the other, who was examined, and said, that he was not at the summons; and the pledges upon attachment upon their examination said, that they knew nothing of the attachment; and the mainpernors upon the distress said, that they knew nothing of the distress. And it was awarded, that the first judgment be reversed, and that he be restored again to his possession, and have writ to the bishop to remove the clerk. Brook says quære well; for it seems there, that the parties were agreed, and that no such judgment was seen before. Br. Disceit, pl. 4. cites 27 H. 6. 5.

\* Orig. in the large and smallest edit. is (sur que) but in the small folio, and the year book it is (s. que).

2. Disceit was brought by B. against C. because C. recovered against him in præcipe quod reddat by default. † And [B] had † process against C. by \* venire facias, and also venire facias against the old sheriff, and against the summoners upon the original, and against the two veiors, and the two summoners returned at the grand cape, and they made default, and the sheriff returned pledges upon them, and distress issued against the first demandant and others, upon which comes the first demandant, (now defendant) and one of the summoners upon the original, and two of the veiors upon the grand cape, and the defendant said, that W. S. who appeared as summoner is W. S. of S. and he, who was summoner, is W. S. of C. And so of the veiors by such an addition, and so of the others, the which matter, &c. And because the summoners and veiors shall not be forced to come at another time, and also it may be that they may die, Prisot, by the advice of other judges examined them, who said, that they knew nothing of the summons; and it was said there, that in Cam. Scacc. it was the opinion of all upon the plea supra, that it shall be tried by examination of the justices, and not per pais, and that judgment in such case was given, quod querens recuperet terram, and that the defendant and sheriff capiantur. Br. Disceit, pl. 5. cites 33 H. 6. 9.

† Orig. (& aver are process vers C. & que recover, per venire facias). — And Cumberford prothonotary said, that 18 H. 6. the judgment was quod querens ad omnia, quæ occasione recuperationis prædictæ amisit, restituatur, and that where he lost damages in the first writ, he shall be restored by those words above, but

where he lost no damages in the first writ, as in formedon, &c. the judgment shall be quod recuperet terram, and that the defendant and sheriff capiantur ut supra. Nota differentiam. Ibid. — And it is said in the end of the case supra of 33 H. 6. 43. that because the defendant at the venire facias, returned against him, did not come to take any averment, therefore the plaintiff recovered, and the judgment was quod querens rebabeat tenementa, and that the sheriff capiatur, and the first judgment is no otherwise reversed expressly, but said, that these words are a sufficient reversal of the judgment, and so see that the plea supra is not rescivable, for it is against the return of the sheriff; for he has returned, that those made the summons by veiors, &c. but quære thereof, for it seems that it stands with the return of the sheriff, for he may summons one sort, and yet another sort may appear. Ibid.

\* [618]



(X) *Reversed in Part, or in all.*

1. **J**UDGMENT in an *annuity* was reversed *as to the annuity and damages*, and good for the *arrears*. Noy. 117. Anon.——cites 14 E. 3. Scire fac. 122.

But per  
Babb. Re-  
cord can-  
not be re-  
versed in  
part for error  
in the original.

2. By a writ of error part of the record may be reversed and stand good in the rest; as where error is in the suing of execution; per Past. quod non negatur. Br. Error, pl. 7. cites 9 H. 6. 38.

*Contra in the process, or in suing the execution.* Ibid. pl. 9. cites 9 H. 6. 46.

Where there is an error in law in a record, and another error in fact, there they may reverse the judgment as to the error in law, and take averment of the rest; per Persey, quod non negatur; and therefore it seems that record may be reversed in part, and good for the rest, and this seems to be where the record is several in itself, as where a man pleads several pleas to several parcels, and otherwise not. Ibid. pl. 27. cites 47 E. 3. 7.

3. A man had judgment to recover 150 l. and released 20 i. of it, and after sued execution, and the other brought an audita querela upon the release, and defeated all the execution. But it is otherwise where such apportionment of such suit is done by act in law; as in 7 Ed. 4. fol. ultimo, the sheriff levied parcel of the debt by fieri facias, yet shall he have an action of the debt for the residue upon the record. Ow. 21. 37 Eliz. B. R. In case of Wright v. the Mayor of Wickham.

4. T. S. was found guilty in an information tam pro rege quam pro seipso, upon the statute of liveries; he brought error, and assigned for error, that the statute 8 E. 4. cap. 2. gives the examination of that offence to the King's Bench and the Common Bench; but because the king may chuse his court to sue where he will for his moiety stet judic. as to the moiety of the king, and the information for that good, but as to the moiety of the party, reversetur. Noy. 117. Anon.——cites 38 Eliz. in the Exchequer, Agar v. Candish.

[ 619 ]

5. In case the plaintiff counted upon two several assumpsits, and upon non-assumpsit it was found for the plaintiff, and damages severally assessed upon the several assumpsits, and costs of suit intirely, and judgment was quod querens recuperet damna sua per jur. assessa nec non 6 l. de incremento quæ in toto se attingunt ad, &c. et defendens in misericordia. In error in the Exchequer Chamber it was held that the first assumpsit was good, and the second void, and the judgment given and damages for the first assumpsit with all the costs good, and so affirmed it; and for the damages assessed for the second assumpsit, and those de incremento intirely given for both, the judgment was reversed. Mo. 708. Hill. 38 Eliz. Reymer v. Grimstone.

Hob. 12. S.  
C. men-  
tions the  
action  
brought for

6. In action for words spoke at two several times, defendant pleaded not guilty, but found against him and several damages; and one intire judgment was given for damages and costs; upon error brought it was held that for part of the words the action lay not; and the justices



justices and barons all conceived that the judgment shall be *reversed only quoad the damages for the words not actionable*, and shall be affirmed as to the costs and the residue; for all the costs are due as well where part of the words are found, as where the residue is found; and thereupon judgment was affirmed \* quoad part, and reversed quoad the residue. Cro. J. 343. Pasch. 12 Jac. in Cam. Scacc. Jacob v. Mills.

the words, and also for the defendant's having caused the plaintiff to be indicted for the matter contained in the

words.—But in action for words, the defendant pleaded as to part of the words, and justified as to other part, and both issues found for the plaintiff, and damages for the first words 12 d. and for the last words 39 s. and costs for both; and the plaintiff having judgment for both, it was reversed for this cause; for the first words were held not actionable, and the judgment being intire is reversible in toto; because in the judgment the damages are conjoined, though they were severed in the verdict. Cro. J. 424. Pasch. 15 Jac. B. R. Loyd v. Pearse.—\* Jenk. 293. pl. 40.

7. In information for ingrossing corn, the defendant *as to part pleaded not guilty, and demurred to the residue*; afterwards, *as to that part which defendant pleaded not guilty to, the informer entred a non vult ulterius prosequi*, and for the other part, upon demurrer joined, judgment was given for the informer; upon error brought it was held that the entry of the nolle prosequi by the informer was error; for should he have power to leave off prosecuting the suit, it might greatly prejudice the king; but as to the residue they affirmed the judgment and awarded execution; because the judgments for those two several parts were several, and therefore the judgment may be affirmed in part, and disaffirmed in part, as in † dower and debt; but Haughton J. doubted if it might be so in trespass. 2 Roll. R. 136. Mich. 17 Jac. B. R. SMITH's information.

† In dower the judgment for recovery thereof, is by the common law, and to recover damages therein is by the statute of Marlbridge. So in a quare impedit; for there

is judgment for the church by the common law, and for damages by the statute, and in that case judgment may stand for one, and be reversed for the other. 7 Mod. 154. in a note of the reporter in case of Cutting v. Williams.

8. Judgment in *formedon* in C. B. upon a verdict, was *quod recuperet seisinam de uno mesuagio & duabus acris terræ & pasturæ*, but did not mention severally the quantity of either; it was moved to affirm the judgment for the mesuage, it being certain as to that, though ill for the uncertainty as to the other; but it was held, that though C. B. might have given judgment for the mesuage only, yet when they gave an intire judgment for the mesuage and land, this being ill in part \* ought to be reversed for the whole, and cannot be affirmed for part. and reversed for the residue. Cro. C. 471. Pasch. 13 Car. B. R. Goodier v. Platt.—\* Carth. 235. S. P. Parker v. Harris.

9. Judgment in *assault and battery against three*; it was assigned for error, that *one was an infant who should have pleaded by guardian*, and that judgment was intirely given against them all, which must be void against the infant, and so it, being intire, must be against the others also; Roll Ch. J. said, if it be a judgment at the common law, or where costs are given by the statute, if it be reversed as to part it is reversed as to all; and here is an intire judgment given by the common law and cannot be helped; and the judgment was reversed. Sty. 121. 125. Aylet v. Oats.

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§

10. Assumpsit,

Holt Ch. J. said, that there are but two judgments in the books which favour the opinion of reversing judgment in part, and the court were long ago of opinion it would be bad in the whole; for the whole judgment is wrong, because it is of more damages than should have been recovered, and not for so much damages upon one promise, and so much upon another; for if it were so it might perhaps be several judgments, and in consequence one might be reversed without the other; but the judgment here is to recover *damna prædicta* which are the whole damages; and Powell J. accordingly, and that if a remittitur be not entered for part, it will be bad for all; for the judgment is of the whole; and they were all of opinion, that if one of the declarations were *fact*, on which no damages ought to be recovered it would be bad; and judgment was reversed in toto by the whole court. 7 Mod. 155. Cutting v. Williams.——11 Mod. 24. S. C.——Cro. J. 661. Berry v. Nevis.——Palm. 343. S. C.

10. *Assumpsit*, and two several counts laid; one was on a promissory note, and the plaintiff counted thereon as on a bill of exchange, upon the custom of merchants; upon non assumpsit intire damages were given, and judgment accordingly; a writ of error being brought in this court it was held, 1st. That the plaintiff could not declare upon the promissory note as upon a bill of exchange; and as there could be no such count or action, so there could be no such damages. 2dly. That they could not reverse the judgment in part, viz. as to the one count, and affirm it as to the other, and denied JACOB AND MILL'S Case. Hob. 6. and took this difference, viz. where the judgment is partly by the common law, and partly by statute, it may be reversed in part; for that which was a judgment at common law will remain a judgment and be compleat without the other. 1 Salk. 24. Hill. 1 Annæ, B. R. Cutting v. Williams.

whole; for the whole judgment is wrong, because it is of more damages than should have been recovered, and not for so much damages upon one promise, and so much upon another; for if it were so it might perhaps be several judgments, and in consequence one might be reversed without the other; but the judgment here is to recover *damna prædicta* which are the whole damages; and Powell J. accordingly, and that if a remittitur be not entered for part, it will be bad for all; for the judgment is of the whole; and they were all of opinion, that if one of the declarations were *fact*, on which no damages ought to be recovered it would be bad; and judgment was reversed in toto by the whole court. 7 Mod. 155. Cutting v. Williams.——11 Mod. 24. S. C.——Cro. J. 661. Berry v. Nevis.——Palm. 343. S. C.

## (X. 2) Reversed in what Court, and when; and where the Judgment shall be said reversed or only the Execution.

1. **I**N præcipe quod reddat, judgment was given by default at the grand cape, and the tenant came the same term and said that the judgment was given when he was in seeking an attorney to have pleaded to it, and prayed to be admitted by attorney, and so he was. See the first judgment \* repealed, in as much as in one and the same term the judgment is in the breast of the judge and not in the roll; contra in another term quod nota, and therefore in the case above the justices would not record their first judgment. Br. Judgment, pl. 103. cites 19 H. 6. 3.

\* Orig. (ap-  
peale.)

† 31 E. 3.  
22.

2. Writ of error was brought of a judgment upon a bill of debt in the exchequer, and it was brought before the chancellor and the barons according to the statute † 37 E. 3. 12. which wills that the errors should be reversed in the Exchequer Chamber before the chancellor and treasurer calling to them the justices; and there Prisot Ch. J. of C. B. and other justices of the same bench, sat, and gave their opinions and affirmed the first judgment. Br. Error, pl. 96. cites 37 H. 6. 15.

Br. Nonabi-  
lity, pl. 33.  
S. P. cites  
S. C. and  
says that it  
was agreed  
by both benches.

3. Writ of error and of attainr will reverse the first judgment, but *audita querela* upon a release after judgment shall not reverse the judgment but the execution. Br. Judgment, pl. 80. cites 6 E. 4. 10.

## 4. Execution

4. Execution of a recognizance was awarded in chancery, error was brought in B. R. and judgment reversed for refusing the plea of a defeasance bearing date before, but delivered after the recognizance. D. 315. pl. 100. Trin. 14 Eliz. Anon.

5. The defendant against whom judgment was recovered brought a writ of error, and afterwards got a reference to the master to examine the regularity of the judgment; the court upon the master's report was of opinion, that by bringing the writ of error the judgment was admitted to be regular, and that he should not examine that now; and the rule was discharged. 1 Salk. 402. Pasch. 4 Annæ, B. R. Anon.

(X. 3) Reversed for what in General.

[ 621 ]

1. A Judgment was reversed in this court for *tautology* used in it, Mich. 22 Car. B. R. that is, for repeating the same thing over and over; for the law will not suffer barbarisms in the proceedings thereof; for that will in the conclusion bring all things into confusion. 2 L. P. R. 95.

(X. 4) Where by reversing the Judgment against the Plaintiff the Original shall revive.

1. If *formedon* be abated by judgment which is reversed after by writ of error in B. R. by this the original is revived, and the demandant may declare, and the tenant answer there. Br. Jurisdiction, pl. 113. cites 1 H. 7. 12.

2. And if a man be outlawed in debt in C. B. which is removed after into B. R. by error, and the defendant sues charter of pardon, and has process against the plaintiff who comes, &c. he may declare there; per Cur. Br. *ibid*.

(X. 5) Revived by Scire facias.

1. ON a judgment above a year's standing, you may have *elegit* without a *sci. fa* but not a *fi. fa*. for on the *elegit*, they enter their continuances all along from the judgment. 2 Show. 235. Mich. 34 Car. 2. B. R. Cook v. Bathurst.

2. If a judgment be above 10 years standing, the plaintiff cannot sue a *sci. fac*. without motion in court; if under 10 but above 7 he cannot have a *sci. fac*. without a motion at side bar. 2 Salk. 598. Hill, 7 W. 3. B. R. Hardisty v. Barney.

defendant dies before execution, the plaintiff must sue a new *sci. fac*. but may have it without motion; for the judgment was revived before. *ut sup*.

If after such motion and judgment revived by *sci. fac*. the

3. Where judgment is revived by motion against testator, if execution be awarded against him there needs no new rule to revive the judgment against the executors, but a *sci. fa*. lies of course. Cumb. 356. Hill. 8 W. 3. B. R. Hardisty v. Barney.

(Y) *When to be signed and entred.*

1. **F**OUR days after the *plaintiff's attorney* doth bring the *poslea* into the court, if the rule for judgment is out, he may enter judgment for his client by the course of the court, Mich. 22 Car. B. R. except the defendant do then, or before, move something to the court in arrest and stay of judgment; but no judgment upon a verdict ought to be entered untill a rule given, and such rule out. 2 L. P. R. 95.

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2. When a *special plea* is pleaded, and a *paper-book* made up, if the *defendant's attorney* doth not return it to the *plaintiff's attorney* within four days, after he receives it, together with his hand to the joining of the issue, and the money for the entering of the issue on his part, judgment may be entered against him by the *plaintiff's attorney* by default, 6 Feb. 1650. B. S. 2 L. P. R. 105.

A judgment may now well be entred in the vacation as of the precedent term, and

3. If a verdict be given after the term, although by adjournment, no judgment can be given upon that verdict, until the next term following; for such proceedings cannot be in the vacation-time, for the judgment is the act of the court, and the court sits not but in term; and until there is a return of the *poslea* at the day in bank, no warrantable judgment can be given. 2 L. P. R. 111.

no mischief to purchasers since the *statute of frauds*, but before it was doubtful; per Holt. Paich. 6 W. & M. B. R. Cumb. 244. Anon.

See Death. —Sid. 462. S. C. and per Cur. such entry is well warranted by common law; and Twissden J. said if the party had died in the term before the judgment entred and it had been suggested to the court, the court

4. After verdict it was moved in arrest of judgment, that there was a mis-trial which was afterwards held well enough; but before the court had delivered their opinions one of the plaintiffs died; it was prayed notwithstanding that judgment might be entered, there being no default in the plaintiffs, but a delay by act of the court, and that it was within the statute of Car. 2. that the death of the party between verdict and judgment should not abate the action, and that it was in the discretion of the court, whether to take notice of the death in this case or not; for the defendant has no day in court to plead, there being no continuances entered after the return of the *poslea*, and cited 1 Le. 187. Issey's case, and Lat. 92. And the court were of opinion that judgment ought to be entred, and there being no continuances, it may be entred as if immediately upon the return of the *poslea*. Vent. 90. Trin. 22 Car. 2. B. R. Crisp and Jackson v. Mayor, &c. of Berwick.

would take no notice of it, but would proceed to judgment. — A rule was for judgment Hill. term was 12 month, but costs not being taxed the secondary out of kindness to the defendant gave time for settling the costs till Easter term, and before costs settled and judgment entred plaintiff died; and now the attorney last Hill. term entred up his judgment as of Hill. term was 12 month, viz. the time that the rule was pronounced, and now upon motion it was set aside for irregularity; and the court directed them if they pleased to enter it as of Hill. term last, being the term that they really had entered it, and enter their continuances till then; for the court could not take notice of the plaintiff's death. 6 Mod. 191. Trin. 3 Annæ, B. R. Hodges v. Templar.

Letter of attorney to confess judgment

5. A judgment to bind the goods, may be signed after the defendant's death, notwithstanding the statute of frauds and perjuries; because

because that statute was made only to help purchasers. 2 L. P. R. 117. cites Pasch. 2 Jac. 2. B. R. Freckleton and Kitson. in debt to the plaintiff, and two hours after, before the judgment signed by the secondary defendant dies; resolved the judgment shall stand, it being for a good debt. Raym. 18. Trin. 13 Car. 2. B. R. Andrews v. Showell.— A verdict was given in Easter term, and before judgment signed the plaintiff died; but Holt Ch. J. said, that shall not hinder the judgment being entered, provided it be within two terms after; and the statute of frauds, &c. only requires the time of signing should be entered on the roll; and that is only for the benefit of purchasers; for if judgment be signed in the vacation, yet it is entered as of the term before and none but a purchaser shall be admitted to say, it was signed at any other time; and it is the course of the court to let all things be done \* in the vacation as of the term before. 1 Salk. 401. Trin. 1 Annæ. B. R. D. of Norfolk's case. — 7 Mod. 39. S. C. — \* 6 Mod. 184.

6. In an action on the case brought against the sheriff for a return of nulla bona upon a fieri facias; although judgment was signed after the teste of the writ of fieri facias, and both the judgment and fieri facias were of Hillary term, but the judgment not signed untill March afterwards, yet it was held good; and the court declared, that they would not make any use of the day of signing of the judgment, but only to relieve purchasers as the statute intended. 2 L. P. R. 118. cites Hill. 2 & 3 Jac. 2. Stamper v. Kinsey.

7. If the plaintiff will not bring his postea into the court according to the rules of the court, that the defendant may have time to speak in arrest of judgment, the court will stay the judgment until the plaintiff shall \* move for judgment; which he cannot do without bringing his postea into court, and giving notice thereof to the defendant's attorney, and he may thank himself for this trouble and delay, by not bringing in of his postea as he ought to have done, the like law is in case of a writ of inquiry. 2 L. P. 115.

A judgment can not be entered until after the postea is brought in and entered in the office, and a rule given there- against him,

upon for the defendant to shew cause (if he hath any) why judgment should not be entered that the defendant may have liberty to offer what he can find out of the record and proceedings to arrest the judgment but after the rule is out, or if judgment be not arrested, then it may be entered up. 2 L. P. R. 115.

\*[623]

8. Upon a writ of inquiry, either on demurrer or judgment by default executed the last day of the term, the plaintiff may enter judgment the 5th day after and not before. 1 Salk. 399. Trin. 5 W. & M. Clerk v. Rowland.

So where there is a verdict, there must be 4 days between

the verdict and the judgment; not that in all cases there can be a motion in arrest as in the principal case, where the verdict or inquest is the last day of the term; but still there may be a writ of error and this time is allowed for these purposes; and therefore after verdict or writ of inquiry, the course is for the plaintiff to give a rule to enable him to enter his judgment nisi causa offensa sit in contrarium infra quatuor dies; and in the principal case, execution was set aside because it was sued out the 4th day after the term, the writ of inquiry being executed and returned the last day. Ibid S. C.

9. After rule entred, judgment shall be signed on the eighth day after inclusively in Hillary and Trinity term. 12 Mod. 40. Pasch. 5 W. & M. Anon.

In judgment and verdict for the plaintiff the

judgment ought not to be signed till the rules are out which will be in four days after the postea returned which happened to be the 6th May; the plaintiff got it signed on the very day but it was not executed till after the 6th day so that the defendant had time enough to bring a writ of error, or move any thing in arrest of judgment, yet the court held the signing irregular it being before the day allowed by the rules of the court; and though it was taken out afterwards that was not material; and the judgment was set aside and the party had restitution. 5 Mod. 205. Pasch. 8 W. 3. Stanford v. Chamberlaine.



S. P. per  
Cur. 12  
Mod. 250.  
Anon.

10. *Indictment* for a misdemeanor was tried three days before the end of the term and judgment entred the same term, so that defendant had not four days to move in arrest of judgment. The question was, whether this entry was regular, and whether it should not have been stayed till the term following? and per Holt Ch. J. if there are four days and more between the trial and the end of the term, judgment ought not to be entred within the four days; but if the *distringas* is returnable within the term, and the party is tried within 2 or 3 days before the end of the term, the judgment shall be entred that term, though there are not 4 days to move in arrest of judgment; and so he said it was settled in the case of *Knox v. LEVAR* upon conference between Scroggs Ch. J. and Sir Wm. Jones attorney general contrary to the report of Sir Sam. Astrey. 1 Salk. 77. Pasch. 11 W. 3. B. R. Anon.

11. By the ancient rules of the court the judgments of one term ought to be entred on the roll before the *essoign day* of the next term; and the late act of parliament for docketting of judgments was only in imitation of the ancient course and in aid of it; per Holt Ch. J. 6 Mod. 184. Trin. 3 Annæ, B. R. in case of *Herring v. Crocker*.

12. The plaintiff, by a *special injunction* out of chancery, was restrained from signing judgment near 12 months after rule given to plead; he may, after such injunction dissolved sign judgment without giving a new rule to plead. Notes of Cases in C. B. 156. Mich. 6 Geo. 2. *Theedham v. Jackson*.

13. Though no appearance be actually entred, yet if defendant's attorney undertakes to appear, it is sufficient to support the judgment. Notes of Cases in C. B. 156. Mich. 6 Geo. 2. *Theedham v. Jackson*.

14. If defendant demands *oyer* of an indenture, which is given, the defendant has the same time to plead after the declaration is verified by the oyer as he had at the time oyer was demanded, and therefore judgment being signed the next day after oyer given, and the oyer having been demanded two days before the rule for pleading was out, the judgment was set aside. Notes of Cases in C. B. 156. Mich. 6 Geo. 2. *Theedham v. Jackson*.

15. The *capias* was returnable the 27th of October last, and judgment signed November the 7th following; it was moved to set aside the judgment as signed the 12th day after the return of the writ, which was one day too soon, the defendant having, by the late act of parliament, eight days to appear after the return of the writ, and by the practice of the court, four days afterwards to plead; and the Court made a rule to shew cause; thereupon it was shewed for cause, that the declaration was left in the office *de bene esse* (pursuant to the rule of court made in Michaelmas term 3 Geo. 2.) on the third of November, and notice thereof that day served upon defendant, and a rule to plead given the same day; and on the seventh of November, defendant not having appeared, plaintiff, upon the usual affidavit, entered an appearance for him; and afterwards, the same day, signed judgment, which the court held to be regular, and discharged the former rule. Notes in C. B. 167. Hill. 7 Geo. 2. *Charlton v. Hankey* and another.

But where the writ was returnable in eight days of St. Hillary, January 20, and declaration filed in the office *de bene esse*, January 23, and notice given defendant that day, and a rule to plead given which was out on Saturday the 26th of

January; on Monday morning the 28th, plaintiff entered the defendant's appearance, and in the afternoon signed judgment. The court, upon hearing counsel on both sides, were of opinion, that by the late



late act of parliament, the defendant hath *eight days* to appear after the return of the writ, (viz.) *exclusive of the return-day*, and therefore set aside the judgment, the appearance being entered, and judgment signed one day too soon. Notes in C. B. 168. Hill. 7 Geo. 2. Bosanquet v. Rondeau.

16. The writ was *returnable tres Mich.* and an appearance entered by the plaintiff. The declaration was left in the office November the 9th, and rule to plead then given; notice of the declaration filed was served upon defendant November 11th. Defendant moved last term to set aside the judgment, and obtained a rule to shew cause, which was made absolute upon hearing counsel on both sides. The declaration not being delivered *de bene esse*, was only well delivered from the time of the notice; and before that time no rule to plead could be given. Notes in C. B. 172. Hill. 8 Geo. 2. Grey v. Saunders.

17. After rule to plead expired, defendant obtained, and served a judge's summons for time to plead. Plaintiff's attorney, notwithstanding the summons, signed judgment; defendant moved to set aside the judgment, and on shewing cause, the court held the judgment to be regular. A summons for time, after rule to plead expired, is not a superedeas or stay of proceedings. The judge was imposed upon; he would not have granted the summons, had he known the rule was out. The judgment is regular, but was set aside on payment of costs, pleading the general issue, and taking short notice of trial. Notes in C. B. 182, 183. Trin. 10 & 11 Geo. 2. Ottiwell v. D'Aeth.

S. P. for a judge's summons regularly obtained is a stay of proceedings till discharged, or other order made thereupon; but it is an abuse upon the judge

to apply for his summons after rule to plead expired, when no summons ought to be granted; and therefore this summons, unduly obtained, is no stay of proceedings. Notes in C. B. 180. Mich. 10 Geo. 2. Whitehead v. Shaw.—The same v. Whitfield.

18. Declaration was delivered with blanks, and rule to plead given October 24. The 26th, blanks were filled up, and defendant at the same time demanded oyer of the bond. The 27th, at eight in the evening, oyer was given, and plea demanded, and 18th judgment was signed, which was held irregular and set aside. Defendant ought to have the same time to plead after oyer given as remained unexpired of the rule to plead at the time of oyer demanded. Notes in C. B. 183. Mich. 11 Geo. 2. Simpson v. Daffield.

19. It was moved for leave to enter judgment upon an old warrant of attorney upon an affidavit, that defendant, who resided at Jamaica, was living and in good health, and had been seen and conversed with there by the person who made the affidavit on the 13th of September last. He sailed from Jamaica very soon afterwards, and arrived at London the 15th of January following. The motion was granted. Notes in C. B. 187. Hill. 11 Geo. 2. Roundell v. Powell.

20. In waste, plaintiff gave a common rule to plead, and at the expiration thereof, without giving a peremptory rule, signed judgment. Defendant moved to set the judgment aside, insisting that a peremptory rule ought to have been given as in a real action; and of this opinion were the Court. The place wasted, as well as damages being to be recovered in the action by the statute of Glouc. cap. 5. In mixed actions a peremptory rule is necessary, as well as in real actions, (except replevin) and the judgment was set aside with-

out costs. Notes in C. B. 192, 193. Trin. 13 Geo. 2. *Wentworth v. Hustler*.

(Z) *Rules as to signing, &c. of Judgments.*

1. *A* rule of court was made upon a motion at the bar, that the secondary should enter a judgment in a cause, wherein a trial was to be had, as a judgment of the term next preceding the term wherein the trial was to be, and that the secondary should express in the rule, that the rule was made by the consent of the plaintiff and defendant in the cause; 2d July 1650. B. S. For consensus tollit errorem; for otherwise the Court would not have made such a rule to antedate a judgment, and there was other special reasons, as I remember, for the doing of it, besides the consent of the parties. 2 L. P. R. 104, 105.

2. A special plea delivered to the plaintiff's attorney, or put into the office without a counsellor's hand to it, is no plea, and the plaintiff may, if his rules are out, and no other plea pleaded, sign his judgment. 2 L. P. R. 105.

3. A judgment signed the very day the rules were out, though not executed until afterwards, was held irregular and set aside. 5 Mod. 205. *Stanford v. Chamberlaine*.

4. Upon a *sci. fa.* on a judgment against the principal, he pleaded *nul tiel record*; whereupon the plaintiff produced the record, and the master signed the roll, *quod querens protulit recordum*, and the plaintiff signed judgment the very next day, and took out execution, which upon motion was set aside as irregular; because he ought not to have signed judgment till four days after the record was brought in. 8 Mod. 237. Pasch. 10 Geo. *Martin v. Henriques*.

5. By a rule made by the court of King's Bench in Michaelmas term 1705, it was ordered, that from and after the first day of the next Hillary term, every judgment in debt, case, covenant, trespass, trover, or any other action, shall be entered fairly on the roll, or an *insipitur* thereof, before such judgment shall be signed by the secondary, or any judge of this court, and the names of the plaintiff and defendant, with the attorney's name, shall be entered in a book, to be kept by the secondary of the court for that purpose; for which nothing shall be paid but the ancient and accustomed fee for entering such judgment. 2 L. P. R. 114.

6. Where a thing is made a concilium, judgment cannot be entered without leave of the Court. 12 Mod. 667. Hill. 13 W. 3. *Vincent v. Preston*.

7. If plaintiff give rules for signing judgment, and rules are out, and no judgment signed before *essoign-day* of next term, the plaintiff must give new rules. 12 Mod. 40. Pasch. 5 W. & M. Anon.

If there be a rule for judgment in one term, it must be en-

tered before the *essoign-day* of the next term, or else they must go over to the next term by continuance; and enter it as of the second term. 12 Mod. 493. Pasch. 13 W. 3. *How v. Aston*.

8. If there be *no rule to stay judgment*, it may be signed; per Cur. 12 Mod. 371. Pasch. 12 W. 3. in case of Butler and Lewin v. ....

9. Action of *debt on judgment*, and *nul tiel record pleaded*; the case was, action between RUSSEL against SPURRELL, tried Trin. 10 Geo. 2. 1736, and *final judgment signed on the postea* that vacation, viz. October 19, when the *postea* was taken away by the plaintiff's attorney, and not brought back to the office, to have the judgment entered till a few days before the motion. It appeared by affidavit, that Russel died in August 1736. And it was moved for defendant upon stat. 18 Car. 2. cap. 8. to stay the entry of judgment, plaintiff's representative being bound by the said statute to enter it within two terms after plaintiff's death, and this judgment is not entered yet. Rule being obtained to shew cause, it was urged for plaintiff, that the fee to the clerk of the judgments for entering judgments was paid at the time of signing, and the party may have the entry made at any time; and that the judgment must be looked upon as actually entered from the time of signing. The rule was enlarged. And per Cur. this practice may be of dangerous consequence. Purchasers, &c. should not be put to search prothonotaries books for minutes of judgments signed, it ought to be sufficient for them to have recourse to the record. Let a general rule be drawn up, that after the first day of next term *all postea and inquisitions, whereon final judgments are signed, be left with the prothonotaries*, in order that the judgments may be immediately entered. Notes in C. B. 191, 192. Pasch. 12 Geo. 2. Webb, administrator of Russel, v. Spurrell.

## (Z. 2) Rules as to signing, &c. Judgments according to the late Acts.

1. 12 Geo. 1. cap. 29. §. 1. enacts, that *where the cause of action shall not amount to 10 l. in a superiour court, or to 40 s. in any inferior court; if the defendant shall not appear at the return of the process, or within four days after; it shall be lawful for the plaintiff, upon affidavit being made and filed of the personal service of such process, (which affidavit shall be filed gratis): to enter a common appearance, or file common bail for the defendant, and to proceed thereon, as if such defendant had entered his appearance, or filed common bail.*

A plea in abatement was pleaded within four days after the declaration delivered, without taking the declaration out of the office, or

paying for the appearance, which was entered by plaintiff according to the statute. The plea was held to be pleaded regularly, and judgment signed, for want of a plea was set aside. Notes in C. B. 177. Trin. 8 & 9 Geo. 2. Atterbury v. Troward.

2. 5 Geo. 2. cap. 27. §. 1. enacts, that *in all cases where the cause of action shall not amount to 10 l. in any superior court, or to 40 s. in any inferior court, the defendants (a copy of process having been served) shall appear at the return thereof, or within eight days after, and the affidavit of service of such process may be made before any judge or commissioner of the court, out of which such process shall issue, or before the proper officer for entering common appearances, or his deputy; and is to be filed gratis.*

The attachment of privilege was returnable on Friday next after the morrow of the Holy Trinity, with notice for defendant to

appear on the 25th of May. Appearance was entered by plaintiff, June 1. and judgment afterwards signed. Defendant moved to set aside the judgment, the appearance being entered by plaintiff one day,

if not two days, before the time for defendant's appearing was expired; and a rule nisi was granted on motion. Afterwards cause was shewn for the plaintiff, and insisted that the cause of action was above 10 l. (viz.) 13 l. and upwards; and therefore this was not a proceeding upon the last act of parliament, but upon the act of 12 Geo. 1. whereupon defendant has but four days to appear. Court were of opinion, that *no sum being mentioned in the writ*, it stands at large, and the appearance by plaintiff was irregularly entered; but it appearing, that defendant had afterwards notice of the declaration being left in the office, he should have applied before judgment, and was too late after judgment; and therefore the rule was discharged. Notes in C. B. 162. Trin. 6 & 7 Geo. 2. *Morie, an Attorney, v. Farnham.*

[ 627 ] 3. The writ was returnable in *Hillary term*, and a declaration left in the office the same term; and afterwards an appearance entered by plaintiff according to the act of parliament; but no notice of the declaration was given till the 12th of April for defendant to appear the first day of this term. It was moved to set aside the judgment, the declaration having been left in the office before the appearance entered, and a rule nisi was granted. Belfield afterwards shewed cause, and Court discharged the rule, the declaration being a *declaration well delivered only from the time of the notice*; but Court made another rule to set aside the judgment, upon paying of costs, pleading an issuable plea, and taking short notice of trial. Notes in C. B. 162. Trin. 6 & 7 Geo. 2. *Matthews and Wife, administratrix, v. Stone.*

4. Defendant moved to stay proceedings in an *action* brought for fees, no bill of fees having been delivered, and obtained a rule nisi; but upon shewing cause, the Court were of opinion, that they could not consider the matter as an irregularity, because it is illegal, and against an act of parliament; but set aside the judgment and inquiry upon payment of costs, bringing the money into court, pleading the general issue, and taking short notice of trial. Notes in C. B. 164. Mich. 7 Geo. 2. *Welland, an Attorney, v. Rock.*

5. The appearance was regularly entered by plaintiff, and before judgment, defendant employs an attorney, and gives notice thereof to plaintiff's attorney. The question was, whether it was necessary to demand a plea of defendant's attorney before plaintiff could sign judgment? and the court was of opinion, that the appearance being entered by plaintiff, he ought to go on upon the act of parliament; and it is not necessary in that case, that a plea should be demanded. Notes in C. B. 175. Pasch. 8 Geo. 2. *Jones v. Wilkinson.*

6. A motion was made to set aside the judgments in these causes, and the irregularity complained of was, that the rules to plead were given before the notices of the declarations being left in the office were served upon the defendants, the appearances having been entered by plaintiff, and the proceedings upon the act of parliament. It appeared that plaintiff's attorney, finding his mistake, waived his judgments, struck out the old, and gave new rules to plead, and after they were expired, signed judgment again; and the question was, whether he could do so without leave of the court? per Cur. It is only one entry upon record in each cause, and the former judgments appear by the prothonotary's book, to be signed by mistake, and the later are regular. Notes in C. B. 178. Mich. 9 Geo. 2. *Craven v. Aislabe.——The same v. Anderton.*

(A. 2) Signed

(A. a) Signed and entered. In what Cases without Rule or Motion.

1. **I** F a *peremptory rule* be given for the defendant to plead at a certain day in a civil cause, if he do not plead accordingly, the plaintiff may enter judgment against him, without moving of the court: but if it be an indictment, information, &c. in the Crown-Office, or in a \* real action, there judgment cannot be entered without a motion in court for a peremptory rule. 2 L. P. R. 116.

\* S. P. And so in mixed actions, but otherwise is personal; but this extends not to pleas in abatement; because

Final judgment is not given on them. 1 Salk. 399. Trin. 9 W. 3. B. R. Cooke v. Cooke.

(B. a) Entry upon Nil dicit, and when.

[ 628 ]

1. **I** F the defendant's attorney do enter a plea for his client in the office, the plaintiff's attorney cannot enter a judgment against the defendant upon a nil dicit for want of a plea, although the plea be not given unto him by the defendant's attorney. 2 L. P. R. 94. cites Mich. 22 Car. B. R. and Pasch. 24. B. R.

For the office is the place where the attorneys on both sides are to in-

form themselves of the proceedings in their clients causes; and the delivery of declarations and pleas, &c. by one attorney to another in their client's causes, is rather matter of curtesy and civility, than of any necessity or duty; yet it is the usual practice to do it, and very rarely omitted. Quere, if judgment may not be signed notwithstanding, if the defendant's attorney has refused to pay for the declaration, &c. 2 L. P. R. 94.

2. If any clerk of this court will not appear to an action, that is brought here against him, after a copy of a bill filed delivered unto him, the plaintiff may, after his rules for pleading are out, enter judgment against him by nihil dicit. By Woodward clerk of the court; for a clerk of the court is supposed to be always present in court; and therefore, if he will not appear, yet it seems it shall be all one as if he had appeared and refused to plead. Trin. 23 Car. B. R. 2 L. P. R. 97.

(C. a) Arrest of Judgment for what; How; and When.

1. **I** T is not a good exception in arrest of judgment, that there is no warrant of attorney filed, though that be matter of record, and may be assigned for error. The reason is, because, though it be a matter of record, yet it is not a matter of that record before the court, but of another. 1 Salk. 77. Trin. 9 W. 3. C. B. Peachy v. Harrison.

2. One may move in arrest of judgment after a motion for a new trial, though not vice versa. 2 Salk. 647. Mich. 9 W. 3. B. R. Turbervill v. Stamp,

3. Arrest

3. Arrest of judgment is either for matter *intrinsic*, i. e. such as appears by the record itself, which will render the judgment erroneous and reversible; or *extrinsic*, i. e. some foreign matter suggested to the court, which proves the writ is abated; for it is not enough that it proves the writ is only abatable. The *old course* of taking advantage in arrest of judgment was thus, the party, after a general verdict, having a day in court (for so he has to matters of law, though not of fact) did assign his exceptions in arrest of judgment by way of plea; and it was called pleading in arrest of judgment. 1 Salk. 77. Pasch. 11 W. 3. B. R. Anon.

In this case was cited the first case in Palmer's Reports, [which was Pasch. 17 Jac. B. R. The Cor-

4. D. was convicted on an information for subornation of perjury, and judgment entered, *quod capiatur pro fine*; and a capias issued, whereupon he was taken and brought into court, where he offered to move in arrest of judgment; but the court was of opinion it was out of time; for that the judgment *quod capiatur* was a final judgment, and the subsequent entry is only for the certainty of the time. 1 Salk. 78. Mich. 1 Ann. the Queen v. Darby.

FORATION OF DUBLIN's case, upon a judgment in quo warranto in Ireland, and error brought thereupon] where it was said, that a writ of error would lie of this judgment [*quod capiatur pro fine*] before the fine set. But there is a note, [of the reporter as it seems] that there was a judgment, that he should be ousted of his franchise, and be likewise taken *pro fine*. And it was insisted in the case of the QUEEN v. DARBY, that that was a stronger case than the case of ejectment; for there in ejectment judgment is not complete till damages are found, and yet a writ of error lies of the judgment before any damages are found; because by the judgment that is given, the possession is touched immediately; and where a judgment is final for any part, error will lie. And here they would have the capias, *pro fine*, to be in nature of an execution, quod Holt negavit, because it is not certain. And, he said, that upon an interlocutory judgment in case or trespass, a capias *pro fine* may go, yet after they may move in arrest of judgment, and that these are the likest of any to the case in question; and it is not like a judgment *quod computet*; for after such judgment, you cannot move in arrest of judgment; for then there is no more to do but to see what is behind. And upon the doubt, time was given to the next day. And it was agreed, that if it could not be moved in arrest of judgment, yet it might be very well moved in mitigation of the fine. 7 Mod. 100. the Queen v. Darby.

\*[629]

1 Salk. 78. S. C. and that he ought to give notice to the clerk in court of the other side; but the better way is to give a rule upon the postea for bringing it into court; for that is notice of itself.

5. One should not move in arrest till the *postea* be brought in, and the defendant should give rule upon the *postea*, which is in itself a notice to bring it in; and it is against the ancient course of the court to make a rule for staying of judgment till the *postea* be brought in. By the course of C. B. the clerk of the assise keeps it till the days for moving in arrest of judgment are past, and the notice is given to him, and he has his fee of 6 s. 8 d. for attending with it; and the clerk of assise ought to deliver the *postea* to none but the clerk in court, and notice to the clerk in court is good notice. 6 Mod. 24. Mich. 2 Ann. B. R. Wood v. Shepherd.

## (D. 2) Judgment set aside, for what Causes.

1. JUDGMENT was given in debt upon a bond against an executor in C. B. and upon error brought in B. R. errors were assigned; and because, upon the record it did not appear that the monies are yet payable, rule was given to reverse the judgment, nisi &c. And the counsel of defendant in error said, he could not maintain the judgment,



judgment, and therefore prayed the reversal of it for his client's expedition, who intended to bring a new action; by which it was reversed absolutely. 2 Saund. 106. 108. Pasch. 22 Car. 2. Holdipp v. Otway.

2. A *feme covert* who lived by her self, and acted as a *feme sole*, gave a warrant of attorney to confess a judgment &c. and afterwards moved to set aside the judgment, because she was covert; but the court would not relieve her, but put her to her writ of error. 1 Salk. 400. Mich. 10 W. 3. B. R. Anon.

3. Upon payment of costs, the court will set aside a judgment, though it be regularly entered, if the plaintiff hath not lost a trial; and so is the common course in C. B. 1 Salk. 402. Mich. 3 Ann. B. R. Sifted v. Lee.

Plaintiff having regularly signed judgment, defendant obtained a

rule to set it aside on payment of costs, pleading an issuable plea, &c. Defendant afterwards pleaded the statute of limitations, and plaintiff moved to set the plea aside. A rule was granted to shew cause, and made absolute. The Court never give leave to plead this plea after a regular judgment signed. Defendant must be bound to plead the general issue, unless in case of a fair and honest defence, where a justification is absolutely necessary. Notes in C. B. 181. Hill. 10 Geo. 2. Leaver v. Whitcher.—Defendant prevailed to set aside a regular judgment on payment of costs, and pressed to be let in to plead a special justification; but plaintiff having been delayed an assize, the court confined the defendant to plead the general issue. Notes in C. B. 186. Hill. 11 Geo. 2. Pradhoe v. Armstrong.

4. 5 Geo. cap. 13. enacts, that where a verdict shall be given in any action in any court of record in England or Wales, the judgment shall not be staid for any defect in form or substance in any part of the proceedings.

5. Baynes moved to set aside the judgment upon an affidavit of a demand of oyer of the bond on the 29th of May, (being the same day whereon a plea was demanded) and of the service of Mr. Justice Fortescue's summons the same day of oyer, and time to plead. Darnal for plaintiff opposed the motion, and produced an affidavit that oyer was not demanded, nor summons served till after the rule for pleading was out. But the Court refused to make any rule. Notes in C. B. 161. Trin. 6 & 7 Geo. 2. Farrance v. Brignal.

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6. A motion was made against judgment for plaintiff upon the issue of *nul tiel record*. The case was, plaintiff had mistaken commorancy in his declaration; defendant had pleaded in abatement, and annexed affidavit of the truth of this plea; plaintiff brought a new action, and the defendant pleaded the former action depending; upon which plaintiff of his own head, without leave of the court, entered a *nil capiat per breve*. The officers were asked their opinions, who all agreed it to be constant practice, and the court allowed it. But then another question arose, whether plaintiff could have made such an entry, in case the first plea had not been in abatement. Borrett and Thompson said, it was confined to abatements; but Cooke thought it might be in all cases; the Court said, it was impossible to be so, and held it confined to abatements. Notes in C. B. 188, 189. Pasch. 11 Geo. 2. Osborne v. Haddock.

(D. a. 2) Set aside for what and how. *Irregularity* in signing it. Want of, or Insufficiency in a Plea.

S. P. Ibid.  
188. Hill.  
11 Geo. 2.  
Stafford v.  
Little.

1. **T**H E defendant's attorney left a note at the house of the plaintiff's attorney on a double penny stamp in this manner, (viz.) *I plead nil debet, yours, &c.* and the plaintiff's attorney, without sending notice to the defendant's attorney, that he expected a plea in form, signed judgment; and upon a motion to set the judgment aside, it was held to be regular, and the note aforesaid to be no plea. Pleas delivered to attornies must be drawn up in the same manner as to be left in the office. Notes in C. B. 156. Mich. 6 Geo. 2. Martyn, qui tam, v. Skinner.

2. It was moved to set aside a judgment signed for *want of a plea*, upon an affidavit of the delivery of a plea to plaintiff's attorney in due time, which was a plea of an outlawry against plaintiff in B. R. pleaded in bar; but *not sub pede sigilli*. In defence of the motion it was insisted, that the outlawry not being pleaded *sub pede sigilli*, plaintiff was not bound to accept it, and therefore might regularly sign judgment, and cited 1 Salk. 217. Carthew 220. The Court ordered it to be moved again; and when the motion came on the second time it was argued that the plea, being *pleaded in bar*, and *not as a dilatory*, differs it from the cases quoted on the other side, and quoted Coke's Inst. 128. 1 Lutw. 40. 2 Mod. Atkins and Bayle. It was replied, that Ld. Ch. J. Holt's words in Carthew and Salkeld, go both to pleas in bar and abatement, where the *outlawry is in another court*; per Cur. Sir W. WILLYPOLE's case in \* Cro. Car. Robinson 213. † 2 Vent. 282. quoted [are of] pleas in bar, not dilatory; plaintiff cannot take upon him to judge of the plea in bar, he should apply to the court, or demur; rule made to set aside the judgment. Notes in C. B. 160. Trin. 6 & 7 Geo. 2. Panter v. Coppin.

3. A rule to plead was given in Trinity term last; and defendant obtained time, by Mr. Justice Reeve's order, to plead till the first day of this term; and for want of a plea the plaintiff signed judgment of this term, without giving a new rule to plead; which the Court held to be regular, the rule to plead, given last term, being enlarged by the judges order to the first day of this term. Notes in C. B. 165. Mich. 7 Geo. 2. Taylor v. Slocomb.

4. The writ was returnable the first return of this term; whereto defendant appeared by his attorney, and plaintiff declared in Yorksbire, gave a rule to plead, and, after demanding a plea, signed judgment for want thereof in four days; defendant moved to set aside the judgment: and the question before the court was, whether in this case the defendant should have four or eight days to plead. And the court held, that pursuant to the rule of court made in Michaelmas-term, the third of his present majesty, in all cases upon writs returnable, the first or second return of any term, if the plaintiff doth not declare

\* Cro. C.  
134. 147.  
Sir William  
Withipole's  
case.—  
† Hill. 2 &  
3 W. & M.  
C. B. Web  
v. Moore.

declare in London or Middlesex, or the defendant lives [above] 20 miles from London, the defendant hath eight days time to plead, and therefore set aside the judgment. Notes in C. B. 165. Mich. 7 Geo. 2. Lazenby v. Bradley.

5. Defendant *pleaded a tender, but brought no money into court*; he gave a rule to reply, and *for want of a replication signed a non-pros*; plaintiff looked upon the plea as a nullity, the money not being brought into court, and signed judgment after the non-pros obtained, and now moved to set aside the non-pros. The defendant moved to set aside the judgment, insisting that plaintiff could not regularly sign judgment until the non-pros was set aside; and of that opinion was Sir George Cooke, but the two other prothonotaries reported the practice contrary; and the Court was of opinion, that the *non-pros not being rightly obtained, plaintiff might proceed in the same manner, as he might have done in case such non-pros was not signed*; and consequently the judgment is regular, and must stand; and the non-pros being irregular must be set aside. Notes in C. B. 179. Mich. 9 Geo. 2. Bray v. Booth.

6. After defendant had *procured time to plead* by a judge's order, *pleading an issuable plea*, he *pleaded a tender as to part, and non assumpsit as to the residue*. Plaintiff looked upon the plea as a nullity, and signed judgment. It was urged that plaintiff had taken the plea out of the office, which was an acceptance of it; but per Cur. *the plea is a nullity, and the judgment is regular*. Notes in C. B. 180. Mich. 10 Geo. 2. Lane v. Smith.

So where defendant before last assizes obtained a judge's order for time to plead, pleading an issuable plea, and

taking short notice of trial, but did not plead to issue, and for want thereof plaintiff signed judgment. Defendant moved to set aside the judgment; pleading to issue, and paying costs, and obtained a rule to shew cause, which was discharged, plaintiff having *lost the benefit of the last assizes*. Notes in C. B. 184. Hill. 11 Geo. 2. Lovell v. Dyer.

7. Stillingfleet, agent for Worrall plaintiff's attorney, gave Wilmot, defendant's agent, time to plead; after which Worrall comes to town himself, calls upon Wilmot for a plea, and for want thereof signs judgment before the time given by Stillingfleet was expired; this judgment was held irregular, and set aside. All matters of this sort are to be transacted by the *agents in town, and not by country attornies*. Notes in C. B. 187. Hill. 11 Geo. 2. Wallace v. Willington.

8. Defendant pleaded by an attorney of another court, and plaintiff, looking upon the plea as a nullity, signed judgment which was held to be regular; and the rule to shew cause why the judgment should not be set aside was discharged. Notes in C. B. 192. Pasch. 12 Geo. 2. Turner v. Williams.

(D. a. 3) Set aside, for irregularity in signing it.  
*Not paying for the Issue, &c.*

1. **I**F defendant *craves oyer of an indenture, set out in the declaration*, and does *not pay for the copy*, the plaintiff may sign judgment. Notes of Cases in C. B. 155. Mich. 6 Geo. 2. Theedham v. Jackson.

2. Motion

By agreement of the country attorneys, the issue was to be delivered in the country; but being tendered in town, and not paid for by the

2. Motion to set aside judgment signed for not paying for the issue, plaintiff's attorney in town calling on defendant's agent there for a plea. It appeared, upon shewing cause, that *defendant had pleaded by his country attorney*; thereupon the *plaintiff's attorney in the country tendered the issue*, which defendant's attorney refused to pay for; and the plaintiff's attorney sent to his agent in town to sign judgment; which was held good, the defendant's attorney having undertaken to be the agent \* by pleading in the country. Notes in C. B. 157. Mich. 6 Geo. 2. Moore v. Hodgson.

agent, judgment was signed, which was held to be regular, the agreement being void. Vide Elwood v. Elwood. Trin. 6 & 7 Geo. 2. Notes in C. B. 173. Mich. 9 Geo. 2. Hatfield v. Duke.

\*[632]

So plaintiff's attorney sent a copy of the issue to the chambers of defendant's attorney in Clifford's Inn, on a Friday when defendant's attorney and his clerk were in Southwark attending the marshal's court. The porter of the

3. The *issue book was left in the office*, and notice thereof left under the chamber-door of Mr. Field defendant's attorney the same day by Mr. Cole plaintiff's attorney, who could not that day find Field, but next day found him at his chambers, and gave him notice that the *issue book was left in the office*, and demanded the money due for the same, which Field refused to pay, insisting that the issue book ought to be brought to him; whereupon Cole signed judgment. The Court, upon hearing counsel on both sides, and the report of prothonotaries Cook and Thomson, held, that defendant's attorneys must pay for issue books at their peril; and if they are not to be found, issue books may be left in the office, and discharged the rule obtained to set aside the judgment nisi; but let defendant in to try the merits, and set aside the judgment upon payment of costs, pleading the general issue, and taking short notice of trial. Notes in C. B. 163. Mich. 7. Geo. 2. Glascock v. Martin.

inn was left in the chambers, to whom the issue-book was tendered, and the money charged thereon demanded, and he not paying the same, judgment was signed which was held regular, but was set aside on payment of costs, &c. Attornies must leave proper persons at their chambers to do their business in their absence. Notes in C. B. 181. Pasch. 10 Geo. 2. Rolt v. Way.

4. Ward, plaintiff's attorney, tendered the issue book to the clerk of Horne, defendant's attorney, and demanded payment for entering defendant's appearance; Horne's clerk offered to pay the rest of the money demanded, but refused to pay the money demanded for entering the appearance; whereupon Ward signed judgment; and defendant moved to set the same aside; per Cur. defendant's attorneys must pay the money charged upon the issue-book, which plaintiff's attorneys are to receive at their peril, and therefore judgment was held to be regular; but, the merits not having been tried, was set aside upon payment of costs, pleading the general issue, and taking short notice of trial. Notes in C. B. 166. Mich. 7 Geo. 2. Robinson v. Sparrow.

5. In ejectment defendants appeared, pleaded, and entered into the common rule by consent, but their attorney neglecting to pay for the issue book, judgment was signed against Den the casual ejector. This judgment was set aside as irregular. Plaintiff might have signed judgment against defendants who had appeared, for non-payment of the money for the issue book, but not against the casual ejector. Notes in C. B. 182. Pasch. 10 Geo. 2. Fear on the demise of Sawell v. Jolly and others.

(D. 2. 4) Set

(D. a. 4) Set aside, for Irregularity in signing it.  
*Not discharging the Summons.*

1. **A** *Summons for time to plead* was served upon plaintiff's attorney, who *attended* at the time appointed by the summons, and stayed an hour; but defendant's attorney did not attend; whereupon plaintiff's attorney signed judgment, which was set aside by the court as irregular, for *want of discharging the summons*. Notes in C. B. 159. Pasch. 6 Geo. 2. Rivers and others v. Plumlee.

Defendant's attorney took out a summons for time to plead in the beginning of Tr. vacation last and attended

thereon; plaintiff's attorney did not attend, and before the summons was renewed or discharged signed judgment; defendant's attorney offered to plead *issuably*, and take notice of trial time enough for plaintiff to have tried his cause at last assizes; but plaintiff refused to accept the plea, and insisted on his judgment; per Cur. the judgment signed without discharging the summons is irregular, and must be set aside. Notes in C. B. 185. Mich. 11 Geo. 2. Browne v. Godfrey.

(E. a) Set aside for Irregularity in signing it. *Want* [ 633 ]  
*of Notice of Writ or Declaration.*

1. **J**UDGMENT was signed against all the defendants in a joint action, though one of them never had notice, either of the writ or declaration; it was moved to set aside the judgment, and a rule was made nisi; whereupon Eyre shewed for cause, that a writ of inquiry was executed, and therefore the motion came too late: but per Cur. the judgment can never be good as to that defendant who was not served; and therefore the judgment being joint must be set aside as to all. Notes in C. B. 169. Hill. 7 Geo. 2. Coulson v. Turnbull & al.

2. *Capias ret' Octob' Hillar' declaration left in the office January 23d, and rule to plead given; the 30th, plaintiff entered appearance by affidavit, and the 31st signed judgment.* The objection to the regularity of the judgment was, that no indorsement was made on the copy of the declaration left in the office, signifying that it was left conditionally, or de bene esse. Judgment was set aside without costs. Notes in C. B. 188. Hill. 11 Geo. 2. Evans v. Tillan.

(F. a) Motion to set aside Judgment for Irregularity; *when* to be made.

1. **I**T was held per Cur. that though judgment be irregular, defendant cannot move to set it aside, unless the motion be made two days before the day appointed for the execution of the writ of inquiry of damages, (according to the report of prothonotary Thomson, who quoted SMITH v. JENKS, Hill. 5 Geo. 2.) the irregularity complained of being a defect in the notice of the declaration served on defendant after appearance entered by plaintiff according to the statute,

tute. If the irregularity be in the notice subscribed to the copy or process, the motion must be made before judgment signed; if in the notice of declaration, two days before the time appointed for the execution of the writ of inquiry. Notes in C. B. 186. Mich. 11 Geo. 2. *Grimes v. Cleaver*.

(G. a) *Void, or only Erroneous.*

But where judgment is given there of land contract, or covenant

(which is out of the jurisdiction of the court,) this is void, and trespass or assise lies. Br. *ibid*.

1. **W**HERE a *franktenement* is recovered in court *baron by plaint*, where it ought to be by writ, it is error, and is not void, nor coram non judice. Br. Error, pl. 120. cites 22 Aff. 64.

2. If *præcipe quod reddat* is brought against my father, who dies pending the writ, and I enter as heir, and after judgment is given against my father, and the demandant enters, I shall not have assise; for the judgment against a dead person is not void, but error, quod nota. Br. Judgment, pl. 113. cites 28 Aff. 17.

3. If justices of assise hold plea of assise without original, or justices of the bank by *capias* without original, it is coram non judice and void; per Catesby. But per Laicon it is good untill it be reversed by error. Br. Error, pl. 164. cites 7 E. 4. 3.

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Br. Error,  
pl. 177.  
cites S. C.

4. Outlawry in debt, trespass, or the like in C. B. without original, is not void, but error; for they are judges of this plea; per Littleton. Br. Judgment, pl. 123. cites 19 E. 4. 8.

5. A judgment which is given contrary to the verdict which was found in the cause, is a void judgment. L. P. R. tit. Judgment, 94. cites Mich. 22 Car. B. R. For the judgment is to be warranted by the verdict, and is but the affirmance of the verdict, and therefore must concur with it in all things, and not contradict it. *Ibid*.

6. There is a difference where the judgment is merely void, and where it is erroneous only. And this depends upon another distinction, (viz.) where the court in which the judgment was obtained, had cognizance of the cause, and where not. For in the first case, if the plaintiff obtains a judgment, and by his own shewing had no cause of action; yet because the court had jurisdiction of the cause, this is only an erroneous and not a void judgment. But it is otherwise where the court had no jurisdiction of the cause. Carth. 148. Trin. 2 W. & M. B. R. in case of Gold & al. v. Strode.

\* Justices of oyer, &c.  
— Justices of peace.

(G. a. 2) *Void. In Respect of the Authority or Commission of the Judge.*

1. **I**N assise, where judgment is given by commissioners in action in nature of writ of ward, where their commission is only of conspiracy and falsities it is void, as it seems there, and that he who was privy may have assise, notwithstanding such judgment. Br. Judgment, pl. 10. cites 29 Aff. 26.

2. Where



2. Where *commission* is awarded to hear and determine causes, &c. and pending this, another *puisne commission* is awarded to others of such like causes, the first commission does not lose its force, and judgment given by it after the second commission issued, shall not be avoided, nor coram non judice untill notice comes to them of the second commission, or until the second commissioners sit by it in sessions, and put it in ure; quod nota. Br. Judgment, pl. 72. cites 34 Aff. 8.

3. Where *commission* issues of certain actions or matters, or between certain persons, and they hold plea of other matters, or between other persons, it is coram non judice. Br. Error, pl. 187. cites 22 E. 4. 30, 31.

(G. a. 3) Void, or only Erroneous. In respect of the Place or Court in which.

1. JUDGMENT given in curia marescalli between parties who are not of the king's household is void, and trespass lies of the execution. Per Litt. J. Br. Error, pl. 177. cites 19 E. 4. 8. Br. Judgment, pl. 123. cites S. C.—S. P. Dav. Rep. 46. b. cites 19 E. 4. 8. 20 E. 4. 15. in the dean and chapter of Ferne's case.——So of judgment and execution, in ancient demesne of land, which is frankfee; for these are coram non judice, and void; per Litt. ibid.——S. P. Dav. Rep. 46. b. cites 11 H. 4. 17.——Contra of a judgment in the court of Admiralty of a thing done upon the land; for it seems that this is no court of record, for it is held by the civil law. But Brook says, it seems therefore to be void, and that trespass lies. Br. Error, pl. 177.——Dav. Rep. 46. b. cites 19 E. 4. 15. that it is void.——But per Litt. 20 E. 4. 16. of the case of the marshal, he may have a writ of error or avoid it by plea at his pleasure. Br. ibid.——S. P. For writ of error lies to avoid judgment in any case. Br. Judgment, pl. 123. cites 20 E. 4. 15.

2. If judgment be given in any appeal in C. B. it is coram non judice. Br. Error, pl. 187. cites 22 E. 4. 30, 31.——As appeal of murder. Dav. Rep. 46. b. cites 22 E. 4. 33.

3. Note, that where the king grants to them of S. *conusance* of pleas, and that they, scilicet the burgessees, shall not be impleaded for an act done there, but in the same vill; yet if they are impleaded in banco or elsewhere, and do not plead their charter, nor take advantage thereof, this is a good judgment and not error, nor coram non judice, Br. Error, pl. 152. cites 9 H. 7. 12. [635] But recovery in Bank of land in ancient demesne, is good until it be reversed by action of descent. Br. ibid.——Put recovery of land in Bank, which lies in Chester, Durham, or Lancaster is void. Br. ibid.——Contra in the cinque ports; for it is good if exception be not pleaded. Br. ibid.——And the diversity seems to be, because ancient demesne and cinque ports were derived from the crown by grant at first, but the counties palatine are exempt, and the king's writ runs not there nor in Wales. ibid. by Brooke.

(H. a) Affirmed in what Cases; By bringing Error or False Judgment. See False Judgment.

1. A Man recovered land, in the county of W. which lies in the county of E. and he, who lost, sued in B. R. to reverse the judgment, and had restitution; he shall not have affise for the entry by the first recovery, because by the suit to reverse this judgment he affirmed it to lie in the county of W. Br. Estoppel, pl. 118. cites 10 Aff. 25. Br. Judgment, pl. 58. cites S. C.

2. *And where a man recovers land in a base court, which does not lie within the jurisdiction, and he who lost brings a writ of false judgment thereupon, he shall not have assise of the entry by the void judgment; for by the suing of the writ of false judgment, he affirmed that it lies within the jurisdiction.* Br. Ibid.

See Warrant of Attorney.

(I. a) Of *Confessing* Judgments *upon Condition*, &c. and *How* to acknowledge a Judgment.

1. **T**H E course for one to acknowledge a judgment is for him, that doth acknowledge it, *to give a general warrant of attorney to any attorney, or some particular attorney of that court, where the judgment is to be acknowledged, to appear for him at his suit, who is to have the judgment acknowledged unto him, and to give common bail, and receive a declaration from him, and to plead non sum informatus, or by cognovit actionem, or to let it pass by nihil dicit; and thereupon judgment is entered of course for want of a plea.* 14 November 1652. B. S. Non sum informatus, is as much as to say, that he is not informed by his client what to plead for him. 2 L. P. R. 105.

2. If the defendant gives a judgment *with stay of execution till a certain day*, the plaintiff may, notwithstanding such stay of execution, *sue forth a capias or fi. fa.* into the county where the action is laid, *returnable before that day*, to enable him at that day to take a return against the defendant; *but he shall not in that case sue out a capias to warrant a scire facias against the bail, unless by special agreement, because it is to the prejudice of a third person; and the capias ad satisfaciendum, in that case, ought to be delivered to the sheriff four days before the return be past, and after the return thereof, to be filed.* Per magistrum Livesay, & alios, &c. Pasch. 21 Car. 2. regis. 2 L. P. R. 102.

[ 636 ] 3. On motion to set aside an execution on a judgment upon suggestion of an *agreement made between the parties after the judgment given, viz. that the judgment should be upon such and such terms.* Per Holt Ch. J. where a judgment is *confessed upon terms*, it being in effect but a conditional judgment, the court will lay their hands upon it, and *see the terms performed; but where a judgment is acknowledged absolutely, and a subsequent agreement made; the court will take no notice of it, but put the party to his action upon the agreement.* And in this case, the agreement being only under their hands, it is no ground for an audita querela; and the court cannot hold plea of an agreement upon a motion. 1 Salk. 400. Mich. 10 W. 3. B. R. Anon.

See Vacat (A).

(K. a) *Vacated.*

1. **I**F a man takes a judgment, and the same is entered, he cannot consent to vacate it; because it is a record. L. P. R. tit. Judgment, 103. cites Mich. 1649. B. R. But he may acknowledge satisfaction upon record, and so make the judgment fruitless. Ibid.

2. It is against the course of the court to vacate a judgment on the

the last day of the term. L. P. R. tit. Judgment 105. cites Pasch. 1656. Per Glyn Ch. J.

3. Note, that a judgment was vacated, because it was now entered as of Trin. term last upon a warrant made this vacation so to do. And the reason why it was vacated was, because it may be of great danger to purchasers; but some said, that it shall be void as to purchasers, but good against the party who confessed; quære, because it seems it cannot be. Sid. 222. Mich. 16 Car. 2. B. R. Anon.

If a judgment be entered contrary to the rule of court made to stay the entry of it, the court upon motion will vacate the

judgment, and punish the party, that entered it, for his disobedience to the court. 2 L. P. R. 98. cites Mich. 22 Car. 2. B. R.

4. If a judgment be *unduly obtained*, and sufficient proof thereof be made unto the court, the court will vacate the judgment, and restore the party damaged by it, to be in the same condition that he was in before the judgment, and oftentimes makes the aggressor pay costs. 2 L. P. R. 112.

5. An executor obtained judgment in debt in this court, and was afterwards, upon an information here, *convicted of forging the will*. It was also made void by sentence in the ecclesiastical court. The court ordered the judgment to be vacated, and the *cause* of vacating to be entered upon the record. Vent. 78. Pasch. 22 Car. 2. B. R. Anon.

6. In quare impedit issue was joined between the parties in Hill. 4 Geo. 2. and afterwards judgment was entered at the foot of the issue for the plaintiff by *cognovit actionem* (relicta verificatione pl'iti) by virtue of a warrant of attorney for that purpose pretended to be executed by the defendant Bond, the validity of which warrant of attorney being contested, an issue was directed by the court, to try whether the same was duly executed by Bond or not; and upon trial, the jury found it to be a forgery; whereupon the court ordered the judgment entered as aforesaid, by virtue of the said warrant of attorney, to be set aside. The defendants moved that the said judgment entered upon record subsequent to the issue joined might be struck out of the roll, in order that defendants might make up the record for trial by proviso. The court denied to make any rule, but declared, that the said judgment might be vacated in a proper manner by virtue of the former rule for setting it aside; and a *vacatur hoc judic.* was accordingly entered on the margin of the roll. Barnes's Notes in C. B. 157. Hill. 6 Geo. 2. Gibson v. the Bishop of Bath & Wells & Bond.

### (L. a) Final.

[ 637 ]

1. [ I ] T seems that issue taken on *excommunication* is peremptory. Sid. 252. cites 3 H. 4. 3.

See (C. a) pl. 4.—  
Abatement.

2. If issue be taken on *dilatory* or other matter in *abatement*, and it is found against demandant, judgment shall be final. Sid. 252. Pasch. 17 Car. 2. B. R. Amcott v. Amcott.

See Abatement (O).

3. If upon a *demurrer to a declaration* the judgment is, *quod querens nil capiat per billam, sed pro falso clamore suo sit inde in misericordia*; this judgment is final, and a bar to any other action to be brought

brought for the very same matter; Hill. 34 & 35 Car. 2. Rot. 847. B. R. But the plaintiff may afterwards make his declaration right, and then proceed, and the pleading of this judgment shall be no bar. But if this judgment should be pleaded in bar, then he must reply specially, and shew where the fault was in his declaration. 2 L. P. R. 113.

4. Final judgment is not given on pleas in abatement. 1 Salk. 399. Trin. 9 W. 3. B. R. Cooke v. Cooke.

See (P. 3) (M. a) In what Cases it shall be said *Transire in Rem Judicatam*.

S. P. by  
Gawdy J.  
Cro. E.  
817. in case  
of Preston  
v. Perton.  
— But if  
recovery  
be in debt  
upon bond  
in county by  
justices,  
there, not-  
withstand-  
ing such  
judgment,  
the plaintiff  
may have  
action of  
debt upon the

1. **I**F a man has judgment in C. B. on a bond, and the record is removed by error into B. R. and before any proceedings on the writ of error plaintiff dies, his executor shall not have a new action on the bond so long as the judgment remains in force; For when a man has brought debt upon a bond, and by the ordinary course of law has judgment upon it, the contract by specialty, which is of a more base nature, is by judgment of the law changed into a thing of record, which is of a higher nature. And if he that recovers shall have a new action and new judgment, he may have so in infinitum, to the perpetual vexation of the defendant, the which in jure reprobatur; besides upon every judgment the defendant shall be amerced, and so the amercements may be infinite too, which will be very mischievous; and *Interest reipublicæ ut sit finis litium*. 6 Rep. 44. b. Mich. 3 Jac. C. B. Higgen's case. — als. Randal v. Higgens.

bond in court of record. For the county court is not of record, and therefore the obligation is not changed into any thing of an higher nature. But so long as such judgment remains in force, the plaintiff shall not have another action by justices in the same court, by reason of the infinite vexation of the party. 6 Rep. 45. a. b. Higgens's case. — cited Hard. 128.

But where *trespass vi & armis* was brought in the county palatine of Lancaster, and the defendant pleaded in bar a recovery for the same trespass in a court baron, and thereupon the plaintiff demurred, Wild Ch. J. of assise at Lancaster, upon adjournment to his chamber at Serjeant's Inn, held it pleadable in bar. But judgment was afterwards given for the plaintiff; for trespass vi & armis lies not in an inferior court, and therefore the judgment there, if it be vi & armis is void, and if it be not vi & armis, it is not the same trespass. But he held as above, that judgment in inferior court is pleadable in bar in a superior court, and he also held, that it is pleadable in abatement, if it be for the same thing. 2 Lev. 93. Mich. 15 Car. 2. B. R. Atkinson v. Woodbarn

2. If a man has annuity by deed or prescription, and brings his writ of annuity, and has judgment: so long as this judgment remains in force, he never shall have writ of annuity, though it be annuity of inheritance, but shall have sci. fa. upon this judgment; because the matter of the specialty or prescription is altered into a thing of a more high nature. 6 Rep. 45. a. in HIGGINS'S CASE, cites 37 H. 6. 13. b.

3. *Sententia contra matrimonium nunquam transit in rem judicatam*. 7 Rep. 42. b. [43. b.] Kenn's case.

For more matter relating to Judgments, see Account, Amendment, Damages, Debt, Error, and the several other proper Titles.

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